Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

8 May 2013 *

(Freedom of movement for persons — Regulation (EEC) No 1612/68 — Article 12 — Divorced spouse of a national of a Member State who has worked in another Member State — Adult child pursuing his studies in the host Member State — Right of residence of parent who is national of a non-Member State — Directive 2004/38/EC — Articles 16 to 18 — Right of permanent residence of family members of a Union citizen who are not nationals of a Member State — Legal residence — Residence based on Article 12 above)

In Case C-529/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom), made by decision of 2 June 2011, received at the Court on 17 October 2011, in the proceedings

Olaitan Ajoke Alarape,

Olukayode Azeez Tijani

v

Secretary of State for the Home Department,

intervening party:

AIRE Centre,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 November 2012,

after considering the observations submitted on behalf of:

— Ms Alarape and Mr Tijani, by Z. Jafferji, Barrister,

— AIRE Centre, by A. Weiss, legal director, and A. Berry, Barrister,

* Language of the case: English.

— the United Kingdom Government, by H. Walker, acting as Agent, and by F. Saheed and B. Kennelly, Barristers,

— the Danish Government, by C. Vang, acting as Agent,

— the European Commission, by C. Tufvesson and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) as amended by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 2, OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28, 'Regulation No 1612/68'), and Articles 16(2), 17(3) and (4), and 18 of Directive 2004/38.

2 The request has been made in proceedings between, on the one hand, Ms Alarape and her son Mr Tijani and, on the other, the Secretary of State for the Home Department ('the Secretary of State') concerning the latter's refusal of their application for a right of permanent residence in the United Kingdom pursuant to Directive 2004/38.

Legal context

European Union law

Regulation No 1612/68

3 Article 12 of Regulation No 1612/68, which is not among the provisions of that regulation that were repealed by Directive 2004/38, provided:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

Directive 2004/38

4 Article 2 of Directive 2004/38, headed 'Definitions', states:

'For the purposes of this directive:

(1) "Union citizen" means any person having the nationality of a Member State;

(2) “family member” means:

(a) the spouse;

…

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

…

(3) “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

5 Chapter III of that directive, headed ‘Right of Residence’, contains Articles 6 to 15 thereof. Article 6 concerns ‘Right of residence for up to three months’.

6 Article 7 of Directive 2004/38, headed ‘Right of residence for more than three months’, is worded as follows:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or,

(c)

— are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.'

7 Article 12 of Directive 2004/38, headed 'Retention of the right of residence by family members in the event of death or departure of the Union citizen', provides:

'1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.'

8 Under the heading 'Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership', Article 13 of Directive 2004/38 states:

'1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on [a] personal basis.'

9 Within Chapter IV of Directive 2004/38, headed 'Right of permanent residence', Article 16 thereof, itself headed 'General rule for Union citizens and their family members', is worded as follows:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

10 Under the heading 'Exemptions for persons no longer working in the host Member State and their family members', Article 17 of the directive provides that those workers and their family members may be granted, subject to certain conditions, a right of permanent residence in the host Member State before the completion of a continuous period of five years of residence.

11 Again within Chapter IV, Article 18 of Directive 2004/38, headed 'Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State', provides:

'Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.'

United Kingdom law

12 The Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations') entered into force on 30 April 2006 and are intended to implement the provisions of Directive 2004/38 in the United Kingdom.

13 Regulation 10 of the 2006 Regulations provides:

'(1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

…

(5) A person satisfies the conditions in this paragraph if:

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either:

(i) prior to the initiation of the proceedings for the termination of the marriage or the· civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year. during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom. of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person:

(a) is not an EEA [European Economic Area] national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

…'

14 Under the heading '*Permanent right of residence*', Regulation 15 of the 2006 Regulations stated:

'(1) The following persons shall acquire the right to reside in the United Kingdom permanently:

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where:

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom: for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f) a person who:

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Ms Alarape and her son Mr Tijani, both of Nigerian nationality, were born on 19 July 1970 and 28 February 1988 respectively. After their arrival in the United Kingdom, in July 2004 and August 2005 Ms Alarape and Mr Tijani obtained a right of residence, respectively as the spouse of a national of Member State employed in the territory of another Member State and as the minor child or dependent of that person, those rights of residence expiring on 17 February 2009.

16 During her period of residence in the United Kingdom Ms Alarape worked on a part-time self-employed basis, so that she had a monthly income of around GBP 1 600. She paid taxes and national insurance contributions.

17 Mr Tijani has been in full-time education since arriving in the United Kingdom, first at school, then at London Metropolitan University and, then at London South Bank University. On the date when the request for a preliminary ruling was lodged at the Court he had been formally admitted to the University of Edinburgh to study for a doctorate. In principle, he had intended to live in Edinburgh for the period of his studies. Between 2006 and 2008 he worked part-time.

18 By a decision of 29 January 2010 the Secretary of State refused the application made by the appellants in the main proceedings for a right of permanent residence in the United Kingdom pursuant to Directive 2004/38. On 16 February 2010 the marriage of Ms Alarape was ended by divorce.

19 The appeal brought by the appellants in the main proceedings against the decision of the Secretary of State was dismissed by the First-tier Tribunal (Immigration and Asylum Chamber), by reason of the fact that they had not proved, in the opinion of that court, that the member of their family who is a Union citizen had exercised in the United Kingdom rights stemming from the EC Treaty in the period at issue, the evidence submitted in that regard establishing that the person concerned had been a worker only in the period from April 2004 to April 2006. That court also rejected the arguments of the appellants in the main proceedings that, first, Ms Alarape had acquired a retained right of residence after her divorce and, secondly, that their fundamental right to respect for private and family life had been infringed by the refusal.

20 In the appeal brought before the referring court against that decision of the First-tier Tribunal (Immigration and Asylum Chamber), the appellants in the main proceedings raised for the first time an argument based on Article 12 of Regulation No 1612/68.

21 The referring court considers that the First-tier Tribunal (Immigration and Asylum Chamber) might have erred in law by not examining, in the main proceedings, the possible effect of Article 12 of Regulation No 1612/68. In that regard, the referring court states that the court should have examined that effect of its own motion, and consequently the fact that Article 12 was not relied on at first instance by the appellants in the main proceedings has no effect on the proceedings.

22 It was in those circumstances that the Upper Tribunal (Immigration and Asylum Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. For a parent to qualify as a “primary carer” so as to derive a right of residence from a child over 21 exercising a right of access to education under Article 12 of Regulation No 1612/68 …, is it necessary for that child to be (i) dependent on such a parent; (ii) residing in that parent’s household; and (iii) receiving emotional support from that parent?

2. If in order to qualify for such a derived right of residence it is unnecessary for a parent to show that all three of the above circumstances obtain, is it sufficient to show that only one obtains or that only two obtain?

3. In relation to [(ii) in the first question], can there continue to be residence on the part of an adult student child in a common household with his parent(s) even when the former is living away from home for the duration of his studies (save for holidays and occasional weekends)?

4. In relation to [(iii) in the first question], is it necessary for the emotional support provided by the parent to be of a particular quality (viz. close or physically proximate) or is it sufficient if it consists in a normal emotional tie between a parent and an adult child?

5. Where a person has held an EU right of residence under Article 12 of Regulation No 1612/68 … for a continuous period of more than five years, does such residence qualify for the purposes of acquiring a right of permanent residence under Chapter IV of Directive 2004/38 … on "Right of Permanent Residence" and being issued with a residence card under Article 19 of the same directive?'

Consideration of the questions referred for a preliminary ruling

The first four questions

23 By the first four questions, which should be examined together, the referring court seeks, in essence, to ascertain what conditions must be met by a parent of a child who is more than 21 years old and who has obtained access to education on the basis of Article 12 of Regulation No 1612/68 if that parent is to continue to be entitled to a derived right of residence on the basis of that article.

24 First, it should be observed that reaching the age of majority has no direct effect on the rights conferred on a child by Article 12 of Regulation No 1612/68, as interpreted by the Court, given that, having regard to their subject-matter and purpose, both the right of access to education under that article and the child's associated right of residence continue until the child has completed his or her education (Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraphs 78 and 79).

25 Thus, since, according to the Court's settled case-law, the scope of Article 12 of Regulation No 1612/68 extends also to higher education, the date on which a child completes his or her education may lie after reaching the age of majority (see *Teixeira*, paragraph 80 and case-law cited).

26 Secondly, as regards a parent's derived right of residence, it should be recalled that the Court has previously held that, where children enjoy, under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State, although the parents who are their carers are at risk of losing their rights of residence, a refusal to allow those parents to remain in the host Member State during the period of their children's education might deprive those children of a right which has been granted to them by the legislature of the European Union (see Case C-310/08 *Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065, paragraph 30).

27 Similarly, the Court has held that the fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a Union citizen, and the fact that that parent has ceased to be a migrant worker in the host Member State are irrelevant in this regard (see Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 63, and *Ibrahim and Secretary of State for the Home Department*, paragraph 29).

28 Further, as regards the derived right of residence of a parent who cared for a child who has reached the age of majority and who is exercising the right to continue his/her education in the host Member State, the Court has held that, although that child is in principle assumed to be capable of meeting his or her own needs, the right of residence of that parent may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education. It is for the referring court to assess whether that is actually the case in the main proceedings (see, to that effect, *Teixeira*, paragraph 86).

29 On the other hand, if the person who is entitled to the right of residence under Article 12 of Regulation No 1612/68 ceases to need the presence and care of that parent in order to be able to pursue and complete his or her education in the host Member State, that parent's derived right of residence in that Member State comes to an end when that person reaches the age of majority (see, to that effect, *Teixeira*, paragraph 87).

30 As the Advocate General stated in points 35 to 37 of his Opinion, determining whether an adult child does or does not continue to need the presence and care of his parent in order to pursue and complete his education is a question of fact that falls to be resolved by the national courts. In that regard, the national courts may take into account the particular circumstances and features of the main proceedings which might indicate that the need was genuine, such as, inter alia, the age of the child, whether the child is residing in the family home or whether the child needs financial or emotional support from the parent in order to be able to continue and to complete his education.

31 Consequently, the answer to the first four questions is that the parent of a child who has reached the age of majority and who has obtained access to education on the basis of Article 12 of Regulation No 1612/68 may continue to have a derived right of residence under that article if that child remains in need of the presence and care of that parent in order to be able to continue and to complete his or her education, which it is for the referring court to assess, taking into account all the circumstances of the case before it.

The fifth question

32 By its fifth question, the referring court seeks, in essence, to ascertain whether periods of residence in a host Member State which are completed by family members of a Union citizen who are not nationals of a Member State solely on the basis of Article 12 of Regulation No 1612/68, where the conditions of entitlement to a right of residence under Directive 2004/38 are not satisfied, may be taken into consideration for the purpose of the acquisition by those family members of a right of permanent residence under that directive.

33 In that regard, it must be recalled that Directive 2004/38 refers to two different situations in which the family members of a Union citizen who are not nationals of a Member State may acquire a right of permanent residence under that directive. First, under Article 16(2) of that directive, those family members are also entitled to the right of permanent residence referred to in Article 16(1) thereof if they have legally resided with that Union citizen in the host Member State for a continuous period of five years. Article 17 of that directive provides, subject to certain conditions, exemptions for workers who are no longer working in the host Member State and their family members. Secondly, under Article 18 of Directive 2004/38, the family members of a Union citizen to whom Articles 12(2) and 13(2) of that directive apply, who satisfy the conditions laid down in those provisions, are to acquire a right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

34 If Article 16(2) of Directive 2004/38 is to apply, it is clear that the acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State is dependent, in any event, on the fact that, first, the Union citizen himself satisfies the conditions laid down in Article 16(1) of that directive and, secondly, those family members have resided with him for the period in question.

35 As regards the conditions which must be satisfied by the Union citizen, it must be observed that, in relation to Article 16(1) of Directive 2004/38, the Court has held, after an examination of the aims of that directive and its overall and specific context, that the concept of legal residence implied by the words ‘have resided legally’ in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in that directive, in particular those set out in Article 7(1) thereof, and consequently a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as ‘legal’ residence within the meaning of Article 16(1) (Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 46 and 47).

36 As regards the acquisition of a right of permanent residence by the family members of a Union citizen who are not nationals of a Member State, the requirement, described in paragraph 34 of this judgment, of residence with that citizen in the host Member State for the period concerned implies that those family members necessarily and concurrently have a right of residence under Article 7(2) of Directive 2004/38, as family members accompanying or joining that citizen.

37 It follows that, for the purposes of acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State under Article 16(2) of Directive 2004/38, only the periods of residence of those family members which satisfy the condition laid down in Article 7(2) of that directive may be taken into consideration.

38 Likewise, by referring to Articles 12(2) and 13(2) of Directive 2004/38, Article 18 of that directive defines the right of permanent residence which it establishes, since, first, that right of residence is available only to the family members of a Union citizen who are not nationals of a Member State and whose right of residence is retained in the event of the death of that citizen or in the event of divorce, annulment of marriage or termination of a registered partnership and, secondly, that right of residence is subject to the condition that the persons concerned can themselves demonstrate, before acquiring a right of permanent residence, that they satisfy the same conditions as those specified in Article 7(1)(a),(b) or (d) of Directive 2004/38.

39 Consequently, only those periods of residence satisfying the conditions laid down in Directive 2004/38 may be taken into consideration for the purposes of acquisition by the family members of a Union citizen who are not nationals of a Member State of a right of permanent residence under that directive.

40 The fact that the family member of a Union citizen who is not a national of a Member State has resided in a Member State solely on the basis of Article 12 of Regulation No 1612/68 cannot therefore have any effect on the acquisition of a right of permanent residence under Directive 2004/38.

41 That conclusion cannot be called into question by the finding in the judgment of 7 October 2010 in Case C-162/09 *Lassal* [2010] ECR I-9217 that continuous periods of five years' residence, completed before the date of transposition of Directive 2004/38 in the Member State concerned, in accordance with earlier European Union law instruments, must be taken into consideration for the purposes of acquisition of a right of permanent residence under Article 16(1) of that directive.

42 First, as is stated in paragraphs 33 to 39 of this judgment, only periods of residence which satisfy the conditions laid down by Directive 2004/38 may be taken into consideration for the purposes of the acquisition by the family members of a Union citizen who are not nationals of a Member State of a right of permanent residence under that directive.

43 Secondly, it must be observed that, in the case which gave rise to the *Lassal* judgment, the question whether the person concerned was a 'worker' within the meaning of European Union law and, consequently, whether she satisfied the condition laid down in Article 7(1)(a) of Directive 2004/38 was not a matter on which there was any argument.

44 It is admittedly true that, since the periods of residence of the person concerned in the Member State in question largely preceded Directive 2004/38, those periods could not have been completed other than 'in accordance with earlier European Union law instruments'. However, that wording in *Lassal* must be understood in the context of the questions put by the referring court, which concerned not the substantive conditions for legal residence within the meaning of Article 16(1) of Directive 2004/38, but the treatment of periods of residence satisfying those conditions completed before the date of transposition of that directive in that Member State.

45 On the other hand, the concept of legal residence implied by the words 'have resided legally' in Article 16(1) of Directive 2004/38 was analysed for the first time only in *Ziolkowski and Szeja*.

46 Further, it must be recalled that, on the one hand, the aim of Directive 2004/38 is to leave behind a sector-by-sector piecemeal approach to the right of freedom of movement and residence in order to facilitate the exercise of that right by providing a single legislative act which codifies and revises the instruments of European Union law which preceded that directive and that, on the other hand, that directive introduced a gradual system as regards the right of residence in the host Member State which, while reproducing, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding that directive, culminates in the right of permanent residence (see *Ziolkowski and Szeja*, paragraphs 37 and 38).

47 Accordingly, the phrase 'earlier [than Directive 2004/38] European Union law instruments', used in paragraph 40 of *Lassal*, must be understood as referring to the instruments which that directive codified, revised and repealed and not those which, like Article 12 of Regulation No 1612/68, were unaffected by that directive.

48 In the light of the foregoing, the answer to the fifth question is that periods of residence in a host Member State which are completed by family members of a Union citizen who are not nationals of a Member State solely on the basis of Article 12 of Regulation No 1612/68, where the conditions laid down for entitlement to a right of residence under Directive 2004/38 are not satisfied, may not be taken into consideration for the purposes of acquisition by those family members of a right of permanent residence under that directive.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The parent of a child who has attained the age of majority and who has obtained access to education on the basis of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community as amended by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, may continue to have a derived right of residence under that article if that child remains in need of the presence and care of that parent in order to be able to continue and to complete his or her education, which it is for the referring court to assess, taking into account all the circumstances of the case before it.**

2. **Periods of residence in a host Member State which are completed by family members of a Union citizen who are not nationals of a Member State solely on the basis of Article 12 of Regulation No 1612/68, as amended by Directive 2004/38, where the conditions laid down for entitlement to a right of residence under that directive are not satisfied, may not be taken into consideration for the purposes of acquisition by those family members of a right of permanent residence under that directive.**

[Signatures]