**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 650 JR]**

**IONEL SANDU**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 31st day of July, 2015**

1. Council Directive 2004/38/EC ('The Citizenship Directive') relates to the right of citizens of the European Union to move and reside freely within the territory of the Member State. The Directive also makes provision for the expulsion of Union citizens from a host Member State in certain circumstances. The question which arises for decision in this case is whether the rules relating to expulsion of a Union citizen from Ireland have been lawfully applied in respect of the applicant.

**Background:**
2. The applicant is a Romanian national (and a citizen of the Union since January 2007 on the accession to the Union of Romania) who sought asylum in the State on the 26th March, 2001. He made the appropriate application to the Refugee Applications Commissioner without the assistance of a lawyer. He and his partner, also a Romanian national, had a baby girl on the 21st of April, 2001. This child, by virtue of her birth in the State, was an Irish citizen on the date of her birth in accordance with the former rules as to citizenship. Following the birth of the child, the applicant signed a form prepared by the Refugee Applications Commissioner which stated that the applicant wished "to withdraw [his] application for declaration as a refugee for the following reasons: (i) [He] intend[s] to apply for residency on the basis of an Irish born child." The form did not offer information or advice as to the effect of withdrawing the asylum application on the applicant's immigration status in Ireland. There is no evidence that the Commissioner informed the applicant that he had permission to be in the State only for as long as he was an applicant for asylum. The form was also signed by an official on behalf of the Commissioner. The form is dated June 2001.

3. Almost two months later (on the 9th of August 2001) the Commissioner wrote to the applicant noting the withdrawal of his application for refugee status and pointing out that his application for permission to reside in Ireland would be forwarded to the immigration division of the Department of Justice. The Court has been informed that the Commissioner sent the application for residency to the relevant authority who in turn then wrote to the applicant on the 21st of March, 2002, seeking information and documents. The Court was not informed when precisely the Commissioner sent the residency application to the immigration authority but it must have happened sometime between June 2001 and March 2002.

4. On the 24th April, 2002, the respondent notified the applicant of a decision to grant him permission to remain in the State "based on your parentage of an Irish citizen child." The permission was for one year but was renewed regularly, according to Counsel.

5. The applicant has been convicted of a number of criminal offences: minor road traffic offences in 2002 and 2003; handling stolen goods in 2002 (resulting in a six month suspended sentence); a public order offence on the 1st November, 2005, (resulting in a community service order); a road traffic offence and obstruction of a police officer offence on 19th December, 2005, (resulting in a fine). The applicant was convicted of assault causing harm on the 28th November, 2011. He was sentenced to a period of imprisonment of three years and six months.

6. When he was in prison the respondent notified the applicant that it was proposed that he be removed from the State. Following receipt of submissions the removal order was made, dated 3rd July, 2013.

7. The applicant was given early release from prison on the 28th June, 2014.

8. The proposal to make a removal order was addressed to the applicant in Mountjoy Prison and was dated the 26th February, 2013. Following invitation, the applicant made a hand written submission dated the 7th March, 2013. This careful handwritten submission seems formulated to comply with schedule 9 of European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) which describes the "representations which may be made to the Minister as to why removal order should not be made". The schedule in the regulations refers to ten headings to be addressed in the representations; including duration of residence in the State, family and economic circumstances, social and cultural integration into the State, state of health and extent of the personal links with his or her country of origin. The applicant indicated that the duration of his residence in the State was twelve years. He also described how he had integrated into Irish society during that period, stating that he had been working diligently and had sought to build his own business. He said that "after twelve special years in Ireland I feel totally Irish, with my daughter fluent in both Irish and English languages."

9. The applicant then acquired a solicitor. By letter of the 17th April, 2013, the applicant's solicitor made a further submission, invoking art. 28(3) of the Citizenship Directive and pointing out an expulsion decision may only be taken based on imperative grounds of public security, where the person in question has resided in Ireland for ten years. The letter asserted that the relevant period of residence had been accumulated.

10. In a decision dated the 3rd July, 2013, the respondent's officials disagreed with the submission made by the applicant's solicitors that the applicant had resided in the State for more than ten years. The respondent's official said:-

> "it should be noted that Mr. Sandu first received permission to reside in the state on 24\04\2002 and commenced his current term of imprisonment for the serious offence of assault causing harm on the 16\11\2011. As time spent in incarceration it is not considered when calculating residency in the state…. Mr. Sandu has been resident in the state for less than ten years."

11. The removal order of the 3rd July, 2013, was the subject of judicial review proceedings bearing record no. 2013/525 J.R..

12. Written legal submissions were delivered by the applicant in the judicial review which asserted that:-

> "The applicant contends that he was lawfully resident in the State from the date of his daughter's birth on the 21 April, 2001, and thus has a continuous period of residence in the State of more than ten years…"

13. The judicial review proceedings were struck out with no order in February 2015 because the applicant's solicitors sought an internal administrative review of the decision of the 3rd July, 2013, in accordance with regulation 21 (1) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008.

14. The application for administrative review of the decision of the 3rd July, 2013, was, at the request of the applicant's solicitors, based upon the written legal submissions prepared for the judicial review proceedings.

15. At this stage it is important to pause and to note that the written submission prepared by the applicant's lawyers for the original judicial review and then used to ground the internal administrative review was that the applicant had been "lawfully resident in the state from the date of his daughter's birth on the 21st April, 2001 and thus has a period of residence in the State of more than ten years, prior to his incarceration on 16 November, 2011." As will become apparent presently the applicant requested the respondent to calculate the ten year period of residence in the State by reference to a point in time when the applicant acquired permission or was otherwise legally entitled to be in the State.

16. It is also important to point out that in the written submissions which formed the basis of the application for the administrative review of the removal order two significant decisions of the Court of Justice of the European Union are mentioned. The first of these is *Land Baden-Württemberg v Panagiotis Tsakouridis* (Case C-145\09) E.C.R. *2010 I-11979*.. The written submission quoted para. 31 of that judgment in the following terms:-

> "….. in view of the wording of Article 28(3) of that directive, the decisive criterion is whether the Union citizen has lived in that Member State for the 10 years preceding the expulsion decision".

17. The second important decision referred to in the written submissions was *Secretary of State for the Home Department v. M.G.* (Case C-400\12) E.C.R. 2014 -00000. Paragraphs 23, 25 and 27 of that judgment were set out in the following terms:-

> "….in view of the wording of Article 28(3) of that directive, the decisive criterion is whether the Union citizen lived in that Member State for the 10 years preceding the expulsion decision …
>
> … in order to determine whether a Union citizen resided in the host Member State for the 10 years preceding the expulsion decision – the decisive criterion for granting enhanced protection under that provision – all relevant factors must be taken into account in each individual case ...
>
> Given that the decisive criterion for granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004\38 is the fact that the person concerned resided in the host Member State for the 10 years preceding the expulsion decision and that absences from that State can affect whether or not such protection is granted, the period of residence referred to in that provision must, in principle, be continuous."

The written submissions also referred to para. 38 of the decision in *M.G.* in the following terms:-

> "…. a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that the person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken."

18. The written submissions asserted that the decision of the court in *M.G.* required that the ten year period of residence must be calculated by counting back from the date of the decision ordering the expulsion and that any period in prison could not be taken into account.

19. The written submissions referred also to the joined decisions of the Court of Justice in Tomasz Ziolkowski (C-424/10) and Barbara Szeja and Others (C-425/10) v. Land Berlin (C-424\10) E.C.R. *2011 -00000* which are authority for the proposition that the period of residence in a host state prior to accession of the home state to the E.U. may be reckonable for the calculation of time in the host state, provided the migrant was engaged in activities described in art. 7(1) of the Citizenship Directive. (These activities/circumstances refer to employment, self employment, education or persons not requiring social welfare support).

20. It was then submitted (at para. 16 of the written submissions):-

> "…that the applicant's entitlement to reside in the State, pursuant to Article 17 of the Treaty Establishing the European Community (now Art. 20 TFEU) arose on 21 April 2001, upon the birth of his daughter Bianca, an EU citizen. The applicant's application, for permission to remain on foot of his relationship with his daughter, was sent to ORAC prior to 9 August 2001, who acknowledged the application and forwarded it to the respondent's Immigration Division. The applicant was not incarcerated until the 16 November 2001 and therefore has a continuous period of excess of 10 years"

21. On the 26th August, 2014, the respondent's official assessed the administrative review and stated as follows:-

> "Mr. Sandu arrived and claimed asylum in the state on 26\03\2001. Mr. Sandu was first granted permission to reside in the state on 24\04\2002 based on his parentage of an Irish Citizen Child… It is noted that Mr. Sandu served a term of imprisonment in the state from 16\11\2001 to 28\06\2014"

22. Dealing specifically with the assertion that Mr. Sandu had accumulated ten years residence in the State, the official, effectively repeating the original decision of July, 2013 said:-

> "….. he did not receive permission to reside in the state until 24\04\2002 when the department approved his application for residence based on his parentage of an Irish citizen child. It is also noted that Mr. Sandu served a term of imprisonment in the state from 16\11\2001 to 28\06\2014 and time spent in incarceration is not considered when

calculating residence in the State…..... It is submitted that at the time that the removal order was signed Mr. Sandu's period of legal residence in the state fell short of the ten year period which would require imperative grounds of public policy to justify his removal."

23. Leave to seek judicial review was granted in November, 2014, and *certiorari* is now sought on the basis that the respondent erred in law in calculating the applicant's period of residence in the State.

24. The legal question for decision in these proceedings is whether the State acted lawfully by calculating Mr. Sandu's period of residence in Ireland by reference to the date upon which the respondent granted him leave to remain, that being the 24th April, 2002.

**Article 16 and article 28 of the directive:**
25. A significant controversy has arisen in this case as to the meaning of the phrase "resided in the host member state", as used in art. 28 of the directive and the phrase "resided legally for a continuous period of five years in the host member state", as used in art. 16 of the directive.

26. Article 16 is entitled "General rule for Union Citizens and their family members" and is the first rule in chapter IV of the directive which is entitled "Right of permanent residence". Article 16 is in the following terms:-

> "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….
>
> 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."

27. Guidance is available from the Court of Justice of the European Union as to the meaning of the phrase "resided legally " in art. 16(1). To understand the case law it is necessary to set out arts. 6 and 7 of the directive first. Article 6 is the first provision of chapter III of the directive which is entitled 'Right of residence.' Article 6 is in the following terms:-

"Right of Residence for up to three months

> 1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions of any formalities other than the requirement to hold a valid identity card or passport.
>
> 2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen."

Article 7 provides for "Right of residence for more than three months" as follows:-

> "Right of residence for more than three months
>
> 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 a 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)."

28. In cases C-424\10 and C-425\10 (*Ziolkowski and Sjeza*) the question of the meaning of the phrase "Union citizens who have resided legally" arose. Mr. Ziolkowski was a Polish national, who arrived in Germany in September, 1989, and who obtained a residence permit on humanitarian grounds for the period July, 1991, to April, 2006. Mrs. Sjeza was a Polish national who arrived in Germany in 1998 and who obtained a residence permit on humanitarian grounds from May, 1990, to October, 2005. In 2005 they applied for a document confirming their right to permanent residence under European Union law. The referring court asked two questions of the Court of Justice :-

> "(1) Is the first sentence of Article 16(1) of Directive 2004/38 … to be interpreted as conferring on Union citizens who have resided legally for more than five years on the basis only of national law in the territory of a Member State, but who did not during that period fulfil the conditions laid down in Article 7(1) of [that] directive …, a right of permanent residence in that Member State?
>
> (2) Are periods of residence of Union citizens in the host Member State which took place before the accession of their Member State of origin to the … Union also to be counted towards the period of legal residence under Article 16(1) of

Directive 2004/38 …?"

The Court of Justice said as follows:-

> "33. While the wording of that provision of Directive 2004/38 does not give any guidance on how the terms 'who have resided legally' in the host Member State are to be understood, the directive does not contain any reference to national laws as regards the meaning of those terms either. It follows that those terms must be regarded, for the purposes of application of the directive, as designating an autonomous concept of European Union law which must be interpreted in a uniform manner throughout the Member States.
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> 41 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence should not be subject to any further conditions, with the aim of it being a genuine vehicle for integration into the society of that State.
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> 42 Lastly, with regard to the right of permanent residence viewed in the specific context of Directive 2004/38, recital 17 in the preamble thereto states that such a right of should be laid down for all Union citizens and their family members who have resided in the host Member State 'in compliance with the conditions laid down in this Directive' during a continuous period of five years without becoming subject to an expulsion measure.
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> 43. That clarification was inserted into that recital during the legislative process that led to the adoption of Directive 2004/38 by Common Position (EC) No 6/2004, adopted by the Council of the European Union on 5 December 2003 (OJ 2004 C 54 E, p. 12). According to the Communication to the European Parliament of 30 December 2003 (SEC/2003/1293 final), that clarification was inserted 'in order to clarify the content of the term "legal residence"' for the purpose of Article 16(1) of the directive.
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> 46. It follows 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).
>
> 47. 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 a 'legal' period of residence within the meaning of Article 16(1).
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> 51. In the light of the foregoing, the answer to Question 1 is that Article 16(1) of Directive 2004/38 must be interpreted as meaning that a Union citizen who has 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 cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive."

29. The second question asked gave rise to an answer from the E.C.J. which confirmed that a period of residence in a host Member State acquired pre-accession of the home state to the Union was reckonable provided the period was compatible with the conditions laid down in art. 7(1) of the directive.

30. The respondent suggests that this case is applicable by analogy to the facts in the decision suit. The court is asked to read art. 28(3) of the directive as if it, too, employed the words "legally resided "and not just the word "resided." Recalling that the respondent calculated the period of residence by reference only to when the applicant was given formal permission to be in the State, I am not sure that such an approach would greatly aid the respondent. It is clear from the decision in *Ziolkowski* that legal residence for the purposes of art. 16 does not necessarily refer to whether the host state granted permission to the migrant to enter and remain in the host state in accordance with purely domestic measures. It refers to whether the migrant was carrying out activities or conducting himself, during the period in question, in accordance with art. 7(1) of the directive. The court said that being legally resident within the meaning of the directive in a host state was an autonomous E.U. law concept. In other words, it was not to be decided by reference to national provisions exclusively or at all.

31. On the other hand, if I were to accept the respondent's argument that this decision guides the proper meaning of art. 28(3) of the directive I would be driven to conclude that both the applicant and respondent have erred in the manner in which they have approached the proper meaning of art. 28. The applicant suggested that the ten year period commenced when his Irish citizen child was born. He later sought to expand the meaning of this submission by saying that, on that date, he acquired a retrospective entitlement to be in Ireland by virtue of the decision of the Court of Justice in *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm).* (Case C-34/09) E.C.R. 2011 I-01177. In that case non E.U. parents of E.U. citizen children acquired derivative rights to reside and work and access social welfare in the E.U. if the denial of those rights would have the effect of forcing the E.U. citizen children out of the territory of the Union.

32. However, by insisting that the applicant's first date of lawful residence was the date he was formally granted permission to be in the State, the respondent has impliedly rejected the argument advanced by the applicant that he had permission to be in the State because of *Zambrano*. In any event, my view is that even if *Zambrano* has the sort of retrospective effect contended for, the applicant would be required to show not just that he was the father of an E.U. citizen but that had he been required to leave the State on or after her birth, she would have been forced out of the territory of the Union. This case was never made out. For these reasons and for other reasons which will be explained below, my view is that the applicant erred in seeking to rely on *Zambrano* rights to establish ten years residence in the State.

33. The respondent has approached the meaning of art. 28(3) in a manner which does not comply with the guidance given in the *Ziolkowski* case if, as the respondent insists, it applies by analogy. As I understand it, the proper question to ask when examining a period of residence under art. 16 and, according to the respondent, by analogy when asking the same question in relation to art. 28, is to inquire what the migrant was doing during the relevant period rather than asking whether the State had granted permission for the migrant to be present in the State. As will be seen below, my view is that the respondent not only asked the wrong question (when did the applicant first have formal permission to be in the State?) it then gave the wrong answer to the incorrectly posed question.

**The decision in M.G. (case C-400\12):**

34. This case involves art. 28(3) of the directive. Ms. G, a Portuguese national entered the United Kingdom with her husband, also a Portuguese national in April 1998. She was employed from May 1998 to March 1999 when she gave up work to have her first child, born in June 1999. She also had a child in 2001 and 2004. She was supported financially by her husband until they separated in 2006. Ms. G. was sentenced to twenty-one months in prison in connection with injuries sustained by one of her children. Mr. G. was awarded custody of the children and whilst Ms. G. was in prison she applied for a certificate of permanent residence which was refused and it was ordered that she be deported on grounds of public policy and public security, pursuant to regulation 21 of the Immigration Regulations in the U.K.. The First Tier Tribunal (Immigration and Asylum Chamber), on her appeal from a decision of the Secretary of State, allowed the appeal on the basis that Ms. G. had resided in the U.K. for a period of over ten years prior to the deportation order and that the Secretary of State had failed to demonstrate the existence of imperative grounds of public security. The Secretary of State appealed and the parties thereto took different positions as regards the method of calculating the ten year period referred to in art. 28(3)(a) of the directive. The Upper Tribunal referred the following questions to the Court of Justice; asking whether a period in prison breaks the residence period to be calculated in art. 28(3)(a) and, whether the ten year period had to be continuous and, whether the ten year period was to be calculated by counting backwards from the date of the expulsion order.

35. The court said:-

> "23….. it should first be noted that the Court has found that, while recitals 23 and 24 in the preamble to Directive 2004/38 certainly refer to special protection for persons who are genuinely integrated into the host Member State, especially if they were born there and have spent all their life there, the fact remains that, in view of the wording of Article 28(3) of that directive, the decisive criterion is whether the Union citizen lived in that Member State for the 10 years preceding the expulsion decision (see Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 31).
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> 24. It follows that, unlike the requisite period for acquiring a right of permanent residence, which begins when the person concerned commences lawful residence in the host Member State, the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion.
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> 25. Secondly, the Court has also found that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in order to determine whether a Union citizen resided in the host Member State for the 10 years preceding the expulsion decision – the decisive criterion for granting enhanced protection under that provision – all relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, which may establish whether those absences involve the transfer to another Member State of the centre of the personal, family or occupational interests of the person concerned (*Tsakouridis,* paragraph 38).

36. The court concluded that the ten year period of residence referred to in art. 28(3)(a) of the directive must be continuous and it must be calculated by counting back from the date of the decision ordering the expulsion. In answering the question as to whether a period of imprisonment is capable of interrupting the continuity of the period of residence for the purposes of art. 28(3)(a) the court said:-

> "30. In that regard, the Court has already found that the system of protection against expulsion measures established by Directive 2004/38 is based on the degree of integration of the persons concerned in the host Member State and that, accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be, in view of the fact that such expulsion can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the FEU Treaty, have become genuinely integrated into the host Member State…
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> 31. The Court has also found, when interpreting Article 16(2) of Directive 2004/38, that the fact that a national court has imposed a custodial sentence is an indication that the person concerned has not respected the values of the society of the host Member State, as reflected in its criminal law, and that, in consequence, the taking into consideration of periods of imprisonment for the purposes of the acquisition, by members of the family of a Union citizen who are not nationals of a Member State, of the right of permanent residence as referred to in Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence…
>
> 32. Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.
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> 35. As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises…
>
> 37. Lastly, as regards the implications of the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment, it should be borne in mind that, even though – as has been stated in paragraphs 24 and 25 above – the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion, the fact that the calculation carried out under that provision is different from the calculation for the purposes of the grant of a right of permanent residence means that the fact that the person concerned resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment referred to in paragraph 36 above."

37. This last paragraph suggests that there is a difference in approach to calculating the period of residence referred to in art. 16 and the period of residence referred to in art. 28(3)(a).

38. In *Tsakouridis,* at para. 33, the court said:-

> "33. The national authorities responsible for applying Article 28(3) of Directive 2004/38 are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the

host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

38. In the light of the foregoing…Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in order to determine whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, which is the decisive criterion for granting enhanced protection under that provision, all the relevant factors must be taken into account in each individual case…."

39. The court said:-

"30. Starting from the premise that, like the right of permanent residence, enhanced protection is acquired after a certain length of residence in the host Member State and can subsequently be lost, the referring court considers that it may be possible to apply by analogy the criteria in Article 16(4) of Directive 2004/38."

40. In my view, the respondent has made an important submission in relation to the difference between the concepts of residence in art. 16(1) and in art. 28(3). Article 16(1) of the directives provide that once a person obtains a right of permanent residence that right is not subject to the conditions contained in chapter three of the directive. In other words, the rules in art. 7 of the directive do not apply to Union citizens who enjoy permanent residence. Once a Union citizen has obtained the status of permanent residence, the right of residence in the host Member State is no longer conditional upon being a worker, or a self employed person, or having sufficient resources, or being enrolled in a course of study. Inquiring as to whether a person is legally resident within the meaning of art. 6(1) requires the decision maker to check to see whether the migrant has been engaged in work or self employment or a course of study. In my view, this question may not be asked by a decision maker who inquires as to whether a person has resided in a host state for ten years for the purposes of art. 28(3)(a). The question is inappropriate because once permanent residency status has been obtained, following completion of a five year period carrying out art. 7 activities, no further compliance with art. 7 is required. Therefore, when inquiring whether a person has resided for a period of ten years within the meaning of art. 28(3)(a) the inquiry is completely different to that which is conducted when asking whether a person was legally resident for the purposes of art. 16.2. It is not the same inquiry.

**Conclusions:**

41. In my view the respondent has erred in the manner in which it addressed the question as to whether the applicant had resided in the State for ten years within the meaning of art. 28(3)(a) of the Citizenship Directive. In accordance with the decision of the E.C.J. in *Tsakouridis* (C-145\09) "the decisive criterion is whether the Union citizen has lived in that Member State for 10 years preceding the expulsion decision." In accordance with this approach, the decision maker was required to begin the inquiry by asking the simple question: "has the applicant lived in Ireland for ten years prior to the 5th July, 2013?" Having regard to the decision of the E.C.J. in *M.G.*, and the requirements that imprisonment be discounted, this approach was required to be adjusted by asking: "has the applicant lived in Ireland for ten years prior to the 16th November, 2011, (being the date on which his prison sentenced commenced)."

42. I observe that the respondent, in response to the claim that the applicant had a ten year period of residence, sought to calculate that period by reference to the date on which the respondent granted the applicant leave to remain in the State because he was the father of an Irish citizen child. In my view, this approach indicates that the respondent and her officials asked the wrong question. Instead of asking: "has the applicant lived in Ireland for ten years prior to the date of his imprisonment?" The respondent asked: "when did the applicant first obtain the legal right to remain in Ireland?"

43. It is clear from the decision in M.G. that the concept of residence in art. 16 of the Citizenship Directive is referable to European law criteria only. It does not refer to residence granted to an individual based on domestic law criteria. If this approach applies by analogy to the quality of residence referred to in art. 28 then the decision of the Minister is further flawed. The reason I say this is because the sole basis upon which the applicant was given leave to remain was an Irish law rule or practice, whereby, the Minister decided to grant leave to remain to the applicant because he was the father of an Irish citizen child.

44. I also find that the respondent erred in deciding that the applicant's period of residence commenced on the date on which the respondent granted the applicant leave to remain, that being the 24th April, 2002. Not only did the respondent ask the wrong question, the wrong answer was given to that question.

45. The applicant applied for asylum in March, 2001. In accordance with s. 9 of the Refugee Act 1996 an applicant for asylum shall be entitled to remain in the State until the date on which his other application is withdrawn or deemed to be withdrawn. Thus, the applicant was entitled to be in the State from the 26th March, 2001, until the date the application was withdrawn. His child was born in April 2001. The withdrawal by the applicant of his asylum claim was achieved by completing a form addressed to and prepared by the Office of the Refugee Applications Commissioner and co–signed by an official from the Commissioner's office in June 2001. That form indicated that the withdrawal of the refugee claim was connected with his intended application for residency based on the parentage of an Irish citizen child. The form in question is one drawn up by the Refugee Applications Commissioner. The Commissioner then communicated the applicant's application for leave to remain in the State to the Immigration and Naturalisation Service of the Department of Justice. It is significant that the Commissioner, who has no role in immigration decisions, took it upon himself to communicate the applicant's application for leave to remain based upon the parentage of an Irish citizen child to the respondent Minister.

46. At no stage did the Commissioner inform the applicant that his entitlement to remain in the State fell with the withdrawal of his application for refugee status. At no stage was he asked to leave the State until the determination of his application for leave to remain. In my view, though the applicant's statutory entitlement to remain in the State fell with the withdrawal of his application that does not mean that the applicant did not have permission to be in the State. At the very least, the involvement of the Commissioner in the process by which the applicant sought leave to remain in the State meant that there existed an implied permission to be in the State pending the outcome of the application for leave to remain based upon parentage of an Irish citizen child. If this is incorrect, then I suggest that the State is estopped from relying on the lapse of the applicant's permission to be in the State which came about when he withdrew his asylum claim. It would be grossly unfair to a person in the position of the applicant that withdrawal of his asylum claim would cause him to become an illegal alien unless the form produced by the Commissioner, whereby he simultaneously withdrew his claim for asylum and presented a claim for leave to remain, expressly warned him of the legal consequences which would follow if he signed the form. The form or scheme could easily accommodate application for leave to remain based on parentage of an Irish citizen child, while postponing further consideration of the asylum claim until the result of the application is known. Such a simple arrangement would ensure that an asylum applicant's right to be in the State would be protected during the residency application process.

47. The case law makes plain that in calculating whether a person has resided in a host state the decision maker must have regard to all the circumstances of the person concerned. Proper weight should have been given to the unusual circumstances of the applicant in the period following the withdrawal of the asylum claim and the ultimate grant of leave to remain.

48. For the sake of completeness, I should add that it is not enough for an applicant to establish physical continuous presence in the State for ten years. It is appropriate for the decision maker to ask: "what was the applicant doing?" The purpose of the enhanced protection from expulsion, according to the decisions of the E.C.J. is to protect the integration achieved by a migrant in a host state. The longer the presence, the deeper the integration, the greater the protection from expulsion. This is designed, according to the recitals in the directive to promote free movement of Union citizens within the territory of the Union. In this sense it is appropriate to examine the ten year period of residence as one which is related to the exercise of treaty rights. Thus, it is appropriate for the decision maker to inquire whether the migrant claiming ten years residence was, during the first five year period, exercising E.U. treaty rights and, in particular, whether the applicant was engaged in the activities or covered by the circumstances described in art. 7(1) of the directive. No such question may be asked in relation to the second five year period because a right of permanent residence is achieved after five years and, thereafter, one is not required to be art. 7(1) compliant in order to remain in the host state.

49. For these reasons, I am of the view that the respondent erred in calculating the applicant's period of residence in the State. I will make an order quashing the expulsion order. The court has a discretion as to whether this should be a simple order of *certiorari* or whether it should be an order quashing and remitting. I will hear the parties as to what order is best suited to this case.