Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

20 January 2022*

(Reference for a preliminary ruling – Area of freedom, security and justice – Immigration policy – Directive 2003/109/EC – Article 9(1)(c) – Loss of the status of long-term resident third-country national – Absence from the territory of the European Union for a period of 12 consecutive months – Interruption of that period of absence – Irregular and short-term stays in the territory of the European Union)

In Case C-432/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria), made by decision of 28 August 2020, received at the Court on 14 September 2020, in the proceedings

ZK,

intervener:

Landeshauptmann von Wien,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi and N. Wahl, Judges,

Advocate General: P. Pikamäe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 15 July 2021,

after considering the observations submitted on behalf of:

– ZK, by E. Drabek, Rechtsanwalt,

– the Austrian Government, by A. Posch, J. Schmoll and C. Schweda, acting as Agents,

– the European Commission, by C. Cattabriga and H. Leupold, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 October 2021,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9(1)(c) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

2 The request has been made in proceedings between ZK and the Landeshauptmann von Wien (Head of Government of the Province of Vienna, Austria) concerning the latter's refusal to renew the former's long-term resident's residence permit.

Legal context

European Union law

Directive 2003/109

3 Recitals 2, 4, 6, 10, and 12 of Directive 2003/109 state:

'(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.

…

(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] Community stated in the [EC] 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.

…

(10) A set of rules governing the procedures for the examination of application for long-term resident status should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as being transparent and fair, in order to offer appropriate legal certainty to those concerned. They should not constitute a means of hindering the exercise of the right of residence.

…

(12) In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.'

4 Article 1 of that directive 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.'

5 Article 2 of that directive, entitled 'Definitions', provides that:

'For the purposes of this Directive:

…

(b) "long-term resident" means any third-country national who has long-term resident status as provided for under Articles 4 to 7;

…'

6 In accordance with Article 4 of that directive, entitled 'Duration of residence':

'1. Member States shall grant long-term resident 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.

…

3. Periods of absence from the territory of the Member State concerned shall not interrupt the period referred to in paragraph 1 and shall be taken into account for its calculation where they are shorter than six consecutive months and do not exceed in total 10 months within the period referred to in paragraph 1.

…'

7 Article 7 of Directive 2003/109, entitled ‘Acquisition of long-term resident status’, provides, in paragraph 1:

‘To acquire long-term resident status, the third-country national concerned shall lodge an application with the competent authorities of the Member State in which he/she resides. …’

8 Article 8 of that directive, entitled ‘Long-term resident’s [EU] residence permit’, provides:

‘1. The status as long-term resident shall be permanent, subject to Article 9.

2. Member States shall issue a long-term resident’s [EU] residence permit to long-term residents. The permit shall be valid at least for five years; it shall, upon application if required, be automatically renewable on expiry.

…’

9 Article 9 of that directive, entitled ‘Withdrawal or loss of status’, provides:

‘1. Long-term residents shall no longer be entitled to maintain long-term resident status in the following cases:

…

(c) in the event of absence from the territory of the [European Union] for a period of 12 consecutive months.

2. By way of derogation from paragraph 1(c), Member States may provide that absences exceeding 12 consecutive months or for specific or exceptional reasons shall not entail withdrawal or loss of status.

…

5. With regard to the cases referred to in paragraph 1(c) and in paragraph 4, Member States who have granted the status shall provide for a facilitated procedure for the re-acquisition of long-term resident status.

…’

10 Article 11 of Directive 2003/109, entitled ‘Equal treatment’, provides:

1. Long-term residents shall enjoy equal treatment with nationals as regards:

…

(b) education and vocational training, including study grants in accordance with national law;

…

(d) social security, social assistance and social protection as defined by national law;

(e) tax benefits;

(f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing;

(g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;

…

2. With respect to the provisions of paragraph 1, points (b), (d), (e), (f) and (g), the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.

…'

Directive 2004/38/EC

11 Article 16(4) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35; OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34), provides:

'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.'

Austrian law

12 The relevant provisions of national law are set out in the Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG) (Law on establishment and residence) of 16 August 2005 (BGBl. I, 100/2005), in the version applicable to the dispute in the main proceedings ('the NAG').

13 Paragraph 2(7) of the NAG is worded as follows:

'Short stays in Austria and abroad, in particular for the purpose of visits, do not interrupt the duration of residence or establishment giving rise to or terminating the right to a residence permit. …'

14 Paragraph 20 of the NAG, entitled 'Duration of validity of residence permits', provides, in paragraphs 3 and 4:

'(3) Holders of a "long-term resident – EU" residence permit … shall – without prejudice to the limited period of validity of the document corresponding to these residence permits – be

established permanently in Austria. This document is to be issued for a period of five years and … is to be renewed, upon application, even after expiry …

(4) A residence permit under subparagraph 3 shall expire if the foreign national resides outside the territory of the [European Economic Area (EEA)] for more than 12 consecutive months. Having regard to particular considerations, such as serious illness, fulfilment of a social obligation or performance of a service comparable with compulsory military service or community service, a foreign national may reside outside the territory of the EEA for up to 24 months, if he or she has informed the authorities thereof in advance. Where the foreign national has a legitimate interest, the competent authority shall declare, upon application, that the residence permit has not expired. It is for the foreign national to prove that he or she resides in the territory of the EEA.

…'

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

15 On 6 September 2018, ZK, a Kazakh national, submitted an application for renewal of his long-term resident – EU residence permit to the Head of Government of the Province of Vienna. The latter refused that application by decision of 9 July 2019.

16 On 12 August 2019, ZK brought an action against that decision before the referring court.

17 The referring court notes that, although it is common ground that the applicant in the main proceedings, during the period from August 2013 to August 2018 and thereafter, never stayed outside the territory of the European Union for a period of 12 consecutive months or longer, it is also common ground that the applicant was present, during that period, in that territory for only a few days per year. The latter point was taken into account by the Head of Government of the Province of Vienna as justification for the refusal to renew the long-term resident – EU residence permit requested by the applicant in the main proceedings.

18 It is apparent from the order for reference that the applicant in the main proceedings produced, before the referring court, a legal analysis carried out by a group of experts of the European Commission in respect of legal migration, according to which the condition relating to the absence from the territory of the European Union, laid down in Article 9(1)(c) of Directive 2003/109, must be interpreted strictly, to the effect that only the physical absence from that territory for a period of 12 consecutive months entails the loss of long-term resident status under that provision, and that it is irrelevant in that regard whether the long-term resident concerned was, during the relevant period, also physically established or had established his or her habitual residence in that territory.

19 The referring court considers that such an analysis, which it is inclined to endorse, supports the arguments of the applicant in the main proceedings. If that analysis were followed, even short stays, or, as in the present case, stays of only a few days per year, would be sufficient to exclude the application of Article 9(1)(c) of Directive 2003/109, with the result that the applicant in the main proceedings would retain his long-term resident status.

20 In those circumstances, the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 9(1)(c) of Directive [2003/109] be interpreted as meaning that any physical stay, no matter how short, of a third-country national who is a long-term resident in the territory of the [European Union] during a period of 12 consecutive months precludes loss of the status of long-term resident third-country national under this provision?

2. If the Court answers Question 1 in the negative: what qualitative and/or quantitative requirements must stays in the territory of the [European Union] for a period of 12 consecutive months satisfy in order to preclude loss of the status of long-term resident third-country national? Do stays during a period of 12 consecutive months in the territory of the [European Union] preclude loss of the status of long-term resident third-country national only if the third-country nationals concerned had their habitual residence or centre of interests in the territory of the [European Union] during that period?

3. Are rules of the legal systems of the Member States, which provide for loss of the status of long-term resident third-country national where such third-country nationals resided in the territory of the [European Union] for a period of 12 consecutive months, but had neither their habitual residence nor centre of interests there, compatible with Article 9(1)(c) of Directive [2003/109]?'

Procedure before the Court

21 The referring court requested that the reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice, stating, inter alia, that the applicant in the main proceedings, his wife and their four minor children, were most recently established in the United Kingdom on the basis of residence permits which were issued by that State and valid for a period of several years. However, the applicant in the main proceedings wishes to resettle in Austria and be joined by the members of his family for the purposes of family reunification, since such a step presupposes, according to the national legislation in force, that it must first be established that the applicant in the main proceedings still has a right to long-term resident status.

22 On 28 September 2020, the Third Chamber of the Court decided, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to reject that request, since the referring court did not provide an adequate explanation of the circumstances that would establish that there was an urgent need to rule on the present case. Thus, that court did not set out, inter alia, a risk that the applicant in the main proceedings and the members of his family would be subject to removal measures in the United Kingdom or Austria or a situation in which respect for their fundamental rights, such as the right to family life, would be jeopardised.

Consideration of the questions referred for a preliminary ruling

23 By its three questions, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain whether Article 9(1)(c) of Directive 2003/109 must be interpreted as meaning that any physical presence of a long-term resident in the territory of the European Union during a period of 12 consecutive months, even if such a presence does not exceed, during

that period, a total duration of only a few days, is sufficient to prevent the loss, by that resident, of his or her right to long-term resident status, under that provision, or whether, by contrast, that provision must be interpreted as permitting Member States to require, for the purposes of avoiding such a loss, the long-term resident concerned to satisfy additional conditions such as having had, for at least part of the relevant period of 12 consecutive months, his or her habitual residence or centre of interests in that territory.

24 As a preliminary point, it should be noted that, pursuant to Article 4(1) of Directive 2003/109, Member States are to grant long-term resident status to third-country nationals who have resided lawfully and continuously for five years on their territory. The acquisition of that status is not however automatic. In accordance with Article 7(1) of that directive, the third-country national concerned must, for that purpose, lodge an application with the competent national authorities of the Member State in which he or she resides, which must be accompanied by documentary evidence establishing that he or she meets the conditions laid down in Articles 4 and 5 of the directive. In particular, he or she must, in accordance with Article 5(1)(a) of the directive, demonstrate that he or she has stable and regular resources which are sufficient to maintain himself or herself and the members of his or her family without recourse to the social assistance system of the Member State (judgment of 14 March 2019, *Y.Z. and Others (Fraud in family reunification)*, C-557/17, EU:C:2019:203, paragraph 59).

25 In the present case, it is common ground that the applicant in the main proceedings, after acquiring long-term resident status and being issued, in Austria, with a long-term resident – EU residence permit under Article 8(2) of Directive 2003/109, was, during the period from August 2013 to August 2018, present in the territory of the European Union for only a few days per year. It is in the light of that fact that the Head of Government of the Province of Vienna considered that the applicant had to be regarded as being, during that period, 'absent', within the meaning of Article 9(1)(c) of that directive, such an absence entailing the loss of the right of the person concerned to long-term resident status, and he therefore refused to renew the applicant's residence permit which had conferred that status.

26 Thus, it is necessary to examine the conditions for the application of the latter provision, in particular the condition relating to the concept of 'absence'.

27 In that regard, in accordance with Article 9(1)(c) of Directive 2003/109, a long-term resident loses the right to long-term resident status in the event of absence from the territory of the European Union for a period of 12 consecutive months.

28 Since that provision does not contain any reference to the national law of the Member States, the concept of 'absence', used in that provision, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union, irrespective of characterisation in the Member States, taking into account the wording of that provision, its context, and the purpose of the rules of which it forms part (see, to that effect, judgment of 3 October 2019, *X (Long-term residents – Stable, regular and sufficient resources*), C-302/18, EU:C:2019:830, paragraph 26).

29 As regards, in the first place, the wording of Article 9(1)(c) of Directive 2003/109, it should be noted that, in a significant number of language versions of that directive, a term equivalent to the term 'absence' is used in that provision. The concept of 'absence', as it appears in that provision and in accordance with the usual meaning of that term in everyday language, means the physical

'non-presence' of the long-term resident concerned in the territory of the European Union. Thus, that concept shows that any physical presence of the person concerned in that territory is capable of interrupting such an absence.

30 It is true that, as the Austrian Government submits in support of its interpretation of that provision, namely that the person concerned must have his or her habitual residence or centre of interests within the territory of the European Union, in the German and Dutch versions of Article 9(1)(c) of Directive 2003/109, instead of there being an expression using the word 'absence', the verbs '*aufhalten*' and '*verblijven*' are used. Thus, those versions rely on the fact of staying or remaining in the territory of the European Union and could therefore, depending on the context, imply a more permanent presence than a physical presence of any duration.

31 However, such a nuance, first, does not mean that those expressions cannot also refer to a mere physical non-presence and, second, must, in any event, be put into context since those language versions of Article 9(2) of Directive 2003/109 also use the terms '*Abwesenheit*' and '*afwezigheid*' respectively, which correspond to the concept of 'absence'.

32 As regards, in the second place, the context of Article 9(1)(c) of Directive 2003/109, it must be noted, first, that Article 8 of Directive 2003/109 provides that long-term resident status is permanent, 'subject to Article 9' of that directive. Accordingly, since the permanent nature of that status constitutes the general rule, Article 9 must be interpreted by way of derogation and, therefore, strictly (see, by analogy, as regards Article 11(4) of that directive, judgment of 10 June 2021, *Land Oberösterreich (Housing assistance)*, C-94/20, EU:C:2021:477, paragraph 37). That requirement suggests that there should not be a broad interpretation of Article 9, namely that the mere physical presence of a long-term resident in the territory of the European Union is not sufficient to interrupt his or her absence from that territory.

33 Secondly, it follows, in particular, from Article 4 of Directive 2003/109 that, where, among the language versions of that directive referred to in paragraph 29 of the present judgment, that directive requires the presence of the person concerned in the relevant territory to go beyond a mere physical presence and that it be of a certain duration or have a certain stability, the directive expressly states so by using the relevant expressions. Thus, Article 4(1) of that directive uses, in those language versions, expressions that correspond to the verb 'reside', and states that, under that provision, the person concerned must reside in the territory of the Member State concerned legally and continuously for five years immediately prior to the submission of [his or her] application, subject to the periods of absence permitted under Article 4(3) of that directive.

34 Such details are lacking in Article 9(1)(c) of Directive 2003/109, which merely defines the period of absence from the territory of the European Union causing the loss of the right to long-term resident status. That provision does not state, in particular, that, in order to be capable of interrupting that absence, the presence of the person concerned in that territory must be of a certain duration or have a certain stability such as that corresponding to the fact that the person concerned has his or her habitual residence or centre of interests in that territory, contrary to what the Austrian Government maintains. Nor, moreover, does that provision impose any other conditions relating to the duration or nature of that presence, based on, inter alia, the existence of an 'actual and authentic link' with respect to the same territory, such as the fact that the person concerned has, in the Member State concerned, family members or assets, contrary to the Commission's contention.

35 An examination of the context of Article 9(1)(c) of Directive 2003/109 thus supports the interpretation which follows from the wording of that provision.

36 As regards, in the third and last place, the objective pursued by Directive 2003/109, it is clear, firstly, from recitals 2, 4, 6 and 12 of that directive that its objective is the integration of third-country nationals who are settled lawfully and on a long-term basis in the Member States and, for that purpose, bringing the rights of those third-country nationals closer to those enjoyed by EU citizens, inter alia by establishing equal treatment with the latter in a wide range of economic and social fields (judgment of 14 March 2019, *Y.Z. and Others (Fraud in family reunification)*, C-557/17, EU:C:2019:203, paragraph 63). It is in order for those third-country nationals to be able to benefit from the rights provided for in that directive that they are granted long-term resident status under Article 4(1).

37 Such an objective supports an interpretation of Article 9(1)(c) of Directive 2003/109, to the effect that those third-country nationals who, by virtue of the duration of their residence in the territory of the Member State concerned, have already demonstrated that they are settled in that Member State are, in principle, free, as are EU citizens, to travel and reside, also for longer periods, outside the territory of the European Union, without that thereby entailing the loss of their long-term resident status, provided that they are not absent from that territory for the entire period of 12 consecutive months referred to in that provision.

38 Secondly, it follows from recital 10 of Directive 2003/109 that the EU legislature intended to pursue the objective referred to in paragraph 36 of the present judgment by providing the persons concerned, in the context of the procedural rules governing the examination of the application for that status, with an adequate level of legal certainty. The importance thus attached to the principle of legal certainty as regards the acquisition of that status must necessarily also apply in respect of the loss of that status, since the loss invalidates that acquisition, as, moreover, is confirmed by the *travaux préparatoires* for Directive 2003/109, in which it was stated that 'long-term resident status must offer its holder maximum legal certainty' since 'the sole grounds on which it may be withdrawn [must be] listed' (see Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final)).

39 In that regard, the principle of legal certainty, which is one of the general principles of EU law, requires, particularly, that rules of law be clear, precise and predictable in their effects (judgment of 13 February 2019, *Human Operator*, C-434/17, EU:C:2019:112, paragraph 34 and the case-law cited).

40 To interpret Article 9(1)(c) of Directive 2003/109 as meaning that any physical presence of the person concerned in the territory of the European Union is capable of interrupting his or her absence and, consequently, of preventing the loss of his or her long-term resident status under that provision, makes the maintenance of that status dependent on a clear, precise and predictable criterion relating to a simple objective event, so that such an interpretation is better able to guarantee the persons concerned an adequate level of legal certainty.

41 Thirdly, as regards, more specifically, the purpose of Article 9(1)(c) of that directive, it must be held that that provision is intended to prevent third-country nationals, who are in circumstances in which the maintenance of that status no longer serves any purpose in achieving the objective referred to in paragraph 36 of the present judgment, from continuing to enjoy long-term resident status and the rights attaching to that status.

42 In that regard, the Court has held, with regard to Article 16(4) of Directive 2004/38, that that provision refers to loss of the right of permanent residence of an EU citizen by reason of absences of more than two consecutive years from the host Member State and that such a measure may be justified because, after an absence of that duration, the link with the host Member State is loosened (judgment of 21 July 2011, *Dias*, C-325/09, EU:C:2011:498, paragraph 59 and the case-law cited).

43 Although Directives 2003/109 and 2004/38 differ from one another in terms of their subject matter and objectives, the fact remains that, as the Advocate General also pointed out, in essence, in points 40 to 43 of his Opinion, the provisions of those directives may lend themselves to a comparative analysis and, where appropriate, be interpreted in a similar way, which is justified, in particular in the case of Article 9(1)(c) of Directive 2003/109 and Article 16(4) of Directive 2004/38, which are based on the same logic.

44 It follows that, without prejudice to the option provided for in Article 9(2) of Directive 2003/109, paragraph 1(c) of that article refers, ultimately, to the loss of the right to long-term resident status in situations in which the link which the holder of that right previously maintained with the territory of the European Union is loosened. That is the case, in accordance with that provision, only after an absence from that territory for a period of 12 consecutive months.

45 Consequently, the specific purpose of Article 9(1)(c) of Directive 2003/109 supports the interpretation of that provision to the effect that, in order to prevent the loss of the right to long-term resident status, it is sufficient for the long-term national concerned to be present, during the period of 12 consecutive months following the start of his or her absence, in the territory of the European Union, even if such presence does not exceed a few days.

46 That being so, the situation of a long-term resident who has spent a few days per year in the territory of the European Union and who therefore has not been absent for a period of 12 consecutive months must be distinguished from the situation where there is evidence that such a resident has committed a misuse of rights. In the present case, the file before the Court does not refer to any evidence from which it might be concluded that there has been such a misuse of rights.

47 In the light of all of the foregoing considerations, the answer to the questions referred is that Article 9(1)(c) of Directive 2003/109 must be interpreted as meaning that any physical presence of a long-term resident in the territory of the European Union during a period of 12 consecutive months, even if such a presence does not exceed, during that period, a total duration of only a few days, is sufficient to prevent the loss, by that resident, of his or her right to long-term resident status under that provision.

Costs

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

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

Article 9(1)(c) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as meaning that any physical presence of a long-term resident in the territory of the European Union during a period of 12 consecutive months, even if such a presence does not exceed, during that period, a total duration of only a few days, is sufficient to prevent the loss, by that resident, of his or her right to long-term resident status under that provision.

[Signatures]