OPINION OF ADVOCATE GENERAL
BOT
delivered on 15 January 2013 (1)

Case C-529/11

Olaitan Ajoke Alarape,
Olukayode Azeez Tijani
v
Secretary of State for the Home Department

(Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom))

(Free movement of persons – Directive 2004/38/EC – Right of permanent residence – Article 16 – Legal residence – Residence based on Article 12 of Regulation (EEC) No 1612/68)

1. This request for a preliminary ruling relates, first of all, to the conditions under which a derived right of residence may be obtained by the parent of a child who has been granted the right to pursue his studies in the host member State under Article 12 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (2) and, second, to the possibility for both the child having a right of residence on the basis of Article 12 and his parent having a derived right of residence to obtain a right of permanent residence under Article 18 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. (3)

2. The questions referred by the Upper Tribunal (Immigration and Asylum Chamber, London (United Kingdom) lead me, in particular, to reconsider the concept of legal residence within the meaning of Directive 2004/38, a fundamental concept since it determines recognition of the status of permanent residence, which is undoubtedly the essential reform (4) brought about by that directive.

3. Directive 2004/38 consolidates the existing instruments and integrates the existing case-law on free movement of persons, basing freedom of movement on the status of Union citizenship, which, according to a formula stated for the first time by the Court

in *Grzelczyk*, (5) and since repeated many times, (6) is destined to be the fundamental status of nationals of the Member States.

4. Whereas earlier law merely recognised, in an embryonic manner, a right to 'remain permanently' in the territory of a member State to certain categories of beneficiaries which are listed exhaustively, (7) Directive 2004/38 establishes, in favour of Union citizens and their family members who have been legally resident in the territory of a Member State for five years, a right of permanent residence, which confers an incomparable advantage on migrants by ensuring that their presence is of indefinite duration, with immunity from expulsion except on serious grounds of public policy or public security, (8) and abolishing the existing restrictions on the principle of equal treatment with nationals of the host Member State. (9)

5. The substantive conditions that must be satisfied in order to obtain the status of permanent residence are set out in Section I of Chapter IV of Directive 2004/38.

6. Article 16 of that directive, headed 'General rule for Union citizens and their family members', provides:

'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.'

7. In addition, 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.'

8. Although Directive 2004/38 repealed and consolidated most of the earlier provisions of European Union law on free movement of persons, it none the less left unaltered Article 12 of Regulation No 1612/68, the latter regulation being repealed and replaced, with effect from 16 June 2011, by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. (10)

9. In the words of Article 12 of Regulation No 1612/68, now Article 10 of Regulation No 492/2011:

‘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.’

10. The present case, the background to which is a dispute between, on the one hand, a mother and her son, both nationals of a non-member country, and, on the other, the Secretary of State for the Home Department, on account of the latter’s rejection of their request for a grant of a right of permanent residence, raises two sets of questions, one raising more difficulties than the other.

11. The first, which has already been largely settled by the case-law, deals with the conditions under which the parent of an adult child pursuing his studies may be entitled to a right of residence under Article 12 of Regulation No 1612/68.

12. The second, which is novel, but the solution to which seems to me to be largely determined by recent case-law, relates to whether periods of residence completed on the basis of Article 12 of Regulation No 1612/68 are capable of giving rise to a right of permanent residence under Directive 2004/38.

13. The facts of the main proceedings are as follows.

14. Ms Alarape, who was born on 19 July 1970, is the mother of Mr Tijani, who was born on 28 February 1988. They are both of Nigerian nationality and they entered the United Kingdom illegally in 2001. Following Ms Alarape’s marriage to a French national, Mr Salama, the appellants in the main proceedings were granted residence in the United Kingdom as members of the family of a Union citizen; that grant of residence came to an end on 17 February 2009.

15. On 29 January 2010 the Secretary of State for the Home Department rejected their application for a right of permanent residence as members of the family of a Union national who had exercised his rights for more than five years and Ms Alarape and Mr Tijani appealed to the First-tier Tribunal (Immigration and Asylum Chamber) (United Kingdom), which dismissed their appeals, on the ground that the documents produced before it showed only that Mr Salama had been employed for two years.

16. The appellants in the main proceedings then appealed to the Upper Tribunal (Immigration and Asylum Chamber), London.

17. That court observes that Ms Alarape and Mr Salama were divorced on 16 February 2010 and that Ms Alarape worked in the United Kingdom on a part time self-employed basis, so that she had a monthly income of around GBP 1 600, and paid taxes and national insurance contributions. Mr Tijani, who worked part time between 2006 and 2008, has been in full-time education since arriving in the United Kingdom; he pursued university studies and obtained a bachelor’s degree and a master’s degree before being accepted at Edinburgh University (United Kingdom) to study for a doctorate. He proposed to live with a University lecturer in Edinburgh for the period of his studies.

18. According to the Upper Tribunal (Immigration and Asylum Chamber), London, the appellants in the main proceedings, who bore the burden of proof, had been able to prove that Mr Salama had exercised rights arising from European Union law (‘EU law’) only for the

period between February 2004 and April 2006. In that regard, the referring court observes that, while Mr Salama's departure from the marital home might have made it more difficult to obtain evidence relating to his employment history, the appellants had not sought an interlocutory order.

19. The referring court states that Article 12(3) of Directive 2004/38, which provides that the right of residence of family members is to be maintained in the event of the Union citizen's death or departure, does not appear to be applicable, since neither of the events referred to in that provision occurred in the present case.

20. It considers, on the other hand, that the question must be examined whether the appellants in the main proceedings have a right of residence under Article 12 of Regulation No 1612/68.

21. 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 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?'

I – My assessment

A – *The first four questions*

22. By its first four questions, the referring court asks, essentially, about the conditions which the parent of an adult child who is pursuing studies must satisfy in order to be entitled to a derived right of residence on the basis of Article 12 of Regulation No 1612/68.

23. That article confers on the children of a national of a Member State who is or has been employed in the territory of another Member State the right to be admitted to the latter 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.

24. On the basis of that provision, which establishes the right of the children of migrant workers to equal treatment in access to education, the Court, in its judgment of 17 September 2002 in *Baumbast and R*, (11) recognised that the child of a citizen of the Union having the capacity of a migrant worker or a former migrant worker has an autonomous right of residence where that child wishes to pursue his studies in the host Member State. The Court considered that to prevent that child from continuing his education in that host Member State and refusing to grant him leave to reside might deter Union citizens from exercising their right to freedom of movement.

25. Furthermore, the Court, after observing that a refusal to grant the parents of a child who is pursuing his studies the possibility of remaining in the host Member State could be such as to deprive the child of a right recognised to him by the Union legislature, which has recognised that the parents, 'who [are] the primary carer[s] of the child', can rely in the host Member State on a right of residence based on Article 12 of Regulation No 1612/68. (12)

26. Subsequently, in its judgment of 23 February 2010 in *Teixeira*, (13) the Court considered the impact of the child's having reached the age of majority on the parent's right of residence as the person who is the child's primary carer. The Court thus stated that the right of residence of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority 'unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education'. (14)

27. The Court has therefore already given an answer in principle, in *Teixeira*, to the first four questions put by the referring court, when it stated that the right of residence of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority unless the child continues to need the presence and care of that parent.

28. As the Upper Tribunal (Immigration and Asylum Chamber), London, asks only about the situation of a child aged over 21, thus proceeding from the assumption that the situation of the parents of adult children aged under 21 must be assimilated to that of the parents of children below the age of majority, it would appear necessary to make clear, at the outset, that that assumption appears to be incorrect in the light of the Court's case-law.

29. It should be borne in mind that the right to pursue studies provided for in Article 12 of Regulation No 1612/68 has been given an autonomous interpretation, (15) in accordance with its specific objectives of integrating workers and their children in the social life of the host Member State, from which the Court inferred, in particular, that the age limit laid down in the former Articles 10 and 11 of that regulation, which were repealed by Directive 2004/38, was not applicable. (16)

30. The approach adopted by the Court in *Teixeira* is therefore applicable to the child as soon as he reaches the age of majority. Although the fact of attaining his majority has no impact on the child's original rights, the converse rule, laid down in that decision in respect of the derived right of the parent who is the primary carer of the child, is that the right of residence is lost, as the extension of that right beyond the age of majority of the child stands as an exception. That rule follows from a presumption that the adult child is capable of caring

for himself, but it is a rebuttable presumption, since evidence to the contrary showing that the child continues to be dependent on his parent may be adduced.

31. The choice of words used by the Court seems to me to be sufficiently clear. It is apparent that the right of residence of the parent of the child who is pursuing his studies is conceived as a conditional right having a specific purpose, which can be extended beyond the child's majority only where such extension appears to be essential in order for the child to be able to complete his studies. The maintenance of that right is therefore the outcome of a test of necessity to be carried out by the national authorities.

32. In that regard, it should be observed that the educational objective attached to the maintenance of the right beyond the child's majority corresponds to the basis of that right recognised in the Court's case-law, namely the effectiveness of the right of children to education, which might be wholly nullified if their parents were denied the possibility of personally caring for their children during their studies. (17)

33. It is ultimately in the light of that educational purpose that the national courts must assess whether or not the child needs the presence and care of his parent in order to pursue and complete his studies.

34. 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 studies is to my mind a question of fact that falls to be resolved by the national courts in the light of all the circumstances specific to each case.

35. I therefore think that the Court should not answer the first four questions, which would require it to depart from the area of law and venture into the area of fact, which is a matter for the national court, whose freedom in assessing the evidence laid before it cannot and must not be restricted by the definition of precise criteria.

36. In that regard, it is necessary to bear in mind that the various factors that may be taken into consideration do not in fact constitute criteria or conditions, in the absence of which the derived right of residence could not be acquired, but constitute, rather, mere indicia on which it can be established that, in spite of having become an adult, the child continues to need the presence and care of his parent.

37. It is impossible to draw up an exhaustive list of those indicia, which must not be taken individually but must be brought together and weighed against each other.

38. I shall therefore confine myself to stating that the three factors mentioned by the referring court seem to me to be relevant.

39. Thus, the proven extension, beyond the child's majority, of his financial dependency on his parent is a factor that must be taken into account. Contrary to the position taken by the United Kingdom Government, I believe that the assumption that the parent caring for the child might continue to provide that financial support from a non-member State is not realistic. As Ms Alarape's representative stated in his oral observations, it is by no means obvious that a parent might find employment in his State of origin or in another non-member State that would provide remuneration equivalent to that which enables him to contribute in the host Member State to the needs of a child who is pursuing his studies. I am scarcely able to see, moreover, the interest that the host Member State might have in depriving the student of financial support from his family and leading him to rely on the social assistance system of that State.

40. The extent to which the relationship between parent and adult child is close may also be taken into consideration, although it does not appear necessary that the emotional support should assume a particular quality, proximity or intensity. (18)

41. Lastly, the 'common residence' test may be taken into consideration but cannot be regarded as decisive. While the Upper Tribunal (Immigration and Asylum Chamber), London, observes that in *Baumbast and R* the Court held that the person actually providing care for the child must be in a position to live with the child in the host Member State, it did not, to my mind, establish common residence as a condition for obtaining the right of residence, but only took for granted in that case, which related to children under the age of majority, the fact that the parent caring for the children lived with them. Furthermore, in the circumstances of *Teixeira*, which, as the European Commission correctly observes, are closer to those of the present case, the Court made the derived right of residence conditional only on the 'presence' of the parent and the provision of 'care'. I do not think that the possibility that a child may need the presence and care of his parents can be excluded *a priori* merely because he has been obliged to leave the family home in order to be able to pursue and complete his studies.

42. All in all, I am of the view that there is no need to answer the first four questions put by the referring court, as the assessment of the need for the child of a migrant worker to continue, after his majority, to benefit from the presence and care of the parent who is his primary carer in order to pursue and complete his studies is a question of fact which falls within the exclusive jurisdiction of the national court, which must reach a decision in the light of the particular circumstances of the case.

B – *The fifth question*

43. By its fifth question, the referring court asks, essentially, whether the child exercising his right to pursue his studies in accordance with Article 12 of Regulation No 1612/68 and the parent who is his primary carer acquire, when they have completed, on the basis of that provision, a period of residence of more than five years in the territory of the host Member State, the right of permanent residence provided for in Directive 2004/38.

44. The conditions on which the members of the family of a Union citizen who do not have the nationality of a Member State may acquire a right of permanent residence in that State are set out in Articles 16(2), 17 and 18 of that directive.

45. Pursuant to Article 16(2) of that directive, those persons acquire a right of permanent residence in the territory of the host Member State on condition that they have 'legally resided' with the Union citizen for a continuous period of five years.

46. By way of derogation from the need to have legally resided with the Union citizen for a continuous period of five years, Article 17(3) of Directive 2004/38 provides that the members of the family of a worker or self-employed person, irrespective of their nationality, are to have the right of permanent residence in the host Member State if the Union citizen has himself acquired the right of permanent residence in that Member State before the end of a continuous period of five years by showing that he has reached retirement age, that he has stopped working as a result of permanent incapacity to work or that he is working in the territory of another Member State while retaining his place of residence in the territory of the host Member State. Likewise, if the Union citizen dies before acquiring the right of permanent residence, the members of his family may none the less acquire a right of permanent residence if the worker resided in the territory of the host Member State for two years or if his death is the result of an accident at work or an occupational disease or again if the surviving spouse had lost the nationality of that Member State following her marriage to that worker.

47. Without prejudice to Article 17 of Directive 2004/38, Article 18 of that directive provides, lastly, that in the event of the death or departure of the Union citizen, divorce, annulment of the marriage or termination of a registered partnership, the members of his family are to acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State, where they satisfy the conditions laid down in Articles 12(2) and 13(2) of that directive, which require that the persons concerned can, among other conditions, show, before acquiring the right of permanent residence, that they themselves satisfy the same conditions as those referred to in Article 7(1)(a), (b) or (d) of that directive.

48. The Court has made clear what periods may be taken into account for the purpose of acquiring the right of permanent residence provided for in Article 16 of Directive 2004/38.

49. In its judgment of 7 October 2010 in *Lassal*, (19) concerning a French national who had had the status of 'worker' within the meaning of EU law during the period from January 1999 to February 2005, the Court, while observing that the acquisition of the right of permanent residence did not appear in the instruments of EU law adopted for the application of Article 18 EC before Directive 2004/38 came into force, none the less considered that it was necessary to take into account, in calculating the continuous period of five years' legal residence necessary for the acquisition of the right of permanent residence, not only the periods of residence after the deadline for the transposition of that directive but also periods of residence completed before that date, 'in accordance with EU law instruments'.

50. The Court subsequently stated that periods of residence completed before 30 April 2006 on the sole basis of a residence permit validly issued pursuant to Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, (20) without the conditions governing entitlement to any right of residence having been satisfied, cannot be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38. (21)

51. In its judgment of 21 December 2011 in *Ziolkowski and Szeja*, (22) the Court, examining the structure of Directive 2004/38, considered that 'the concept of legal residence implied by the terms "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 the directive, in particular those set out in Article 7(1)', (23) from which it inferred that a Union citizen who had been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State could not be regarded as having acquired the right of permanent residence.

52. The Court therefore made recognition of the right of permanent residence conditional on compliance with the conditions set out in Article 7 of Directive 2004/38 for the extension of the right of residence beyond three months.

53. Article 7 requires that those concerned demonstrate 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 established in the host Member State, of a person who satisfies those requirements.

54. The United Kingdom and Danish Governments and the Commission, on the one hand, and the association AIRE Centre for Advice on Individual Rights in Europe (24) and Ms

Alarape, on the other hand, offer diametrically different interpretations of the Court's case-law.

55. The former infer from *Ziolkowski and Szeja* that a national of a non-member State who has had a right of residence for a continuous period of five years under Article 12 of Regulation No 1612/68 cannot derive from that fact alone the right of permanent residence under Directive 2004/38.

56. They maintain, in essence, that the right of residence acquired under Article 12 of Regulation No 1612/68 can exist only in so far as it is necessary in order to enable the child to complete his studies in the host Member State, that that right, which is distinct from the rights of residence acquired under Directive 2004/38, does not satisfy the conditions set out in Article 7 of that directive and that certain periods of residence completed under Directive 2004/38 are not to be taken into account for the acquisition of the right of permanent residence if the conditions relating to being gainfully employed or possessing sufficient resources are not satisfied. (25)

57. AIRE Centre maintains, on the contrary, that a person who has had a right of residence under Article 12 of Regulation No 1612/68 for a continuous period of five years acquires, by the application by analogy of Article 16 of Directive 2004/38, the right of permanent residence in the Member State concerned. Observing that the final purpose of that provision is to ensure the integration of workers who are Union citizens and their families in the host Member State, and emphasising that a period of residence of five years is regarded as sufficient indication of a certain integration, AIRE Centre claims, in support of that argument, that the provisions of Regulation No 1612/68 that remained in force following the adoption of Directive 2004/38 must be regarded as forming a legislative whole with that directive and that the application by analogy of Article 16(2) of that directive would lead to the result sought by the Court, namely the uniform application of EU law, escaping the vicissitudes of the various national laws.

58. In the oral submissions made at the hearing, Ms Alarape, while supporting the observations submitted by AIRE Centre, adds that there is no reason to reconsider the *Lassal* case-law, which implies that any period of residence completed under an instrument earlier than Directive 2004/38 must be taken into consideration. She emphasises that, in the present case, there is indeed a period of residence before April 2006 that must consequently be taken into account, and observes that there is no reason to consider that residence that was 'legal' before 2006 should no longer be legal after that date. She maintains that the judgment in *Ziolkowski and Szeja* was delivered in a very different situation, in which the applicant relied on a right of residence under his national law.

59. In Ms Alarape's submission, to refuse access to the status of permanent residence would have deterrent effects, since, in particular, the qualifications obtained in the host Member State might not be recognised in the State whose nationality the child possesses and since a child might not feel integrated if he knows at the outset that he will never be able to become a permanent resident even if he pursues his studies over a long period.

60. Lastly, she observes that in any event both she and her son satisfy the criteria set out in Article 7 of Directive 2004/38.

61. Ms Alarape's reasoning therefore proceeds from the twofold premiss that, first, *Ziolkowski and Szeja* excluded periods of residence completed on the basis of national law and, second, *Lassal* allows any period of residence completed under an instrument earlier than Directive 2004/38 to be taken into account.

62. Those two premisses seem to me to be incorrect.

63. I consider that it is clear from *Ziolkowski and Szeja* that the Court distinguished periods of residence which allow the right of permanent residence to be acquired from those periods of residence which do not by reference not to the origin of the right but to its nature. In other words, the Court made a distinction not between EU law and national laws but between periods of residence which satisfy the conditions of an economic nature set out in Article 7(1) of Directive 2004/38 and those which do not satisfy those requirements.

64. Thus, the Court took care to observe, in answer to the first question put in that case by the referring court, that a Union citizen who had been resident in the territory of the host Member State for more than five years on the sole basis of national law could not be regarded as having acquired the right of permanent residence 'if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of [Directive 2004/38]', (26) from which it may be deduced, by argument *a contrario*, that if the person concerned, although he had been resident on the basis of national law, had also satisfied those conditions, he would have been able to acquire a right of permanent residence.

65. In answer to the second question in that case, moreover, the Court stated that periods of residence completed on the territory of a Member State by a national of a non-member State before the accession of that State to the European Union must be taken into account for the purpose of the acquisition of the right of permanent residence provided that those periods were completed in compliance with the conditions laid down in Article 7(1) of Directive 2004/38. By definition, those periods of residence could be completed only under the national law of the host Member State. (27)

66. In the light of that judgment, which was followed in the judgment of 6 September 2012 in *Czop and Punakova*, (28) it is therefore clear that a period of residence completed on the sole basis of national law but under conditions consistent with those laid down in Directive 2004/38 may be taken into account for the purpose of the acquisition of the right of permanent residence. That means, in practice, periods of residence completed by a Union citizen or a member of his family before the date of transposition of Directive 2004/38 or by a national of a non-member State before the accession of that State to the Union.

67. It remains to be ascertained whether, conversely, a period of residence which has been completed on the basis of EU law but which fails to satisfy the conditions laid down in Article 7 of Directive 2004/38 might be taken into consideration.

68. Taken in isolation, *Lassal* might, at first sight, be relied on in favour of a positive answer to that question since, for the purpose of the acquisition of the right of permanent residence, that judgment accepts that any period of residence completed 'in accordance with instruments of Union law' preceding the date of transposition of Directive 2004/38 might be taken into account, without limiting that to certain specific cases, such as those in which the earlier law already provided for a right of permanent residence.

69. However, the scope of that judgment must be assessed by reference to the factual circumstances accepted by the Court and the clarification provided by *Ziolkowski and Szeja*. The Court observed that Ms Lassal was a '"worker" for the purposes of EU law', (29) from which it follows that she satisfied, before Directive 2004/38 entered into force, conditions identical to those subsequently set out in Article 7 of that directive. In the light of *Ziolkowski and Szeja*, it is impossible to analyse *Lassal* as having decided anything other than that, in order to be legal, the residence completed before the date of transposition of that directive had to be consistent with the instruments of EU law which made the right of residence subject to conditions equivalent to those set out in Article 7 of that directive.

70. It remains to be determined whether the possibility that Article 12 of Regulation No 1612/68 belongs to a coherent 'legislative whole' formed with Directive 2004/38 requires that Article 16 of that directive be applied by analogy.

71. The autonomous nature of the right of residence established in the case-law seems to me to lie at the heart of the analysis which needs to be undertaken in order to answer that question.

72. The autonomy of the right of residence may give rise to two opposing lines of reasoning.

73. As stated by the United Kingdom and Danish Governments and the Commission, the autonomous nature of the right of residence based on Article 12 of Regulation No 1612/68 appears to preclude its being transformed, by analogy, into the equivalent of the second degree, corresponding to residence of more than three months, in the progressive scale of integration conceived by Directive 2004/38.

74. However, the argument based on the autonomy of the right of residence of children pursuing their studies can be inverted and an analysis in entirely the opposite direction may be proposed. That right of residence has been freed by the case-law from the 'resources and sickness insurance' condition, since it is 'based not on [the] self-sufficiency [of the persons concerned] but on the fact that the aim of Regulation No 1612/68, namely freedom of movement for workers, requires the best possible conditions for the integration of the worker's family in the host Member State'. (30) Since the children and the parents caring for them may be entitled to a right of residence of more than three months which corresponds to that provided for in Article 7 of Directive 2004/38, but the implementation of which is independent of the conditions set out in that article, the reintroduction of those conditions for the acquisition of the status of permanent resident is paradoxical, which is all the more striking because the principle of the autonomy of the right of residence, conceived to benefit the child by relieving him of any requirement of financial autonomy, finally rebounds against its beneficiary by depriving him of access to the status of permanent resident. (31)

75. What is more, the reintroduction of a requirement of financial autonomy in order to prove a sufficient link of integration in the society of the host Member State appears to be scarcely compatible with the idea that the right of residence recognised to migrant workers and also to members of their families rests on a presumption of integration resulting from the fact that they have entered the employment market. After referring to the distinction between migrant workers and members of their families, on the one hand, and Union citizens who are not economically active, on the other, the Court, in its judgment of 14 June 2012 in*Commission* v *Netherlands*, (32) emphasised that, in the particular case of a migrant worker, the link of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of employment, a migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers. (33)

76. If, moreover, the link of integration were not presumed but had to be proved, it would also be possible to maintain that the fact that a child, after having settled in the host Member State as a member of the family of a migrant worker, has completed all his primary and secondary studies there before pursuing higher studies, creates a sufficient level of integration.

77. Although I am aware of the argument based on the actual degree of integration in the host Member State, which had led me to propose, in my Opinion in *Ziolkowski and Szeja*, that the concept of legal residence should include periods of residence completed solely in

accordance with national law, by assimilating those who are legally resident within the meaning of Directive 2004/38 to those who are not staying illegally, I consider, however, in the light of the judgment in that case, that periods of residence completed under Article 12 of Regulation No 1612/68 must not be taken into account for the purpose of the acquisition of the status of permanent resident.

78. The following considerations dictate that approach.

79. In the first place, the fact that Regulation No 1612/68 is based on a presumption of integration or the circumstance that the child pursuing his studies will in most cases be able to show a genuine link of integration in the host Member State are factors that are of no relevance to the question of acquisition of the status of permanent resident.

80. The *ratio* of the judgment in *Ziolkowski and Szeja* seems to me to be capable of being identified in the need to preserve the balance, desired by the Union legislature, between, on the one hand, requirements of freedom of movement and integration and, on the other, the financial interests of the Member States. That desire to strike a balance is apparent in the adoption of an exacting concept of level of integration, and the Court has held that 'the integration objective which lies behind the acquisition of the right of permanent residence … is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State'. (34) In fact, since the 'quality' of integration is measured exclusively in the light of the condition of financial autonomy, I have the feeling that it would be more realistic to infer that the conditions governing the acquisition of the right of permanent residence are ultimately independent of the level of integration of the claimant in the host Member State.

81. Indeed, Article 12 of Regulation No 1612/68, the purpose of which is to allow the child of a migrant worker to pursue and complete his studies, in such a way that the worker is not deterred from exercising his right to freedom of movement, is applicable to the children of former migrant workers (35) and requires only that the child has lived with his parents or with one of them in a Member State while at least one of his parents lived there as a worker. (36) The link with the exercise of an economic activity, which is considered to allow a sufficient level of integration to be presumed, may, consequently, prove very tenuous, in particular where the Union citizen through whom the child holds his rights worked several years previously and for a very short period. It therefore seems logical that children pursuing their studies should themselves be required to satisfy the requirements of Directive 2004/38.

82. Further, if periods of residence completed on the basis of Article 12 of Regulation No 1612/68 could be taken into account there would be a danger of accentuating, without valid reasons, the disparity between two categories of persons not in employment, those who can benefit from rights only on conditions that they are financially independent and those who escape that requirement for the sole reason that their right of residence has its source in the right of residence of a migrant worker.

83. In the second place, if periods of residence completed on the basis of Article 12 of Regulation No 1612/68 were taken into account, that to my mind would not be consistent with the general structure of the provisions of Directive 2004/38 on the conditions for the acquisition of the right of permanent residence where the right of residence is maintained notwithstanding the occurrence of an event which causes the members of the family of a Union citizen to lose that status.

84. While Articles 12(2) and 13(2) of Directive 2004/38 allow, under certain conditions, the members of the family of a Union citizen who are nationals of a non-member State to acquire an independent right of residence in the event of the death or departure of the Union citizen,

divorce, annulment of a marriage or termination of a registered partnership, the periods completed by virtue of that right will be taken into account for the purpose of the acquisition of a right of permanent residence solely on condition that the persons concerned themselves satisfy the requisite conditions.

85. It is even more significant to note the absence of any reference to the acquisition of the right of permanent residence in Article 12(3) of Directive 2004/38, which is specifically intended to cover, in the special case of the departure or death of the Union citizen, the situation of children who are enrolled at an educational establishment and that of their parents who are their primary carers.

86. Article 12(3) of that directive provides that, in spite of the death or departure of a Union citizen, the right of residence will be maintained by the children or 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*'. (37)

87. The object of Article 12(3) of Directive 2004/38 is made clear by the proposal for a directive submitted on 23 May 2001 by the Commission, (38) which states that '[t]his paragraph gives legislative status to the principle propounded by the Court of Justice in Joined Cases 389/87 and 390/87 *Echternach and Moritz* (judgment given on 15 March 1989) (39) and concerns the children of Union citizens, who are not nationals of a Member State, who are studying in the host Member State and are integrated in its education system and who might have difficulty integrating into a new education system for reasons such as, amongst others, language and culture. These persons might be penalised by the fact that the Union citizen parent leaves the territory of the host Member State for professional or other reasons. This right of residence, which may be limited to the duration of the studies, is subject to enrolment at an educational establishment at a secondary or post-secondary level, precisely because re-integration in a new system may prove more difficult at this level'. (40)

88. Even though it does not create an autonomous and full right of residence equivalent to that produced by Article 12 of Regulation No 1612/68, (41) Article 12(3) of Directive 2004/38, which illustrates the particular importance which that directive accords to the situation of children who pursue studies in the host Member State and the parents who care for them, (42) is directly inspired by the case-law, which it seeks to consolidate, if only in part.

89. In fact, Article 18 of Directive 2004/38, which provides for the acquisition of the right of permanent residence by the members of the family who do not have the nationality of a Member State, concerns only the members of the family of a Union citizen who are referred to in Articles 12(2) and 13(2) of that directive, to the exclusion of children enrolled at an educational establishment who are referred to in Article 12(3) of that directive, who cannot therefore acquire a right of permanent residence.

90. Consequently, if periods of residence completed on the basis of Article 12 of Regulation No 1612/68 were taken into account for the purpose of the acquisition of the status of permanent resident, the consequence would be a different set of rules that would be difficult to justify.

91. Thus, a child who has lived for four years with his father, a Union citizen without economic activity but with sufficient resources and sickness insurance, could not acquire the status of permanent resident after the father's death, in spite of having pursued his studies for several years in the territory of the host Member State, while the child of the spouse of a Union citizen who has divorced and left his family after working for six months in another

Member State would be entitled to ask that the periods of residence corresponding to his education be taken into account.

92. All in all, while the right of residence under Article 12 of Regulation No 1612/68, although having its source in the parent's situation as a migrant worker, was severed from that situation in order, among other consequences, to escape the condition of financial independence, I consider, in the light of the Court's interpretation of the concept of legal residence, that that dispensation cannot be extended to the acquisition of the status of permanent resident.

93. That approach clearly is not without disadvantages for persons who derive their rights exclusively from Article 12 of Regulation No 1612/68 but are not also able to establish that they satisfy the conditions set out in Article 7 of Directive 2004/38. The situation of those persons, when they have completed their studies, which, moreover, they will have an interest in prolonging, will become precarious, since measures might be taken to expel them, although the implementation of those measures will be subject to a review of their proportionality by reference to the adverse effect on the right to a private and family life of those concerned.

94. However, it is not illogical to think that the importance of the rights conferred by the status of permanent resident, which, once acquired, confers an entitlement to social assistance which is unconditional, must have as its counterpart the rigour of the conditions laid down for its acquisition. Furthermore, the setting of rigorous but clear conditions of eligibility for that status meets beyond doubt the requirement of legal certainty, which would be seriously undermined if the Court should reconsider the case-law very recently established in *Ziolkowski and Szeja*.

95. It is for those reasons that I propose that the Court's answer to the fifth question put by the referring court should be that periods of residence completed on the sole basis of Article 12 of Regulation No 1612/68, where the conditions set out in Article 7(1) of Directive 2004/38 are not satisfied, cannot be taken into account for the purpose of the acquisition of the right of permanent residence.

II – Conclusion

96. In the light of the foregoing considerations, I suggest that the Court should answer the fifth question referred by the Upper Tribunal (Immigration and Asylum Chamber), London, as follows:

Periods of residence completed on the sole 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, where the conditions set out in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC are not satisfied, must not be taken into account for the purpose of the acquisition of the right of permanent residence provided for in that directive.

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1 – Original language: French.

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2 – OJ, English Special Edition 1968 (II), p. 475.

3– OJ 2004 L 158, p. 77, and corrigenda in OJ 2004 L 229, p. 35; OJ 2005 L 30, p. 27; OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28.

4 – See, to that effect, J.-Y. Carlier, 'Le devenir de la libre circulation des personnes dans l'Union européenne: regard sur la Directive 2004/38', Cahiers de droit européen, 2006, p. 13 et seq., pp. 23 and 28; and also A. Iliopoulou, 'Le nouveau droit de séjour des citoyens de l'Union et des membres de leur famille: la directive 2004/38/CE', Revue du Droit de l'Union Européenne, 2004, p. 523 et seq. and p. 539.

5– Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

6– See, Case C-256/11 *Dereci and Others* [2011] ECR I-0000, paragraph 62.

7– See Articles 2 and 3 of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ, English Special Edition 1970 (II), p. 402, and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ 1975 L 14, p. 10.

8– See Article 28(2) of Directive 2004/38.

9– See Article 24(2) of that directive.

10– OJ 2011 L 141, p. 1.

11– Case C-413/99 [2002] ECR I-7091.

12 Paragraph 73 of that judgment.

13– Case C-480/08 [2010] ECR I-1107.

14– Paragraphs 86 and 87 of that judgment.

15 – Case C-310/08 *Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065, paragraph 35. See also *Teixeira* (paragraph 46 and case-law cited).

16– Case C-7/94 *Gaal* [1995] ECR I-1031, paragraph 25. See also *Ibrahim and Secretary of State for the Home Department* (paragraph 35) and *Teixeira* (paragraphs 82 and 83).

17– See, to that effect, *Teixeira* (paragraph 71).

18 – In that regard, I note that the European Court of Human Rights, which has accepted on several occasions that the ties between young adults who had not yet established their own families and their parents could be analysed as family life, does not require that those ties have a particular intensity. Thus, in *Bousarra v. France* (judgment of the European Court of Human Rights of 23 September 2010, No. 25672/07), although the French Government maintained that the applicant, an unmarried adult without children, did not show that he had established links of dependency 'other than normal emotional ties' with his parents (§ 34), the European Court of Human Rights none the less found that there was a right to protection of family life, without showing proof of special emotional links.

19– Case C-162/09 [2010] ECR I-9217.

20– OJ, English Special Edition 1968 (II), p. 485.

21– See Case C-325/09 *Dias* [2011] ECR I-0000, paragraph 66.

22– Joined Cases C-424/10 and C-425/10 [2011] ECR I-0000.

23– Paragraph 46 of that judgment.

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24 – 'AIRE Centre'.

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25 – The Commission cites, by way of example, Articles 12(2) and 13 of Directive 2004/38, on the maintenance of the right of residence of nationals of non-member countries in the event of, respectively, the death or departure of the citizen of the Union and the break-up of the marriage.

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26 – See *Ziolkowski and Szeja* (paragraph 28).

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27 – As the Court expressly stated, moreover, at paragraph 61 of that judgment.

28– Joined Cases C-147/11 and C-148/11 [2012] ECR I-0000.

29– *Lassal* (paragraph 18).

30– *Teixeira* (paragraph 66).

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31 – See, for a similarly paradoxical situation, *Dias*. The analysis according to which the issue of a residence permit must be regarded as an act declaring the existence of rights, and not as an act giving rise to rights, which is normally advantageous to a Union citizen, since it prevents a citizen's residence from being considered 'illegal' within the meaning of Union law on the sole ground that he does not have a residence card, proves to be disadvantageous, in that it prevents the residence of a citizen of the Union from being considered 'legal' within the meaning of EU law on the sole ground that such a card was validly issued to him. See also the commentary on that judgment by F. Kauff-Gazin, *Revue Europe,* 2011*,* No 10, commentary 337.

32– Case C-542/09 [2012] ECR I-0000.

33– Paragraph 66 of that judgment.

34– *Dias* (paragraph 64).

35– See *Commission* v *Netherlands* (paragraph 49 and the case-law cited).

36– Ibid. (paragraph 50 and case-law cited).

37– Emphasis added.

38– Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final).

39– [1989] ECR 723.

40 – Page 16: paragraph 3 of that proposal for a directive.

41– See, on that subject, point 52 of the Opinion of Advocate General Kokott in *Teixeira*. See, in favour of a broad reading of that provision, going beyond the actual letter thereof, in order, in particular, also to cover the case of divorce, P. Starup and M.-J. Elsmore, 'Taking a logical or giant step forward? Comment on *Ibrahim* and *Teixeira*', *European Law Review,* 2010, p. 571, in particular p. 583.

42 – See, to that effect, *Ibrahim and Secretary of State for the Home Department* (paragraph 58) and also *Teixeira* (paragraph 69).