Trinity Term
[2019] UKSC 35
On appeal from: [2012] EWCA Civ 1199

JUDGMENT

Secretary of State for the Home Department (Appellant) *v* Franco Vomero (Italy) (Respondent)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Wilson
Lord Mance
Lord Hughes

JUDGMENT GIVEN ON

24 July 2019

Heard on 7 February 2019

Appellant	*Respondent*
Robert Palmer QC	Raza Husain QC Professor Takis Tridimas Nick Armstrong
(Instructed by The Government Legal Department)	(Instructed by Luqmani Thompson & Partners)

LORD REED: (with whom Lady Hale, Lord Wilson, Lord Mance and Lord Hughes agree)

1. On 27 July 2016, following a hearing of this appeal, this court referred a number of questions of EU law to the Court of Justice for a preliminary ruling: *Secretary of State for the Home Department v Vomero* [2016] UKSC 49; [2017] 1 All ER 999. On 17 April 2018 the Court of Justice delivered its judgment: *FV (Italy) v Secretary of State for the Home Department* (Joined Cases C-424/16 and C-316/16) [2019] QB 126. In the light of that judgment, and the opinion of Advocate General Szpunar, this court held a further hearing of the appeal on 7 February 2019. It is now in a position to give its decision on the appeal.

The facts

2. The respondent, Franco Vomero, is an Italian national born on 18 December 1957. On 3 March 1985 he moved to the United Kingdom with his future wife, a UK national. They were married in the UK on 3 August 1985 and had five children here, for whom Mr Vomero cared, in addition to working occasionally, while his wife worked full-time.

3. Between 1987 and 2001 Mr Vomero received several convictions in the UK, two of which (in 1991 and 1992) resulted in short terms of imprisonment. In 1998 the marriage broke down. Mr Vomero left the family home and moved into accommodation with Mr Edward Mitchell.

4. On 1 March 2001, Mr Vomero killed Mr Mitchell. Both men had been drinking, a fight ensued and Mr Vomero struck Mr Mitchell at least 20 times on the head with weapons including a hammer, and then strangled him with electrical flex from an iron. Mr Vomero was arrested on 2 March 2001 and remanded in custody until his trial. The jury reduced the charge of murder to manslaughter by reason of provocation. Mr Vomero was on 2 May 2002 sentenced to eight years' imprisonment. He was released on licence on 3 July 2006 but re-arrested a short time later as no hostel accommodation was available for him. He was subsequently detained under immigration powers.

5. By decision made on 23 March 2007 and maintained on 17 May 2007, the appellant, the Secretary of State, determined to deport Mr Vomero under regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Regulation 19(3)(b) permits the Secretary of State to deport a

national of the European Economic Area ("EEA"), or a family member of an EEA national, where the person's removal is justified on the grounds of public policy, public security or public health. Any such deportation must be in accordance with regulation 21. The latter regulation gives effect to articles 27 and 28 of Council Directive 2004/38/EC of 29 April 2004 (OJ 2004 L158, p 77) ("the Directive"), which are set out below.

6. Mr Vomero challenged that decision before the Asylum and Immigration Tribunal. The decision of that tribunal was appealed to the Court of Appeal, whose decision ([2012] EWCA Civ 1199; [2013] 1 WLR 3339) has given rise to the present appeal. The proceedings were twice adjourned pending the determination of other cases, including latterly the references in *Onuekwere v Secretary of State for the Home Department* (Case C-378/12) [2014] 1 WLR 2420 and *Secretary of State for the Home Department v MG (Portugal)* (Case C-400/12) [2014] 1 WLR 2441.

7. Mr Vomero was detained with a view to deportation until December 2007. He subsequently committed and was convicted of further offences, two of which resulted in custodial sentences. In January 2012 he was convicted of having a bladed article, battery and committing an offence while subject to a suspended sentence. He was sentenced to 16 weeks' imprisonment. In July 2012 he was convicted of burglary and theft and was sentenced to a further 12 weeks' imprisonment.

8. In summary, therefore:

(1) From 1985 to 2001 Mr Vomero lived in the UK, with convictions from time to time which resulted in short periods of imprisonment during 1991 and 1992.

(2) From March 2001 to July 2006 he was in prison for manslaughter.

(3) The decision to deport him was made in March 2007, less than nine months after his release from prison, by which time he had entered immigration detention.

(4) Subsequently he was convicted again and served further short sentences during 2012.

The court has no information before it as to Mr Vomero's circumstances since 2012.

The Directive

9. In Chapter III of the Directive, entitled "Right of residence", articles 6 and 7 specify the conditions under which Union citizens and their family members have rights of residence in a member state other than that of which they are nationals. Under article 6, entitled "Right of residence for up to three months", Union citizens have the right of residence on the territory of another member state for a period of up to three months without any conditions or formalities other than the requirement to hold a valid identity card or passport. Under article 7, entitled "Right of residence for more than three months", Union citizens have the right of residence on the territory of another member state for a period of longer than three months if they meet one of the conditions set out in para 1, including if they "(a) are workers or self-employed persons in the host member state".

10. In Chapter IV, entitled "Right of permanent residence", article 16 states:

> "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 also apply 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.
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> 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.
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> 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."

"Legal" residence is residence which satisfies the conditions laid down in the Directive, in particular those set out in article 7(1): *Ziolkowski v Land Berlin* (Joined Cases C-424/10 and C-425/10) [2014] All ER (EC) 314; [2011] ECR I-14035, para

46. In its application to periods of residence preceding the date for transposition of the Directive, the expression is construed as meaning residence in accordance with the earlier EU law instruments: *Secretary of State for Work and Pensions v Lassal (Child Poverty Action Group intervening)* (Case C-162/09) [2011] All ER (EC) 1169; [2010] ECR I-9217, para 40.

11. Chapter VI of the Directive, entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health" contains articles 27 to 33. Article 27, entitled "General principles", states in paras 1 and 2:

> "1. Subject to the provisions of this Chapter, member states may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
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> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

12. Article 28, entitled "Protection against expulsion", provides:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin.

> 2. The host member state may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by member states, if they:
>
> > (a) have resided in the host member state for the previous ten years; or
> >
> > (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

13. Under article 40, member states were required to transpose the Directive by 30 April 2006: that is to say, during the period when Mr Vomero was serving his sentence of imprisonment for manslaughter.

14. The Directive did not contain any transitional provisions explaining whether the right of permanent residence could be acquired immediately on 30 April 2006 on the basis of earlier periods of legal residence, or, if so, which earlier periods would qualify, in particular if they had been interrupted or had ceased at some point prior to that date. Nor did the Directive contain any provisions explaining whether periods of imprisonment might be treated as legal residence, or whether imprisonment interrupted the continuity of residence. Those and other lacunae have been filled by numerous judgments of the Court of Justice.

The previous judgment of this court

15. At the previous hearing of the appeal, the Secretary of State's case, put shortly, was that since Mr Vomero was in prison between 2001 and 2006, he had not acquired a right of permanent residence under article 16 by the time the deportation order was made in March 2007. It followed that, although he enjoyed the protection of articles 27(2) and 28(1) of the Directive, he did not benefit from the protection against expulsion conferred by article 28(2). In the Secretary of State's submission it also followed, contrary to the conclusion of the Court of Appeal, that Mr Vomero was not entitled to "enhanced protection" against expulsion

under article 28(3)(a). As presented to this court, the Secretary of State's case did not involve investigating events prior to 2001, but rested on the undisputed fact of Mr Vomero's imprisonment from 2001 to 2006.

16. Lord Mance, with whose judgment the other members of the court agreed, observed at para 8 of his judgment that no right of permanent residence under the Directive could in law be acquired before 30 April 2006, when the period for transposing the Directive expired. To acquire such a right, Mr Vomero therefore required, as at 30 April 2006 or at some later date, to "have resided legally for a continuous period of five years" in the UK, as stipulated by article 16(1) of the Directive: *Lassal*, para 38. As at the date when the deportation decision was taken, Mr Vomero had completed the custodial part of his sentence less than nine months earlier, and had entered immigration detention. Lord Mance also noted at para 9 that in *Onuekwere* the Court of Justice held that, under the terms of article 16(2) of the Directive, "periods of imprisonment cannot be taken into consideration for the purposes of the acquisition of a right of permanent residence for the purposes of that provision" (para 22), and that articles 16(2) and (3) "must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host member state" (para 32). Lord Mance observed that the same must necessarily apply in respect of a Union citizen under article 16(1).

17. Lord Mance went on to refer in para 10 to the judgment of the Court of Justice in *Secretary of State for Work and Pensions v Dias* (Case C-325/09) [2012] All ER (EC) 199; [2011] ECR I-6387, which concerned a Union citizen who had resided legally in the UK for over five years between January 1998 and April 2003 (not yet acquiring a right of permanent residence, since the period ended before 30 April 2006), and then remained in the UK between April 2003 and April 2004, during which time she did not work or satisfy any other condition entitling her to reside in the UK under EU law. She then worked in the UK between April 2004 and March 2007, at which point she asserted that she had acquired a right of permanent residence. Lord Mance observed:

> "The Court of Justice held that the rule laid down in article 16(4) regarding absences ['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'] must be applied by analogy in relation to the period when she had not been working. Since this was for less than two years, it did not affect her acquisition of a permanent right of residence as from 30 April 2006. The Supreme Court considers it clear … that the Court of Justice was here identifying a bright line rule relating to the acquisition of a permanent right of residence."

18. Lord Mance went on to observe at para 11 that, where a person had acquired a right of permanent residence, "[b]y analogy with absence, it might … seem logical if a period exceeding two years spent in prison were to lead to the loss of any right of permanent residence acquired on or after 30 April 2006". Lord Mance added however that the parties were not agreed on this, and that it was unnecessary to consider the point further on the present appeal.

19. Lord Mance concluded at para 12:

> "It follows from paras 8 and 9 above that, as the Secretary of State rightly submits, the respondent had not acquired any right of permanent residence before the date of the decision to deport him. The respondent's case on this basis has to be that this is irrelevant, and that a Union citizen with no right of permanent residence may nevertheless acquire a right to enhanced protection under article 28(3)(a)."

20. In that regard, counsel for Mr Vomero submitted at the previous hearing that the requirement in article 28(3)(a) that the Union citizen "have resided in the host member state for the previous ten years" involved an overall assessment of the degree of integration at the date of the decision to deport, that there must "in principle" have been ten continuous years of residence, but that a period of imprisonment immediately preceding the decision to deport would not necessarily mean that prior integration was lost to a degree depriving the Union citizen of enhanced protection under article 28(3)(a). That submission had been accepted by the Court of Appeal, which noted that Mr Vomero had resided in the UK for more than ten years prior to his imprisonment in 2001, and considered that his integrative link with the UK remained intact in March 2007, when the deportation decision was taken.

21. Against that background, this court referred the following questions to the Court of Justice:

> "(1) Whether enhanced protection under article 28(3)(a) depends upon the possession of a right of permanent residence within article 16 and article 28(2).
>
> If the answer to question (1) is in the negative, the following questions are also referred:

(2) Whether the period of residence for the previous ten years, to which article 28(3)(a) refers, is

(a) a simple calendar period looking back from the relevant date (here that of the decision to deport), including in it any periods of absence or imprisonment,

(b) a potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible, at a total of ten years' previous residence.

(3) What the true relationship is between the ten year residence test to which article 28(3)(a) refers and the overall assessment of an integrative link."

The judgment of the Court of Justice

(1) The court's preliminary observations

22. Before answering the first question referred by this court, the Court of Justice made the following preliminary observations:

"40. By its first question, the Supreme Court of the United Kingdom asks, in essence, whether article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence, within the meaning of article 16 and article 28(2) of that Directive.

41. As a preliminary point, it should be noted that that question is based on the premise that Mr Vomero does not have such a right of permanent residence in the United Kingdom.

42. Since the court does not have all the information necessary in order to assess the merits of that premise, it must

be assumed, for the purposes of the question, that it is well founded."

23. It is also relevant to note the preliminary observations made by Advocate General Szpunar in his opinion:

"32. … [T]he national court has stated that Mr Vomero has not acquired any right of permanent residence, which is a matter for that court to determine before taking a final decision with due regard to EU law as interpreted by the court. According to the national court, that finding is based on the fact that Mr Vomero was in prison between 2001 and 2006, as well as the approach taken by the court in its case law, particularly in *Secretary of State for Work and Pensions v Dias* (Case C-325/09) [2011] ECR I-6387; [2012] All ER (EC) 199, para 57 and *Onuekwere's* case [2014] 1 WLR 2420, para 26.

33. However, it must be noted that, in the case of citizens of third states who fulfil the condition of minimum presence on the employment market of a member state, namely citizens whose rights are based on Association Council Decision No 1/80 of 19 September 1980 on the Development of the Association between the European Economic Community and Turkey, the court has held that their right of residence, as the corollary of the right to have access to the employment market, is not affected by imprisonment: see *Cetinkaya v Land Baden-Wùrttemberg* (Case C-467/02) [2004] ECR I-10895, paras 38 and 39 and *Aydinli v Land Baden-Wùrttemberg* (Case C-373/03) [2005] ECR I-6181, para 32. (In the context of pre-trial detention followed by a criminal sentence of suspended imprisonment, also see *Nazli v Stadt Nùrnberg* (Case C-340/97) [2000] ECR I-957, paras 40 and 41.) In taking that approach, the court referred to the wording of the provisions of that Decision, which does not permit any limitation on the right of residence except in the event of absence or on grounds of public policy, public security or public health: *Cetinkaya's* case, para 38 and *Aydinli's* case, para 28. However, in *Dias's* case, para 64, the court held that a similar provision of Directive 2004/38, namely article 16(4), may be applied by analogy to periods prior to those covered by Directive 2004/38 which do not amount to legal residence for the purpose of article 16(1) of that Directive: *Dias's* case, para 65. In *Dias's* case the court sought above all to address a lacuna in Directive 2004/38 and a situation which could arise only prior to that

> Directive: see opinion of Advocate General Trstenjak in *Dias's* case EU:C:2011:86; [2011] ECR I-6387, point 102. The case law cited above concerns the effect of imprisonment on the enjoyment of rights acquired after presence on the employment market for a number of years, while *Onuekwere's* case, relates to the stage at which a right is acquired. Consequently, the main reason stated by the court in *Onuekwere's* case, para 26, according to which the taking into consideration of periods of imprisonment for the purpose of acquiring a right of permanent residence would be contrary to the aim pursued by Directive 2004/38, cannot be applied to the case of forfeiture of that right because, in some cases, it may involve a Union citizen taking advantage not of periods of imprisonment directly, but of earlier periods of residence in the member state."

24. It will be necessary to return to these observations and to consider their significance.

(2) The court's answer to the first question

25. The Court of Justice began its consideration of the first question referred to it by explaining that article 28 provides a graduated scheme of protection against expulsion, under which the degree of protection reflects the degree of integration of the Union citizen concerned in the host member state:

> "44. … Directive 2004/38, as is apparent from recital (24) in the Preamble, establishes a system of protection against expulsion measures which is based on the degree of integration of those persons in the host member state, so that the greater the degree of integration of Union citizens and their family members in the host member state, the greater the guarantees against expulsion they enjoy.
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> 45. In that context, first of all, article 28(1) of Directive 2004/38 provides generally that, before taking an expulsion decision 'on grounds of public policy or public security', the host member state must take account in particular of considerations such as how long the individual concerned has resided on its territory, his or her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his or her links with the country of origin …

> 46. Next, under article 28(2), Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on the territory of the host member state pursuant to article 16 of the Directive cannot be the subject of an expulsion decision 'except on serious grounds of public policy or public security'.
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> 47. Lastly, in the case of Union citizens who have resided in the host member state for the previous ten years, article 28(3)(a) of Directive 2004/38 considerably strengthens their protection against expulsion by providing that such a measure may not be taken except where the decision is based on 'imperative grounds of public security, as defined by member states' …
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> 48. It thus follows from the wording and the structure of article 28 of Directive 2004/38 that the protection against expulsion provided for in that provision gradually increases in proportion to the degree of integration of the Union citizen concerned in the host member state.
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> 49. In those circumstances, and even though it is not specified in the wording of the provisions concerned, the enhanced protection provided for in article 28(3)(a) of Directive 2004/38 is available to a Union citizen only in so far as he first satisfies the eligibility condition for the protection referred to in article 28(2) of that Directive, namely having a right of permanent residence under article 16 of that Directive." (citations omitted)

26. The Court of Justice accordingly concluded at para 61 that the answer to the first question was "that article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence within the meaning of article 16 and article 28(2) of that Directive". It followed that the second and third questions referred by this court did not require to be examined.

(3) B v Land Baden-Wùrttemberg

27. The Court of Justice joined the reference made by this court with another reference made by a German court, in the case of *B v Land Baden-Wùrttemberg* (Case C-316/16), which raised related questions. It is relevant to note some passages in the court's judgment in which it considered the fourth question referred to it by the German court, which it described as being "in essence, at what point in time compliance with the condition of having 'resided in the host member state for the previous ten years', within the meaning of article 28(3)(a) of Directive 2004/38, must be assessed": para 84.

28. The answer to that question was that whether a person satisfied that condition must be assessed at the date on which the expulsion decision is initially adopted. However, the court added the following remarks:

> "89. It must be noted, however, that that conclusion is without prejudice to the separate issue of when it is necessary to assess whether there are actually 'grounds of public policy or public security' within the meaning of article 28(1) of Directive 2004/38, 'serious grounds of public policy or public security' within the meaning of article 28(2) of that Directive, or 'imperative grounds of public security' within the meaning of article 28(3) of that Directive, on the basis of which expulsion may be justified.
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> 90. In that regard, it is indeed for the authority which initially adopts the expulsion decision to make that assessment, at the time it adopts that decision, in accordance with the substantive rules laid down in articles 27 and 28 of Directive 2004/38.
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> 91. However, that does not preclude the possibility that, where the actual enforcement of that decision is deferred for a certain period of time, it may be necessary to carry out a fresh, updated assessment of whether there are still 'grounds of public policy or public security', 'serious grounds of public policy or public security' or 'imperative grounds of public security', as applicable.
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> 92. It must be borne in mind, in particular, that under the second sub-paragraph of article 27(2) of Directive 2004/38, the

> issue of any expulsion measure is, in general, conditional on the requirement that the conduct of the person concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host member state …
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> 94. Furthermore, it follows, more generally, from the case law of the court that the national courts must take into consideration, in reviewing the lawfulness of an expulsion measure taken against a national of another member state, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy or public security. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court …" (citations omitted)

The parties' submissions

29. In the light of the preliminary observations of the Court of Justice and the Advocate General, an issue has arisen between the parties as to whether it is open to Mr Vomero to argue that he had acquired a right of permanent residence in the UK by the date of the decision to deport him. In the submissions advanced on behalf of Mr Vomero, the argument is couched in terms of whether he "retained" a right of permanent residence which was "notionally, though not formally" acquired prior to 30 April 2006. It is argued on his behalf, under reference to cases concerned with actual, not notional, rights of permanent residence, that a period of more than two years' imprisonment need not result in the loss of such a right. A similar argument was presented on behalf of Mr Vomero to the Court of Justice, but was not reflected in the approach which it adopted. As it seems to me, references to a "notional" right of permanent residence are liable to obscure the true question. There is no indication in the judgments of the Court of Justice that EU law recognises a right of permanent residence of a merely "notional" character. On the contrary, the judgments of the Court of Justice in the cases concerning the Directive have drawn a distinction between the acquisition of a right of permanent residence (as in *Lassal*, *Dias* and *Onuekwere*) and the subsequent loss of such a right (as provided for under article 16(4) of the Directive). Before any question can arise as to whether Mr Vomero retained a right of permanent residence, it is necessary first to determine whether he had acquired such a right, not "notionally" but in reality: something which, as the Court of Justice has made clear (for example, in *Dias*, paras 40 and 57), could only occur on or after 30 April 2006.

30. As explained earlier, Lord Mance concluded in his judgment that Mr Vomero had not acquired a right of permanent residence in the UK by the date of the decision to deport him, notwithstanding his many years' residence, because his imprisonment between 2001 and 2006 had the result that he had not, as at 30 April 2006 or some later date, resided legally in the UK for a continuous period of five years prior to the decision to deport him.

31. It is argued on Mr Vomero's behalf that this reasoning cannot be correct, given the Court of Justice's statement in para 42 of its judgment (cited at para 22 above) that it did not have all the information necessary in order to assess the merits of the premise of the first question referred, namely, as the court stated in para 41, "that Mr Vomero does not have such a right of permanent residence in the United Kingdom". Since, it is argued, the court had Lord Mance's judgment before it, it cannot have found in Lord Mance's reasoning a sufficient basis for his conclusion.

32. In response, the Secretary of State submits that the conclusion expressed in para 12 of Lord Mance's judgment is correct. He concedes, however, that when the appeal is remitted to the Upper Tribunal to be reconsidered, it will be open to Mr Vomero to argue, if he can establish it on the evidence, that he has acquired a right of permanent residence since the date of the decision to deport him, and therefore now benefits from the protection given by article 28(2) of the Directive. The parties agree that that is because the tribunal is required under domestic law to consider the position as at the date of the hearing before it, rather than the date of the decision under challenge. This is agreed to follow from section 85(4) of the Nationality, Immigration and Asylum Act 2002, together with Schedule 2, paragraph 1 of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052). Given that that is a matter of agreement, this court need express no view as to whether it is legally correct.

Discussion

33. The preliminary observations made by the Court of Justice do not set out any criticism of the reasoning which led Lord Mance to the conclusion stated in para 12 of his judgment. The court properly confined itself to answering the question referred to it. It is notable that the premise which the court said that it was unable to assess was not the same as Lord Mance's conclusion. That conclusion was that "the respondent had not acquired any right of permanent residence before the date of the decision to deport him": that is to say, that he had not acquired such a right by 23 March 2007. The premise which the court assumed to underlie the reference was different: "that Mr Vomero does not have such a right of permanent residence in the United Kingdom": that is to say, that he does not presently have such a right. This court expressed no view as to whether Mr Vomero presently has such a right. That question was not, and is not, before this court. As explained in para 32 above, the

parties are in agreement that the question whether Mr Vomero has acquired a right of permanent residence since 23 March 2007 remains open for consideration by the tribunal when the case is remitted there. The Court of Justice's observation that it did not have all the information necessary in order to assess whether Mr Vomero (presently) has a right of permanent residence does not, therefore, undermine Lord Mance's conclusion to any extent.

34. The preliminary observations of the Advocate General also began at point 32 (cited at para 23 above) by attributing to this court a statement that "Mr Vomero *has not* acquired any right of permanent residence" (emphasis supplied): a statement which, however, this court did not make. The Advocate General's belief that this court had made such a statement may form the background to part of what he said in point 33.

35. In that paragraph, the Advocate General began by referring to the approach adopted by the Court of Justice in the cases of *Cetinkaya* and *Aydinli*, which were not concerned with the Directive but with the effect of imprisonment on rights of residence acquired under Decision 1/80 of the EEC-Turkey Association Council of 19 September 1980. The Advocate General contrasted that approach with the approach adopted in the case of *Dias*, concerned with the acquisition of the right of permanent residence under the Directive. He explained the latter approach as being designed to address a lacuna in the Directive. In this passage, the Advocate General appears to have intended to clarify the case law of the Court of Justice, or possibly to invite the court to do so. In the event, the Court of Justice did not comment on the matter: its judgment contains no mention of *Cetinkaya* or *Aydinli*, and mentioned *Dias* only to record that this court had referred to it.

36. The Advocate General then went on in point 33 to contrast *Cetinkaya* and *Aydinli*, which as previously mentioned concerned the effect of imprisonment on the enjoyment of rights previously acquired, with the case of *Onuekwere*, which concerned the effect of imprisonment on the acquisition of a right of permanent residence. He expressed the view that the reasoning in *Onuekwere* could not be applied to cases concerned with the forfeiture of that right once acquired. That passage in his opinion is relevant to para 11 of Lord Mance's judgment (cited at para 18 above), where Lord Mance observed, obiter, that it might seem logical if a period of more than two years' imprisonment were to lead to the loss of a right of permanent residence once acquired. It does not, on the other hand, affect the reasoning which led Lord Mance to his conclusion in para 12.

37. The preliminary observations of the Advocate General do not, therefore, place in question Lord Mance's conclusion in para 12 of his judgment that Mr Vomero had not acquired a right of permanent residence in the UK by the date of the decision that he should be deported. That conclusion follows, as Lord Mance

explained, from the principles laid down in the judgments of the Court of Justice in *Dias* and *Onuekwere*.

38. The case of *Dias*, like the present case, concerned a situation where a Union citizen had been legally resident in the UK for a continuous period of more than five years prior to 30 April 2006: as explained earlier, she resided legally in the UK between January 1998 and April 2003. That period of continuous legal residence had, however, been followed by a period between April 2003 and April 2004 when she was not legally resident, since she did not work or satisfy any other condition entitling her to reside in the UK under the Directive, although she remained in possession of a residence permit issued under Council Directive 68/360/EEC. She then worked in the UK between April 2004 and March 2007, at which point she asserted that she had acquired a right of permanent residence.

39. The Court of Justice held, following its judgment in the case of *Lassal*, that continuous periods of five years' legal residence which were completed before 30 April 2006 counted towards the acquisition of the right of permanent residence, but that the right could not be acquired until that date. It then referred to article 16(4) of the Directive, under which the right of permanent residence, once acquired, is lost through absence from the host member state for a period exceeding two consecutive years. Although that provision is concerned with the loss of the right of permanent residence, rather than with its acquisition, and although it is concerned only with absence from the host member state, the Court of Justice held that the rule which it laid down had also to be applied by analogy, in the context of the acquisition of a right of permanent residence, to periods spent in the host member state during which the conditions governing entitlement to a right of residence were not satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date.

40. In that regard, the court stated:

> "60. Next, the court has also held that that provision [article 16(4)] falls to be applied independently of whether the periods of residence in question were completed before or after 30 April 2006, for the reason that, since residence periods of five years completed before that date must be taken into account for the purpose of acquisition of the right of permanent residence provided for in article 16(1) of Directive 2004/38, non-application of article 16(4) thereof to those periods would mean that the member states would be required to grant that right of permanent residence even in cases of prolonged absences which call into question the link between the person concerned and the host member state (see *Lassal's* case (para 56)).

…

> 62. Such reasoning must also be applied by analogy to periods of residence completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to any right of residence having been satisfied, which occurred before 30 April 2006 but after a continuous period of five years' legal residence completed prior to that date.
>
> 63. Even though article 16(4) of Directive 2004/38 refers only to absences from the host member state, the integration link between the person concerned and that member state is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that member state without having a right of residence.
>
> 64. In that regard, it should be noted, as the Advocate General has stated in points 106 and 107 of her opinion, that the integration objective which lies behind 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 time factors but also on qualitative elements, relating to the level of integration in the host member state.
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> 65. As the situations are comparable, it follows that the rule laid down in article 16(4) of Directive 2004/38 must also be applied by analogy to periods in the host member state completed on the basis solely of a residence permit validly issued under Directive 68/360, without the conditions governing entitlement to a right of residence of any kind having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date."

41. The case of *Dias* was concerned with a period, following a continuous period of five years' legal residence completed prior to 30 April 2006, during which the conditions of legal residence were not satisfied because the Union citizen was out of work. The case of *Lassal* was concerned with a period, following a continuous period of five years' legal residence completed prior to 30 April 2006, during which those conditions were not satisfied because the Union citizen was absent from the

host member state. The present case is concerned with a period, following a continuous period of five years' legal residence completed prior to 30 April 2006, during which the Union citizen was in prison.

42. The leading authority on the significance of imprisonment in relation to the acquisition of a right of permanent residence is the case of *Onuekwere*. It concerned a Nigerian national who became the husband of a Union citizen exercising her right of residence in the UK. The question was whether he had acquired a right of permanent residence under article 16(2) of the Directive (see para 10 above). In order to do so, he had to have resided legally with his wife in the UK for a continuous period of five years. He resided with her legally between 2000 and 2004, but was then in prison between September 2004 and November 2005. He was imprisoned again between 2008 and 2009. He then asserted that he had acquired a right of permanent residence. The court held that the periods of imprisonment could not be taken into account for the purpose of calculating the length of the claimant's residence in the UK. It stated at para 26:

> "The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host member state in its criminal law, with the result that *the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a member state of the right of permanent residence for the purposes of article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive* in establishing that right of residence." (Emphasis supplied)

The court went on to state at para 32 that article 16(2) and (3) must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host member state of a third-country national who is a family member of a Union citizen. The practical result was that Mr Onuekwere was unable to aggregate the periods of residence before and after his periods of imprisonment, so as to establish a period of five years' continuous legal residence.

43. *Onuekwere* differs from *Lassal* and *Dias* in that the decision was not based on the application by analogy of the rule in article 16(4) of the Directive, under which a right of permanent residence, once acquired, is lost where there has been a period of absence exceeding two consecutive years. Instead, it was based on the application of article 16(3), which concerns continuity of residence for the purpose of the acquisition of a right of permanent residence, and was interpreted as applying where there has been a period of imprisonment, as well as in the cases expressly set out in that provision. The reasoning in *Onuekwere* nevertheless resembles that in

Lassal and *Dias*, in that it was based (as appears, for example, from paras 24-25 and 30) on the significance of imprisonment in relation to the integrative link between the offender and the host member state.

44. As Lord Mance observed in para 9 of his judgment, the same reasoning as was applied in *Onuekwere* for the purposes of article 16(2) of the Directive (which applies article 16(1) to the family members of a Union citizen who are not themselves nationals of a member state) and article 16(3) (which applies for the purposes of both article 16(1) and article 16(2)) must also apply to Union citizens themselves for the purposes of article 16(1).

45. The present case differs from *Onuekwere*, however, in that Mr Vomero had completed more than five years' continuous legal residence in the UK before he was imprisoned in 2001. Considering whether Mr Vomero had acquired a right of permanent residence when the period for implementation of the Directive expired on 30 April 2006, the position is therefore analogous to those in *Lassal* and *Dias*: the rule in article 16(4) has to be applied by analogy. Treating imprisonment as weakening the integrative link between the person involved and the host member state in a similar way to the circumstances in *Lassal* and *Dias*, in accordance with the judgment in *Onuekwere*, it follows that the period of imprisonment for more than two years which Mr Vomero had undergone by 30 April 2006 prevented him from acquiring a right of permanent residence on that date, or at any subsequent time prior to 23 March 2007, when the decision to deport him was taken. The necessary period of five years' continuous legal residence could not begin any earlier than 3 July 2006, when he completed the custodial part of his sentence, and would depend on his fulfilling the conditions for legal residence laid down in the Directive. If five years' continuous legal residence had not been completed by the time of the periods of imprisonment in 2012, those periods would not count towards the five years required, and would interrupt the continuity of residence, in accordance with *Onuekwere*.

46. Lord Mance's conclusion that Mr Vomero had not acquired a right of permanent residence by the date of the decision to deport him was therefore correct. On the other hand, a question is raised by the Advocate General's comments in the last two sentences of point 33 of his opinion in the present case in relation to the tentative suggestion made by Lord Mance in the penultimate sentence of para 11 of his judgment. As explained earlier, Lord Mance observed, obiter, that it might seem logical if a period of more than two years' imprisonment were to lead to the loss of a right of permanent residence once acquired. The Advocate General, however, expressed the view that the reasoning in *Onuekwere* could not be applied to cases concerned with the forfeiture of that right once acquired. In the light of those comments, it would be wise for this court to refrain from expressing any view in the present case as to whether there may be a distinction between the effect of imprisonment on the acquisition of a right of permanent residence, with which

Onuekwere was concerned, and its effect on the retention of such a right once obtained.

47. Finally, as the Court of Justice made clear in paras 89-94 of its judgment in the case of *B v Land Baden-Wùrttemberg*, cited at para 28 above, it will be necessary for the tribunal, when this case is remitted to it, to consider not only whether Mr Vomero has acquired a right of permanent residence since the date of the decision to deport him, in accordance with the agreement of the parties (see para 32 above), and if so the implications of his having done so, but in any event whether there are still "grounds of public policy or public security" within the meaning of article 28(1) of the Directive on the basis of which his expulsion may be justified.

Conclusion

48. For the foregoing reasons, the court should in my view allow the appeal, grant a declaration that neither article 28(2) nor article 28(3) of Directive 2004/38/EC applied to Mr Vomero as at the date of the Secretary of State's decision to deport him on 23 March 2007, and remit the respondent's appeal against that decision to the Upper Tribunal to be reconsidered in accordance with this judgment.