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Lingua del documento :

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Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

22 January 2020 (\*)

(Reference for a preliminary ruling — Freedom of movement for persons — Citizenship of the Union — Right to move and reside freely in the territory of the Member States — Directive 2004/38/EC — Article 17(1)(a) — Right of permanent residence — Acquisition before completion of a continuous period of five years of residence — Workers who, at the time they stop working, have reached the age for entitlement to an old age pension)

In Case C-32/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 19 December 2018, received at the Court on 18 January 2019, in the proceedings

**AT**

## **Pensionsversicherungsanstalt**

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Tenth Chamber, E. Regan (Rapporteur), President of the Fifth Chamber, and E. Juhász, Judge,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Pensionsversicherungsanstalt, by J. Milchram, A. Ehm and T. Mödlagl, Rechtsanwälte,
- the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,
- the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, H. Eklinger and J. Lundberg, acting as Agents,
- the European Commission, by B.-R. Killmann, J. Tomkin and E. Montaguti, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 17(1)(a) 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 (EEC) 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in proceedings between AT and the Pensionsversicherungsanstalt (Pensions Office, Austria), concerning the latter's refusal to grant him the compensatory supplement provided for in Austrian legislation to augment his retirement pension.

## **Legal context**

### ***European Union law***

#### ***Regulation (EEC) No 1251/70***

3 Article 2(1) of Regulation No 1251/70 of the Commission 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) stated that:

‘The following shall have the right to remain permanently in the territory of a Member State:

(a) a worker who, at the time of termination of his activity, has reached the age laid down by the law of that Member State for entitlement to an old age pension and who has been employed in that State for at least the last twelve months and has resided there continuously for more than three years;

...’

*Directive 75/34/EEC*

4 Article 2(1) of 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) provided that:

‘Each Member State shall recognize the right to remain permanently in its territory of:

(a) any person who, at the time of termination of his activity, has reached the age laid down by the law of that State for entitlement to an old age pension and who has pursued his activity in that State for at least the previous twelve months and has resided there continuously for more than three years.

Where the law of that Member State does not grant the right to an old age pension to certain categories of self-employed workers, the age requirement shall be considered as satisfied when the beneficiary reaches 65 years of age;

...’

*Directive 2004/38*

5 Recitals 10 and 17 to 19 to Directive 2004/38 state:

‘(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore 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.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by [Regulation No 1251/70] and [Directive 75/34].’

6 Chapter III of Directive 2004/38, entitled ‘Right of residence’, comprises Articles 6 to 15 thereof.

7 Article 6(1) of the directive, entitled ‘Right of residence for up to three months’, provides:

‘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 or any formalities other than the requirement to hold a valid identity card or passport.’

8 Article 7(1) of Directive 2004/38, entitled ‘Right of residence for more than three months’, states:

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

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
  - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).’

9 Article 14 of Directive 2004/38, entitled ‘Retention of the right of residence’, states:

‘1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.’

10 Chapter IV of Directive 2004/38, entitled ‘Right of permanent residence’, comprises, inter alia, Section I, entitled ‘Eligibility’, which includes Articles 16 and 17 thereof.

11 Article 16(1) of the directive, entitled ‘General rule for Union citizens and their family members’, states:

‘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.’

12 Article 17(1) of the directive, entitled ‘Exemptions for persons no longer working in the host Member State and their family members’, provides:

‘By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

...’

#### *Austrian law*

13 Paragraph 53a(1) and (3) of the Niederlassungs- und Aufenthaltsgesetz (Law on establishment and residence, BGBl. I, 100/2005), in its version applicable to the case in the main proceedings, provides:

‘(1) Nationals of the [European Economic Area (EEA)] who are entitled to the right of residence under EU law (Paragraphs 51 and 52) shall acquire the right of residence after residing legally for a continuous period of five years in federal territory, irrespective of whether the conditions laid down in Paragraphs 51 and 52 continue to be fulfilled. A document certifying their permanent residence shall be issued without delay upon application, after verification of the duration of residence.

...

(3) By way of derogation from subparagraph 1, EEA nationals shall, pursuant to Paragraph 51(1) (1), acquire the right of permanent residence before completion of the five-year period if:

1. at the time they stop working, they have reached the statutory retirement age or are workers who stop working to take early retirement, provided that they have been working in federal territory for at least the preceding twelve months and have resided in federal territory continuously for more than three years;

2. they have resided continuously in federal territory for more than two years, and cease to pursue their activity there as a result of permanent incapacity to work whereby the conditions as to length of residence shall not apply if such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a pension payable in full or in part by an Austrian pension insurance institution, or

3. they were continuously employed and resident in federal territory for three years and then work in another Member State of the European Union and retain their place of residence in federal territory, to which they return, as a rule, at least once a week;

For the purposes of entitlement to the right referred to in points 1 and 2, periods of employment spent in another Member State of the European Union shall be regarded as having been spent in federal territory. ...'

14 Paragraph 292(1) of the Allgemeines Sozialversicherungsgesetz (General Code of Social Insurance) states:

'If a pension plus any other net income accruing to a pensioner, together with amounts to be taken into account pursuant to Paragraph 294, fall short of the appropriate standard rate (Paragraph 293), the pensioner shall be entitled to a compensatory supplement to that pension in accordance with the provisions of this subsection, provided that he or she is legally and habitually resident in Austria.'

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

15 The applicant in the main proceedings, a Romanian national born on 28 January 1950, has resided continuously in Austria since 21 August 2013 and reached the statutory retirement age on 28 January 2015.

16 From 1 October 2013 until his effective retirement on 31 August 2015, the applicant in the main proceedings worked in a tobacco shop for 12 hours per week. From 1 April 2016 until 1 February 2017, the day he permanently withdrew from working life, he worked in the tobacco shop again for less than the 20 hours of weekly work stipulated in his employment contract, with a view to obtaining a registration certificate as an employee, pursuant to Paragraph 51(1)(1) of the Law on establishment and residence, which was issued by the Austrian authorities on 10 August 2016.

17 The applicant in the main proceedings receives an Austrian retirement pension of EUR 26.73 per month, on top of his Romanian pension of EUR 204 per month.

18 On 14 February 2017, the applicant in the main proceedings sought a compensatory supplement, with effect from 1 March 2017, under Paragraph 292 of the General Code of Social Insurance to augment his retirement pension. In support of his application, he relied on the fact that, under Austrian law, he had a right of permanent residence pursuant to Article 17(1)(a) of Directive 2004/38.

19 The Pensions Office dismissed the application, and based its decision on the unlawful presence in Austria of the applicant in the main proceedings.

20 The Landesgericht Graz (Regional Court, Graz, Austria) dismissed the action of the applicant in the main proceedings against the decision of the Pensions Office. According to that court, the conditions laid down in Article 17(1)(a) of Directive 2004/38, namely that the person must have been working in the host Member State for at least the preceding 12 months and must have resided in that Member State continuously for 3 years, also had to apply to persons who stopped working because they have reached the statutory retirement age. The applicant, it found, did not satisfy these conditions.

21 The Oberlandesgericht Graz (Higher Regional Court, Graz, Austria) dismissed the appeal brought by the applicant in the main proceedings against the decision of the Landesgericht Graz (Regional Court, Graz) and confirmed the latter's interpretation of Article 17(1)(a) of the directive.

22 The Oberster Gerichtshof (Supreme Court, Austria), before which the applicant in the main proceedings brought an appeal on a point of law, states that it is not disputed that, as an economically inactive Union citizen at least since the end of the second employment relationship, the applicant in the main proceedings does not have sufficient resources within the meaning of Article 7(1)(a) and (b) of the directive. The Oberster Gerichtshof (Supreme Court, Austria) adds that at the relevant date under Austrian law, namely on 1 March 2017, the applicant in the main proceedings had not yet resided in Austria for a continuous period of 5 years.

23 Accordingly, in order to decide the dispute before it, the referring court asks whether the temporal conditions laid down in the last clause of Article 17(1)(a) of Directive 2004/38 also apply to workers or self-employed persons who, at the time they stop working, have already reached the statutory retirement age of the host Member State.

24 In that regard, the referring court specifies that the question as to when the applicant in the main proceedings is to be regarded as having stopped working has no bearing on the outcome of the dispute in the main proceedings since, regardless of when this occurs, the cumulative conditions set out in Article 17(1)(a) of the directive would not be satisfied. First, while the applicant on 31 August 2015, when he first stopped working in Austria after reaching the statutory retirement age, had been working for the preceding 12 months, he had not yet been residing in that Member State continuously for 3 years. Secondly, when he stopped working for the second time on 1 February 2017, he had been residing in that Member State for more than 3 years but that second period of activity had lasted only 10 months before he permanently withdrew from working life.

25 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 17(1)(a) of Directive [2004/38] to be interpreted as meaning that workers who, at the time when they stop working, have reached the age laid down by the law of the State of employment for entitlement to an old age pension must have been working in the State of employment for at least the preceding twelve months and must have resided in the State of employment continuously for at least three years in order to acquire the right of permanent residence before completion of a five-year residence period?

2. If Question 1 is answered in the negative: Do workers have the right of permanent residence pursuant to the first alternative in Article 17(1)(a) of [Directive 2004/38] if they take up employment in another Member State at a point in time at which it is foreseeable that they will be able to engage in their employment for only a relatively short period of time before they reach the statutory retirement age and, because of low income, will in any event be dependent on the host Member State's social assistance after they stop working?’

## **Consideration of the questions referred**

### ***The first question***

26 By its first question the referring court asks, in essence, whether Article 17(1)(a) of Directive 2004/38 must be interpreted as meaning that, for the purpose of acquiring the right of permanent residence in the host Member State before completion of a continuous period of 5 years of

residence, the conditions that the person must have been working in that Member State for at least the preceding 12 months and must have resided in that Member State continuously for more than 3 years apply to workers who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension.

27 First, as to the wording of that provision, it should be noted that the provision, for the purpose of recognising a right of permanent residence in the host Member State, refers to two situations with regard to when a worker or a self-employed person stops working, namely, on the one hand, where that person has reached the age laid down by the relevant national legislation for entitlement to an old age pension and, on the other hand, where that person stops working to take early retirement.

28 While the referring court, with a view to applying Article 17(1)(a) of Directive 2004/38, wonders whether a distinction is to be made between those two cases, nothing in the terms of that provision indicates that it would be appropriate to restrict the applicability of the conditions concerning the period of activity and the period of residence to cases where the person stops working to take early retirement.

29 It follows from the structure of the provision that the conditions listed in the last clause thereof – starting with the conjunction ‘provided that’ – apply to both cases governed by that provision. Those conditions must therefore be satisfied by workers who, at the time they stop working, have reached the age laid down by the law of the host Member State for entitlement to an old age pension.

30 Secondly, that interpretation is borne out by the general scheme of Directive 2004/38. In that regard, it is appropriate to note, in the first place, that recital 19 thereof provides that certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided 5 years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Regulation No 1251/70 and Directive 75/34.

31 Article 2(1)(a) of Regulation No 1251/70 provided that a worker who, at the time of termination of his activity, had reached the age laid down by the law of that Member State for entitlement to an old age pension and who had been employed in that State for at least the preceding 12 months and had resided there continuously for more than 3 years, had the right to remain permanently in the territory of a Member State. A similar provision was made in Article 2(1)(a) of Directive 75/34 for self-employed workers.

32 Consequently, while under Article 17(1)(a) of Directive 2004/38 the EU legislature extended the scope of the derogation provided for in that provision to workers who cease paid employment to take early retirement, it cannot be inferred that it was necessarily intended to exempt the other workers from the conditions, set out in that provision, that already applied to them under Regulation No 1251/70 or Directive 75/34.

33 In the second place, it should be recalled that Directive 2004/38 introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of EU law and case-law preceding that directive and culminates in the right of permanent residence (judgment of 17 April 2018, *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256, paragraph 51 and the case-law cited).

34 First, for periods of residence of up to three months, Article 6 of the directive limits the conditions and formalities of the right of residence to the requirement to hold a valid identity card



or passport and, under Article 14(1) thereof, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment of 17 April 2018, *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256, paragraph 52 and the case-law cited).

35 Next, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2) thereof, that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, *inter alia*, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment of 17 April 2018, *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256, paragraph 53 and the case-law cited).

36 Lastly, it follows 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 5 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 (judgment of 17 April 2018, *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256, paragraph 54 and the case-law cited).

37 In that regard, it must be observed that while, as noted in paragraph 31 above, the right of permanent residence of persons who stopped working in the host Member State was, prior to Directive 2004/38, covered by specific provisions of EU law, that right is now governed by Article 17(1) of the directive – that provision, as stated therein, constituting a derogation from Article 16 thereof.

38 Accordingly, the provisions concerning the acquisition, in the host Member State, of a right of permanent residence for workers who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension – such as those provided for in Article 17(1)(a) of Directive 2004/38 – form part of the gradual system established by the directive and constitute therein a regime that is more favourable to that category of EU citizens, in that the acquisition of a right of permanent residence in that Member State is provided for before completion of a continuous period of 5 years of residence. Furthermore, as provisions which constitute a derogation, they are to be interpreted strictly (see, by analogy, judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 42).

39 It follows that, for the purpose of acquiring a right of permanent residence in the host Member State, those workers must satisfy the conditions set out in Article 17(1)(a) of Directive 2004/38 that they must have been working in the host Member State for at least the preceding 12 months and must have resided in that Member State continuously for more than 3 years. If that provision were to be interpreted in such a way that the mere fact that a worker, at the time he or she stops working, has reached the age laid down by the law of the host Member State for entitlement to an old age pension is sufficient to be entitled to a right of permanent residence in that Member State, regardless of any period of residence in that Member State before that person stops working, the gradual system provided for by that directive would be misconstrued.

40 Thirdly, an interpretation that would not require workers who, at the time they stop working, have reached the age laid down by the law of the Member State for entitlement to an old age pension to satisfy the conditions set out in Article 17(1)(a) of Directive 2004/38 for the purpose of

acquiring a right of permanent residence in the host Member State before completion of a continuous period of 5 years of residence would run counter to the objectives of the directive.

41 In that regard, as recital 17 in the preamble to Directive 2004/38 states, the right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship. The EU legislature accordingly made the acquisition of the right of permanent residence pursuant to Article 16(1) thereof subject to the integration of the citizen of the Union in the host Member State (judgment of 17 April 2018, *B and Vomero*, C-316/16, EU:C:2018:256, paragraph 57 and the case-law cited).

42 As the Court has already held, integration, which is a precondition of the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38, is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State (judgment of 17 April 2018, *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256, paragraph 58 and the case-law cited).

43 Consequently, in the light of the objective pursued by Directive 2004/38, a right of permanent residence under Article 17(1)(a) of the directive can be available to workers who, at the time they stop working, have reached the age laid down by the law of the Member State for entitlement to an old age pension only if their integration in the host Member State can be demonstrated through the conditions set out in that provision (see, by analogy, judgment of 9 January 2003, *Givane and Others*, C-257/00, EU:C:2003:8, paragraph 29).

44 In the light of the foregoing, the answer to the first question is that Article 17(1)(a) of Directive 2004/38 must be interpreted as meaning that, for the purpose of acquiring the right of permanent residence in the host Member State before completion of a continuous period of 5 years of residence, the conditions that the person must have been working in that Member State for the preceding 12 months and must have resided in that Member State continuously for more than 3 years apply to workers who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension.

### ***The second question***

45 Given the answer to the first question, there is no need to answer the second question.

### **Costs**

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

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

**Article 17(1)(a) 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 (EEC) 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 must be interpreted as meaning that, for the purpose of acquiring the right of permanent residence in the host Member State before completion of a continuous period of 5 years of residence, the conditions that a person must have been working in that Member State at least for the preceding**

**12 months and must have resided in that Member State continuously for more than 3 years apply to workers who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension.**

[Signatures]

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\* Language of the case: German.

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