Reports of Cases

OPINION OF ADVOCATE GENERAL
DE LA TOUR
delivered on 17 March 2022[1]

Case C-624/20

E.K.
v
Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling
from the rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, the Netherlands))

(Reference for a preliminary ruling – Border control, asylum and immigration – Immigration policy – Status of third-country nationals who are long-term residents – Residence excluded from the scope of Directive 2003/109/EC – Residence on temporary grounds – Residence pursuant to the derived right under Article 20 TFEU)

I. Introduction

1. Can a parent who is a third-country national and resides in a Member State by virtue of the right that he or she derives from the status of citizen of the European Union of his or her child, a minor, rely on that residence before the authorities of that Member State with a view to obtaining the status of long-term resident?

2. In its case-law arising from its judgments of 8 March 2011 *Ruiz Zambrano*,[2] and of 10 May 2017, *Chavez-Vilchez and Others*,[3] the Court recognised that the parents of a child, who is a Union citizen and in a situation of dependency vis-à-vis those parents, enjoy a right of residence derived from that child's rights as a citizen. The parents can therefore remain in the territory of the Member State where the child resides for as long as that dependency exists. When that relationship of dependency ends, the derived right of residence ends accordingly.

3. The question raised by the referring court is whether that residence can enable those parents to rely on a sufficiently long period of residence to apply to be granted the status of long-term resident. Such an application was submitted by E.K., a Ghanaian national who has resided in the

1 Original language: French.

2 C-34/09, EU:C:2011:124, 'the judgment in *Ruiz Zambrano*'.

3 C-133/15, EU:C:2017:354. In the Netherlands, this right of residence is called the 'right of residence under *Chavez-Vilchez and Others*' because it refers to that case which concerned a situation in the Netherlands.

Netherlands for many years with her son, who has now reached the age of majority, to the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, the Netherlands). That application was refused and is being challenged before the referring court.

4. That court asks whether the particular nature of that residence means that it cannot be classified under the category of temporary residence, within the meaning of Article 3(2)(e) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.[4] If that is the case, such residence falls outside the scope of that directive.

5. In this Opinion, I will be moved to find that the concept of temporary residence, within the meaning of Article 3(2)(e) of the directive, is a concept of EU law and that the derived right of residence under Article 20 TFEU falls into that category.

II. Legal context

A. Directive 2003/109

6. Recitals 4, 6 and 17 of Directive 2003/109 state:

'(4) The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the [European Union] stated in the Treaty.

…

(6) The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in the country. Provision should be made for a degree of flexibility so that account can be taken of circumstances in which a person might have to leave the territory on a temporary basis.

…

(17) Harmonisation of the terms for acquisition of long-term resident status promotes mutual confidence between Member States. Certain Member States issue permits with a permanent or unlimited validity on conditions that are more favourable than those provided for by this Directive. The possibility of applying more favourable national provisions is not excluded by the Treaty. However, for the purposes of this Directive, it should be provided that permits issued on more favourable terms do not confer the right to reside in other Member States.'

[4] OJ 2004 L 16, p. 44.

7. Article 1 of that directive, which is entitled 'Subject matter', provides:

'This Directive determines:

(a) the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto; and

(b) the terms of residence in Member States other than the one which conferred long-term status on them for third-country nationals enjoying that status.'

8. Article 3(2)(e) of the directive states:

'This Directive does not apply to third-country nationals who:

…

(e) reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited.'

9. Article 13 of the same directive, which is entitled 'More favourable national provisions', reads as follows:

'Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member States as provided by Chapter III of this Directive.'

B. Netherlands law

1. The Vw 2000

10. Article 8(e) of the Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000)[5] of 23 November 2000 provides:

'A foreign national is lawfully resident in the Netherlands only:

…

(e) by virtue of his status as a [Union] national, so long as that national is resident pursuant to arrangements established under the [FEU] Treaty or the Agreement on the European Economic Area [of 2 May 1992[6]].'

[5] Stb. 2000, No 495; 'the Vw 2000'.

[6] OJ 1994 L 1, p. 3.

11. Article 21(1) and (6) of the Vw 2000 provides:

'1. An application for the grant of a residence permit of indefinite duration within the meaning of Article 20 made by a foreign national who, immediately prior to submitting the application, for a continuous period of five years has been legally resident either within the meaning of Article 8(a), (c), (e) [or] (l) or pursuant to a long-term resident EU residence permit can be refused only where the foreign national:

(a) does not independently and on a long-term basis have sufficient means of existence, whether or not in conjunction with the family member with whom he resides;

(b) has provided incorrect information or has failed to provide information which would have resulted in the refusal of the application for grant, amendment or extension;

(c) has been convicted by a judgment which has become final of an offence punishable by a prison sentence of three years or more, or the measure provided for in Article 37a of the Wetboek van Strafrecht [Criminal Code] has been imposed on him in that regard;

(d) represents a danger for national security;

(e) has established his main place of residence outside the Netherlands;

(f) does not have, on the day on which the application is received, a temporary right of residence; or

(g) has not passed the examination provided for in Article 7(1)(a) of the Wet inburgering [Law on Civic Integration of 30 November 2006[7]] or obtained a diploma, certificate or other document within the meaning of Article 5(1)(c) of that law.

…

6. Rules relating to the grounds laid down in paragraph 1 may be established by or pursuant to a general administrative measure. In that context, cases other than those provided for in paragraphs 1 to 4 may be specified in which a residence permit of indefinite duration within the meaning of Article 20 may be granted.'

12. Article 45b of the Vw 2000 reads as follows:

'1. An application for the grant of a long-term resident EU residence permit shall be refused where, immediately prior to submitting the application, the foreign national:

(a) has a temporary right of residence under a fixed-term residence permit within the meaning of Article 14;

(b) has a formally limited right of residence;

(c) is resident on the basis of a special privileged status;

[7] Stb. 2006, No 625.

(d) is resident pursuant to a fixed-term residence permit within the meaning of Article 28 that was not granted pursuant to Article 29(1) or (b);

(e) is resident pursuant to a fixed-term residence permit within the meaning of Article 28 which was granted pursuant to Article 29(2), in the case of a foreign national who has a residence permit within the meaning of Article 28 that was not granted pursuant to Article 29(1)(a) or (b).

2. Without prejudice to paragraph 1, an application for the grant of a long-term resident EU residence permit can be refused only where the foreign national:

(a) has not been lawfully resident for a continuous period of five year immediately prior to submitting the application as referred to in Article 8, taking into account paragraph 3;

(b) during the period referred to in (a), has resided for six months consecutively or longer, or for a total of ten months or longer, outside the Netherlands;

(c) does not independently and on a long-term basis have sufficient means of existence, whether or not in conjunction with the family member with whom he resides;

(d) has been convicted by a judgment which has become final of an offence punishable by a prison sentence of three years or more, or the measure provided for in Article 37a of [Criminal Code] has been imposed on him in that regard;

(e) represents a danger for national security;

(f) does not have sufficient sickness insurance for himself and for his dependent family members; or

(g) has not passed the examination provided for in Article 7(1)(a) of the [Law on Civic Integration] or has not obtained a diploma, certificate or other document within the meaning of Article 5(1)(c) of that law.

3. In calculating the period referred to in point (a) of paragraph 2, account shall not be taken of residence within the meaning of paragraph 1 or residence within the meaning of point (b) of paragraph 2, with the exception of residence for the purpose of studies or professional training, half of which shall be taken into account.

4. Rules concerning the application of paragraphs 1 and 2 may be established by or pursuant to a general administrative measure.'

2. The Decree on Foreign Nationals of 2000

13. Article 3.5 of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals of 2000)[8] of 23 November 2000 states:

'1. The right of residence on the basis of an ordinary, fixed-term residence permit shall be temporary or non-temporary.

[8] Stb. 2000, No 497.

2. The right of residence shall be temporary if the residence permit is granted with a restriction relating to:

(a) residence as a family member, where the reference person:

1. has a temporary right of residence, or

2. holds a temporary residence permit on grounds of asylum;

(b) seasonal work;

(c) a temporary intragroup transfer;

(d) the cross-border provision of services;

(e) an apprenticeship;

(f) studies;

(g) the search for employment or work as an employed or self-employed person;

(h) an exchange, whether or not under an agreement;

(i) medical treatment;

(j) temporary humanitarian grounds;

(k) a pending application under Article 17 of the Rijkswet op het Nederlanderschap [Law on Netherlands nationality of 19 December 1984[9]].

3. In accordance with obligations under treaties or binding decisions of organisations governed by international law, cases in which, by way of derogation from paragraph 2, the right of residence is non-temporary may be determined by ministerial regulation.

4. If granted with a restriction other than those listed in paragraph 2, the residence permit shall be non-temporary, unless otherwise provided when it is granted.'

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

14. The applicant in the main proceedings, E.K., who was born on 30 November 1960, is a Ghanaian national. She has a son, who was born on 10 February 2002, who is a Netherlands national. On 9 September 2013, in accordance with Article 20 TFEU, she was granted an EU residence permit bearing the endorsement 'Family member of a citizen of the Union'.

15. On 18 February 2019, E.K. submitted an application for a 'long-term resident EU residence permit'. That application was refused on 30 August 2019 by the State Secretary for Justice and Security, who took the view that, since E.K.'s right of residence was temporary, she could not be granted the permit applied for.

[9] Stb. 1984, No 628.

16. The complaint lodged by E.K. was declared unfounded by a decision of 12 December 2019. E.K. brought an action against that decision before the referring court.

17. That court asks, in the first place, whether the temporary or non-temporary nature of residence, when a third-country national has a derived right of residence on the basis of Article 20 TFEU, falls within the competence of the Member States or is a concept that must be given a uniform interpretation within the European Union.

18. In the second place, if the concept of 'temporary residence' is a concept of EU law, that court asks whether a third-country national's residence pursuant to a derived right of residence under Article 20 TFEU ('derived right of residence under Article 20 TFEU') is temporary or not. It observes that the case-law of the Court does not afford any independent right to such a third-country national. Any rights afforded to them, under the Treaty or secondary law, are simply rights arising from the exercise by a Union citizen of his or her right to move and reside within the territory of the European Union.

19. The referring court notes that, whilst Directive 2004/38/EC[10] does allow the holder of a derived right of residence to obtain a permanent right of residence, that legislation was agreed to by the Member States, unlike the derived right of residence under Article 20 TFEU which is a product of case-law.

20. That court observes that Article 3(2)(e) of Directive 2003/109 excludes from the scope of that directive third-country nationals who reside solely on temporary grounds. It states that those grounds cover situations in which the national does not intend to settle long term in the country concerned. It infers from that that the condition of the intention to settle long term must be applied when assessing whether residence under Article 20 TFEU is temporary or not. The referring court adds that the defendant in the main proceedings acknowledges that a permit granted to the parent of a minor on grounds of family life based on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[11] is not temporary.

21. In the third place, the referring court asks about the implementation of Article 3(2)(e) of Directive 2003/109 by the Kingdom of the Netherlands if the residence of a third-country national pursuant to the derived right of residence under Article 20 TFEU were held to be temporary. Article 45b of the Vw 2000 provides that only national permits granting a temporary right of residence constitute grounds for refusing a long-term resident EU residence permit. Conversely, temporary rights of residence that are based on EU law allow a long-term resident residence permit to be obtained.

22. In those circumstances, the rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it within the competence of the Member States to determine whether the right of residence on the basis of Article 20 TFEU is in itself of a temporary or non-temporary nature, or should it be interpreted in conformity with [EU law]?

[10] Directive 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).

[11] Signed in Rome on 4 November 1950; 'the ECHR'.

(2) If interpretation must be in conformity with [EU law], does a distinction [then] exist, when applying Directive [2003/109], between the various dependents' residence rights to which third-country nationals are entitled on the basis of EU law, including the dependent's right of residence granted to a family member of a Union citizen on the basis of [Directive 2004/38] and the right of residence on the basis of Article 20 TFEU?

(3) Is the right of residence on the basis of Article 20 TFEU, which by its nature depends on the existence [of] a relationship of dependency between the third-country national and the Union citizen and is therefore finite, of a temporary nature?

(4) If the right of residence on the basis of Article 20 TFEU is of a temporary nature, must Article 3(2)(e) of the Directive [then] be interpreted as precluding national legislation which only excludes residence permits issued under national law from acquiring long-term residence status within the meaning of the Directive?'

23. Written observations were lodged by E.K., the Netherlands, Danish and German Governments and the European Commission. Those parties, with the exception of the Danish Government, presented oral argument at the hearing held on 7 December 2021.

IV. Analysis

24. By those questions, the referring is seeking to ascertain whether the residence of a third-country national enjoying a derived right of residence under Article 20 TFEU, which the Court granted in the judgment in *Ruiz Zambrano* and the judgment of 10 May 2017 *Chavez-Vilchez and Others*[12] to such a national, the parent of a young child who is a Union citizen, is temporary or not, with a view to determining, in particular, whether or not that person's situation falls within the scope of Directive 2003/109.

A. The first question referred for a preliminary ruling concerning whether the temporary or non-temporary nature of residence, within the meaning of Directive 2003/109, where the third-country national enjoys a derived right of residence under Article 20 TFEU, is to be given a uniform and autonomous interpretation within the European Union

25. By its first question referred for a preliminary ruling, the referring court asks whether the concept of 'temporary residence', which appears inter alia in Article 3(2)(e) of Directive 2003/109, is a concept of EU law or whether it falls within the competence of the Member States.

26. I take the view, like all the parties with the exception of the Danish government, that that concept is a concept of EU law which must be given an autonomous and uniform interpretation within the European Union.

27. Two rules can be established on the basis of the settled case-law of the Court.

28. First, the Court, in interpreting Directive 2003/109, has stated that, in the light of its subject matter, as laid down in Article 1(a) thereof, the determination of the concept of 'legal residence' and of the conditions or rights pertaining to that residence falls within the competence of the

[12] C-133/15, EU:C:2017:354.

Member States. [13] However, it has also held that the words 'where their residence permit has been formally limited', contained in Article 3(2)(e) of that directive, must be regarded as designating an autonomous concept of EU law and interpreted in a uniform manner, given the lack of any express reference to the law of the Member States, for the purpose of determining the meaning and the scope of that concept, in order to comply with the requirements of the uniform application of EU law and the principle of equality. [14]

29. In addition, Directive 2003/109 does not contain any express reference to the law of the Member States for the purpose of defining the meaning of the words in the expression at issue in the context of the first question referred for a preliminary ruling, namely 'reside solely on temporary grounds'.

30. Second, compliance with the need for uniform application and with the principle of equality must prevail, a fortiori, as regards the scope and the nature of the rights arising from citizenship of the Union, [15] which is the case here, as the third-country national's right of residence is derived from the rights of a Union citizen.

31. I therefore propose that that first question be answered to the effect that the concept of 'temporary residence' within the meaning, inter alia, of Article 3(2)(e) of Directive 2003/109 is a concept of EU law that is to be given an autonomous and uniform interpretation.

B. The second and third questions referred for a preliminary ruling concerning the temporary or non-temporary nature, within the meaning of Article 3(2)(e) of Directive 2003/109, of the derived right of residence under Article 20 TFEU

32. By its second and third questions referred for a preliminary ruling, the referring court seeks to ascertain, first, whether there is a distinction between the derived right of residence under Article 20 TFEU and the dependent's right of residence granted to a family member of a Union citizen, as provided for in Directive 2004/38, and, second, whether the fact that the derived right of residence under Article 20 TFEU stems from a relationship of dependency between the third-country national who enjoys that right and that Union citizen is sufficient for the residence to be characterised as temporary. Those questions may be dealt with jointly as, in essence, they are asking the Court about the temporary or non-temporary nature, for the purposes of Article 3(2)(e) of Directive 2003/109, of the residence of the third-country national enjoying a derived right of residence under Article 20 TFEU.

33. The referring court needs an answer to those questions in order to determine whether or not E.K. can obtain long-term resident status in accordance with Article 4(1) of Directive 2003/109, which provides that Member States are to grant that status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application, bearing in mind that Article 4(2) of that directive provides that 'periods of residence for the reasons referred to in Article 3(2)(e) … shall not be taken into account for the purposes of calculating the period referred to in paragraph 1'.

[13] See judgment of 18 October 2012, *Singh* (C-502/10, EU:C:2012:636, paragraph 39).

[14] See, to that effect, judgment of 18 October 2012, *Singh* (C-502/10, EU:C:2012:636, paragraphs 42 and 43).

[15] See, to that effect, judgments of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31), and of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 43).

34. Thus, if the residence of the third-country national enjoying a derived right of residence under Article 20 TFEU is classified as temporary within the meaning of Article 3(2)(e) of Directive 2003/109, account cannot be taken of the duration of that residence when calculating the mandatory five-year period of residence required under Article 4 of that directive in order to obtain long-term resident status.

35. In the present case, it is not in dispute that E.K. enjoyed a derived right of residence under Article 20 TFEU for the five years prior to her application for long-term resident status.

36. That question is separate from the question whether, after her child, a Union citizen, reached the age of majority, the applicant in the main proceedings could still enjoy a derived right of residence linked to her child's dependency on her, which does not appear to pose any difficulty in principle in the light of case-law, provided that the national court establishes that state of dependency, which will be assessed more strictly than in the case of a child who is a minor. [16]

37. In that regard, it should be observed, as was stated at the hearing, that E.K. currently enjoys a 'private and family life' right of residence, based on Article 8 ECHR, which will entitle her to be granted long-term residence status after a period of five years.

38. The point of dispute between the positions taken is, in reality, whether the outcome is solely dependent on the underlying philosophy of Directive 2003/109 or whether account should be taken of the specific nature of that derived right of residence under Article 20 TFEU in order to give effects to it that are strictly limited to the prevailing objective when it was recognised in case-law, namely to ensure the genuine enjoyment by the Union citizen of the substance of the rights conferred on him or her by that status. The objective pursued by the Court was not to afford a third-country national who accompanies and cares for that Union citizen, who is dependent on the third-country national, his or her own rights or to give rise to circumstances under which that national is granted his or her own rights beyond that relationship of dependency.

39. I propose, first of all, to apply the traditional methods of interpretation, before assessing the specific nature of the derived right of residence under Article 20 TFEU and, finally, comparing it with the dependents' residence rights which allow a long-term permit to be obtained.

1. The temporary nature of the residence within the meaning of Article 3(2)(e) of Directive 2003/109 in the light of the methods of interpretation

40. In the first place, application of the literal method ultimately means that the words residence 'on temporary grounds' are interpreted such that the derived right of residence under Article 20 TFEU is excluded from the scope of Directive 2003/109.

41. After all, residence that is temporary lasts only for a limited time as opposed, therefore, to residence that is permanent or definitive. Temporary residence means that, from the outset, the residence is intended to be for the short term. Based on that meaning, it is undeniable that residence resulting from the exercise of the derived right of residence under Article 20 TFEU is neither permanent nor definitive, since its duration is linked to the existence of a state of dependency between the parent enjoying that right and his or her child. That residence is therefore 'temporary' in the literal meaning of the word.

[16] See, inter alia, judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 65).

42. However, in the second place, from a teleological perspective, the assessment would be quite the opposite. It follows from the objectives of Directive 2003/109, as set out in recitals 4 and 6, that long-term settlement and the duration of legal and continuous residence in the territory concerned are key elements for acquiring the status of long-term resident and to enable economic and social cohesion.

43. There can be no question that raising a child in a country for the whole time that that child is a minor can lead, without this always being the case, to a person settling there long term and a relatively long, or even very long, period of residence, which may exceed the five-year period required under Directive 2003/109 in order to obtain long-term resident status.

44. Reference should also be made to the examples given by that directive of temporary grounds for residence under Article 3(2)(e) of the directive, namely work as an au pair, seasonal worker or worker posted by a service provider for the purposes of cross-border provision of services. Those examples show that that residence is intended to be for a short duration from the outset. It may be inferred from that fact, first, that raising a child in a country is not comparable with residence as an au pair or seasonal worker and, second, that the temporary nature of the residence is not of the same nature as the examples of residence given by the same directive. Thus, in the light of the objectives of Directive 2003/109, it appears that the temporary nature of the residence can be interpreted as not entailing, from the start of the residence, long-term settlement.

45. Several factors support that view. First, the explanatory memorandum to the proposal for a directive which culminated in the adoption of Directive 2003/109 specifically states, in relation to that directive's scope, that 'the only excluded categories are those which are not intending to actually settle, in particular persons resident in order to study or to engage in a seasonal occupation and those enjoying temporary protection'.[17] Second, much more recently, in its 'Report on Migration and Asylum' tabled on 29 September 2021, the Commission announced that it was going to propose a revision of the directive on long-term residents in order to improve the rights and the intra-EU mobility of those migrants who were already well integrated in the Member States.[18] Lastly, the Court, when it was called upon to provide an interpretation of the other category of residence rights excluded from the directive under Article 3(2)(e) thereof, that is to say 'formally limited permits', gave a ruling on the 'temporary grounds', stating that such grounds '[do] not *prima facie* reflect any intention … to settle on a long-term basis in the territory of the Member States'.[19]

46. In addition, the social and economic implications of a child's education may contribute to the integration of the parent, bearing in mind that, under Article 5(2) of Directive 2003/109, Member States are afforded the possibility, in accordance with their national law, to examine the integration conditions of the third-country nationals. Nevertheless, Member States do not determine the integration of the individual when examining the condition of the duration and nature of the residence, even though Directive 2003/109 clearly pursues the objective of integration.

[17] Explanatory memorandum to the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final, point 5.3).

[18] See, to that effect, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Report on Migration and Asylum (COM(2021) 590 final, p. 17).

[19] Judgment of 18 October 2012, *Singh* (C-502/10, EU:C:2012:636, paragraph 47).

47. It therefore appears that it is the intention to settle that is meant to shed light on the concept of 'temporary grounds' contained in Article 3(2)(e) of Directive 2003/109. Accordingly, consideration must be given to whether, when the right of temporary residence was granted, the residence was intended to be lasting in nature and whether the parent who accompanied the Union citizen intended to settle in the relevant country. This amounts to dispensing with the subjective concept of the intention to settle, which could exist in the case of certain rights of temporary residence expressly excluded from the scope of that directive, such as cases of au pairs who might intend to settle eventually. However, it is clear that a person holding a residence permit to work as an au pair in a family does not intended to settle by virtue of that fact. Similarly, account should not be taken of the question of integration since, as I have set out in the preceding point, that is a further condition for obtaining long-term resident status which takes account of the form that the residence has taken and not the reason why it was permitted.

48. In the third place, application of the subjective interpretation method likewise does not deliver a clear analysis in favour of including the derived right of residence under Article 20 TFEU within the scope of Directive 2003/109.

49. Although, prima facie, the explanatory memorandum to the proposal for a directive does mention the intention of the families of Union citizens to settle,[20] account must however be taken of the fact that statement could be explained simply by the initial inclusion in that proposal of an Article 3(3) that specifically covered families of those Union citizens who had exercised their freedom of movement.[21] That paragraph was dropped in the course of the legislative procedure after it was found that the paragraph was difficult to understand and that the matter ought to be dealt within the framework of the directive on freedom of movement.[22] It was therefore solely in the context of the prior exercise of that freedom by the citizen that the position of families was mentioned, and then removed, as part of the negotiation of the proposal.

50. Nor is it possible to rely, in my opinion, on the fact that the text of the directive was not amended following the judgment in *Ruiz Zambrano*. That ruling was made in the final stretch of the negotiations for the revision of Directive 2003/109 by Directive 2011/51/EU[23] and could not be taken into account (in one way or another) at that time.

51. In the fourth place, application of the systematic method of interpretation means, in actual fact, having to consider the very specific nature of the derived right of residence at issue.

2. The specific nature of the derived right of residence under Article 20 TFEU

52. By way of reminder, in the judgment in *Ruiz Zambrano*, the Court laid down the principle that 'Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union

[20] See explanatory memorandum to the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final, point 5.3 (OJ 2001 C 240 E, p. 79)).

[21] Under Article 3(3) of that proposal, 'third-country nationals who are members of the family of citizens of the Union who have exercised their right to free movement of persons may not acquire long-term resident status in the citizen of the Union's host Member State until they have obtained the right of permanent residence in that Member State within the meaning of the legislation on the free movement of persons' (OJ 2001 C 240 E, p. 81).

[22] See, to that effect, Report on the proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 – C5-0250/2001 – 2001/0074(CNS), p. 36), tabled by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament, of 30 November 2001, available at the following internet address: https://www.europarl.europa.eu/doceo/document/A-5-2001-0436_EN.pdf.

[23] Directive of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109 (OJ 2011 L 132, p. 1).

citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'. [24]

53. Subsequent judgments have clarified that 'the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals' and that 'any rights conferred on [such nationals] by the Treaty provisions on citizenship of the Union are not autonomous rights of those nationals but rights derived from those enjoyed by the Union citizen'. [25] The Court explained that the foregoing concerned very specific situations in which the effectiveness of such citizenship of the Union would be undermined, 'if, as a consequence of refusal of such a right [of residence for the third-country national], that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status'. [26]

54. That line of case-law thus created a derived right of residence to cover very specific situations in the field of third-country nationals' rights of residence which falls within the competence of the Member States. Since that derived right of residence is granted solely for the benefit of the Union citizen, it was agreed in return for that encroachment that provision would not be made for any autonomous right for those nationals but merely a right of residence in recognition of the citizenship of the Union of their dependent child for the duration of that state of dependency.

55. It is undeniable that, by creating a long-term resident status, Directive 2003/109 provides for the establishment of an autonomous right for third-country nationals, subject to satisfaction of the conditions laid down in Chapters I and II of that directive. In addition, the examples of residence on 'temporary grounds' excluded from the scope of the directive provided therein concern only nationals with an individual right of residence (au pairs, for instance). Thus, even the fact that a person has his or her own right of residence [27] is not sufficient to bring such residence within the scope of the directive and, therefore, to confer eligibility, subject to certain conditions, to long-term resident status.

56. Accordingly, it seems to me that E.K., who pursuant to the judgment in *Ruiz Zambrano* enjoys only a derived right of residence linked to her child's dependency on her, does not have an autonomous right of residence. It is that lack of intention to grant autonomous rights to her that must viewed in the light of the intention to settle in the long term, the intention that forms the basis of Directive 2003/109.

57. In any case, it is my view that taking account of E.K.'s intention to settle in the long term in the territory of the Member State concerned with a view to benefiting from the provisions of Directive 2003/109 at the end of five years' residence under a derived right of residence would go beyond the conclusions that the Court sought to draw from Article 20 TFEU in such matters. In my opinion, the intention to settle in the long term is one of the autonomous rights of the third-country national which she may not claim on account of the derived nature of her right of residence.

[24] Judgment in *Ruiz Zambrano* (paragraph 45 and operative part).

[25] Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 72 and 73 and the case-law cited).

[26] See, inter alia, judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 74 and the case-law cited), and of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 51).

[27] See, additionally, all the exceptions set out in Article 3(2) of Directive 2003/109.

Furthermore, interpreting that directive in the manner sought by E.K. would, as the Commission pointed out in its observations, in effect enable her to acquire not only long-term resident status but also, thereby, the right to reside in the other Member States. [28]

58. As long as the relationship of dependency with the child, a Union citizen, exists, which is for the national court to determine, the parent may remain on the territory in question in order to ensure their child's genuine enjoyment of the substance of the rights of a Union citizen.

59. However, the Court has held that 'the mere fact that it might appear desirable to a national of a Member State, … in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted'. [29] Thus, Article 20 TFEU does not afford a right of residence in order to keep a family together where the departure of the third-country national would not entail the departure of that Union citizen himself. It is therefore not the right to family unity that is protected as such, but rather the possibility of the Union citizen remaining in the territory of the European Union.

60. As an interim conclusion, I would point out that, if consideration is given to the specific nature of the derived right of residence under Article 20 TFEU, since the person who enjoys that right does not intend to settle in the long term, that residence appears to me to be excluded from the scope of Directive 2003/109, since it is based on a temporary ground.

61. There is even some question as to whether exclusion from the scope of the directive of residence resulting from the derived right of residence under Article 20 TFEU is not in actual fact attributable per se to the nature of that residence, which does not create any autonomous right.

3. The specific nature of the derived right of residence under Article 20 TFEU applying reasoning by analogy

62. The main argument put forward by E.K. and the Commission why the derived right of residence under Article 20 TFEU should be effective for the purpose of obtaining long-term resident status draws on the existence in EU law of examples of derived rights of residence that afford access to a right of permanent residence, which constitutes an autonomous right. In their view, reasoning by analogy must therefore be applied.

63. That premiss forms the basis of the second question referred for a preliminary ruling, which mentions the provisions of Directive 2004/38, Article 16(2) of which states that a derived right of residence affords access to a right of permanent residence after a period of five years. [30] In her observations, E.K. also refers to Article 15 of Directive 2003/86/EC, [31] which provides for an autonomous residence permit for a sponsor's family members. [32]

[28] See, to that effect, Article 14 of Directive 2003/109.

[29] Judgment of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 68).

[30] Under that provision, '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'.

[31] Council Directive of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

[32] According to the first paragraph of that provision, 'no later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor'.

64. With regard to Directive 2004/38, the analogy with the mechanism established by that directive may appear persuasive at first sight because the factual circumstances are the same if viewed from the parent's perspective: the parent, a third-country national, enjoys a derived right of residence linked to his or her child's citizenship of the Union for a period of more than five years. In addition, those two derived rights of residence arise in the context of the free movement of persons, as this is how EU law protects that freedom enjoyed by that Union citizen. [33] In the cases covered by Directive 2004/38 and by Article 21 TFEU, [34] this allows the parent to obtain a right of permanent residence after a period of five years.

65. There are, however, a number of significant differences between those two derived rights of residence.

66. First, the derived right of residence and the right of permanent residence that follows therefrom under Directive 2004/38 were expressly afforded to third-country nationals who are family members of Union citizens, whereas the Court adopted the standpoint of the Union citizen, who could feel prevented from exercising rights pertaining to his or her status, in order to afford the derived right of residence under Article 20 TFEU to a third-country national on whom that Union citizen is dependent.

67. Second, the factual situations considered from the perspective of the Union citizen are actually different. Directive 2004/38 does not apply where the same Union citizen has never exercised his or her right of free movement and has always resided in the Member State of which he or she is a national, [35] which is the case with E.K.'s child. Thus, the derived right of residence under Article 20 TFEU afforded by the Court is justified only as long as the state of dependency between the child, a Union citizen, and his or her parent, a third-country national, persists. Therefore, with a view to protecting the Union citizen's genuine enjoyment of the basic rights that he or she derives from that citizenship, there is no need to extend the derived right of residence under Article 20 TFEU via a right of permanent residence for the third-country national parent if the state of dependency continues.

68. Furthermore, it is quite clear that, even in relation to Directive 2004/38, which pursues objectives of protecting family life and the integration of the family in the host Member State, those objectives are deemed by the Court to be secondary to the primary objective, which is to promote the freedom of movement of Union citizens. [36] Moreover, the rights to free movement and residence of E.K.'s child are not hampered as long as his state of dependency vis-à-vis his parent, and therefore her derived right of residence, continues. When that state of dependency ends, the parent's potential departure will not automatically entail the departure of the child who is a Union citizen.

69. It is true that the Court did draw an analogy between the restrictions on freedom of movement on grounds of public policy, public security and public health which, on the one hand, are laid down in Article 27 of Directive 2004/38 and, on the other hand, those that can always be invoked by Member States in the context of Union citizenship as established by Article 20 TFEU. [37]

[33] See, to that effect, judgment of 2 September 2021, *État belge (Right of residence in the event of domestic violence)* (C-930/19, EU:C:2021:657, paragraph 74).

[34] See, in this respect, judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 52).

[35] See, inter alia, judgment of 5 May 2011, *McCarthy* (C-434/09, EU:C:2011:277, paragraph 57).

[36] See, to that effect, judgment of 2 September 2021, *État belge (Right of residence in the event of domestic violence)* (C-930/19, EU:C:2021:657, paragraph 82).

[37] See, inter alia, judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 81).

70. I also find such reasoning by analogy to be insufficiently convincing, since that reference to the threat to public policy concerns whether or not it is possible to restrict the derived right of residence under Article 20 TFEU, whereas, in the present case, E.K. is claiming the award of an autonomous right of residence for the beneficiary of that derived right of residence. Finally, as far as concerns the condition of sufficient resources, which may also be used to restrict the derived right of residence, the Court has refused to reason by analogy between the system established under Directive 2004/38 and that arising from Article 20 TFEU, stating that, 'where there is a relationship of dependency … between a Union citizen and a third-country national who is a member of his or her family, Article 20 TFEU precludes a Member State from providing for an exception to the derived right of residence which that third-country national has under that article, on the sole ground that that Union citizen does not have sufficient resources'. [38] Thus, even when assessing the limits of the derived right of residence (which is not at issue in the present case), the Court refuses to turn automatically to reasoning by analogy.

71. As for Directive 2003/86, upon which E.K. relies, the analogy is even trickier to draw. Indeed, the Court has recently held that third-country nationals who are spouses of Union citizens and victims of domestic violence committed by their spouses are not, as regards the retention of their right of residence on the territory of the Member State concerned, in a comparable situation according to whether their situation falls within the scope of Directive 2004/38 or Directive 2003/86. [39] In addition, members of the family of such Union citizens are expressly excluded from the scope of the latter directive. [40] Finally, whilst the situation of those Union citizens who have not exercised their freedom of movement had been included in the initial proposal for a directive on the right to family reunification, it was not retained in the version adopted. [41]

72. Accordingly, the view cannot be taken, based on reasoning by analogy with provisions of secondary law, that a third-country national has an autonomous right to the consolidation of his or her derived right of residence arising from Article 20 TFEU.

73. It must, however, be made clear that Article 13 of Directive 2003/109 does provide that Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down in that directive. In that regard, it is apparent from the information in the file that the Netherlands authorities were able to issue a residence permit on the basis of Article 8 ECHR and acknowledged, in the course of the hearing, that, after a period of five years, that permit may afford eligibility to the status of long-term resident. It must be noted that the permit will not afford the individual a right of residence in the other Member States.

74. Taking into account the specific nature of the derived right of residence under Article 20 TFEU and the fact that such residence does not demonstrate an intention to settle in the long term, and can therefore be classified as residence on temporary grounds that justifies its exclusion from the scope of the directive, I am of the view that, given its temporary nature, the status of long-term resident provided for in Article 4 of the same directive cannot be granted on the basis of that derived right of residence.

[38] Judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)* (C-836/18, EU:C:2020:119, paragraph 49).

[39] See, in this respect, judgment of 2 September 2021, *État belge (Right of residence in the event of domestic violence)* (C-930/19, EU:C:2021:657, paragraph 90).

[40] See Article 3(3) of the directive.

[41] See judgment of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 49.

75. Thus, Article 3(2)(e) of Directive 2003/109 is to be interpreted as meaning that the residence of a third-country national who enjoys a derived right of residence under Article 20 TFEU constitutes residence solely on temporary grounds.

C. The fourth question referred for a preliminary ruling concerning the compatibility with Directive 2003/109 of national law which excludes only short-term national permits for the purpose of obtaining long-term EU resident status

76. The referring court asks about the compatibility of national law with Directive 2003/109 in so far as national law is more favourable than that directive because, in relation to long-term EU residence permits, it excludes only short-term national permits.

77. In the light of the proposed answers to the other questions, from which it follows that the derived right of residence under Article 20 TFEU does not fall within the scope of the directive, there is no need to answer that question.

V. Conclusion

78. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, the Netherlands) as follows:

(1) The concept of 'temporary residence' within the meaning, inter alia, of Article 3(2)(e) of 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, is a concept of EU law that is to be given an autonomous and uniform interpretation.

(2) Article 3(2)(e) of Directive 2003/109 is to be interpreted as meaning that the residence of a third-country national who enjoys a derived right of residence under Article 20 TFEU constitutes residence solely on temporary grounds.