

Case C-432/20

Request for a preliminary ruling

Date lodged:

14 September 2020

Referring court:

Verwaltungsgericht Wien (Austria)

Date of the decision to refer:

28 August 2020

Applicant:

ZK

Defendant authority:

Landeshauptmann von Wien

[...]

Request

for a

Preliminary Ruling

pursuant to Article 267 of the Treaty on the Functioning of the European Union
and

Article 107 of the Rules of Procedure of the Court of Justice
(Urgent preliminary ruling procedure)

Parties to the main proceedings [...]:

(a) Applicant: ZK, born 1985,
1130 Vienna,
nationality: Kazakh

[...] [...]

(b) Defendant authority: Landeshauptmann von Wien, MA 35,

1200 Vienna, [...] **[Or. 2]**

In relation to the action brought by Mr ZK, (born: 1985; nationality: Kazakh) against the decision of the Landeshauptmann von Wien (Governor of Vienna), Magistratsabteilung (Municipal Department) 35, of 9 July 2019, [...] concerning the refusal of an application for renewal of Mr ZK's 'long-term resident – EU' residence permit

the Verwaltungsgericht Wien (Administrative Court, Vienna) [...] has made the following

ORDER

I. The following questions are referred to the Court of Justice of the European Union for a ruling pursuant to Article 267 TFEU and Article 107 of the Rules of Procedure of the Court of Justice:

1. Must Article 9(1)(c) of Directive 2003/109/EC 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 Community 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 Community 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 Community 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 Community 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 Community 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/EC?
[Or. 3]

II. Pursuant to Article 107(2) of the Rules of Procedure of the Court of Justice, the Administrative Court, Vienna, proposes that the Court of Justice should answer the questions referred for a preliminary ruling as follows:

1. Article 9(1)(c) of Directive 2003/109/EC must be interpreted as meaning that any stay, no matter how short, of a third-country national who is a long-term resident in the territory of the Community during a period of 12

consecutive months precludes loss of the status of long-term resident third-country national.

2. 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 Community for a period of 12 consecutive months, but had neither their habitual residence nor centre of interests there, are incompatible with Article 9(1)(c) of Directive 2003/109/EC.

III. [...] [national procedural law]

Grounds

A. Introduction

1. On 12 August 2019 Mr ZK, born in 1985 and a Kazakh national ('the applicant'), brought, pursuant to Articles 130(1)(1) and 132(1)(1) of the Bundes-Verfassungsgesetz (Federal Constitutional Law; 'B-VG') and within the prescribed period, an action against the [...] decision of the Landeshauptmann für Wien ('the defendant authority') of 9 July 2019. By that decision, the defendant authority had refused the applicant's application of 6 September 2018 for the renewal of his 'long-term resident – EU' residence permit under Paragraph 20(4) of the Niederlassungs- und Aufenthaltsgesetz (Law on establishment and residence; 'NAG'), in conjunction with Paragraph 2 thereof. According to the case file, which is not disputed in this regard, at no time did the applicant reside for 12 consecutive months or longer outside the territory of the Community between August 2013 and August 2018 (or thereafter). The stays in the territory of the Community lasted – as was established, also without dispute, at the hearing – only a few days each year.
2. On 25 October 2019 a public hearing was held before the Administrative Court, Vienna, during which [Or. 4] the applicant's legal representative suggested, following discussion of the legal situation, that several questions on the interpretation of Article 9(1)(c) of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents should be referred to the Court of Justice of the European Union for a preliminary ruling.

B. Relevant legal situation

3. Provisions of EU law:

Articles 8 and [9] of Directive 2003/109/EC are worded as follows:

Article 8

Long-term resident's EC residence permit

- (1) The status as long-term resident shall be permanent, subject to Article 9.
- (2) Member States shall issue a long-term resident's EC 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.
- (3) A long-term resident's EC residence permit may be issued in the form of a sticker or of a separate document. It shall be issued in accordance with the rules and standard model as set out in Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals. Under the heading 'type of permit', the Member States shall enter 'long-term resident – EC'.

Article 9

Withdrawal or loss of status

- (1) Long-term residents shall no longer be entitled to maintain long-term resident status in the following cases:
 - (a) detection of fraudulent acquisition of long-term resident status;
 - (b) adoption of an expulsion measure under the conditions provided for in Article 12;
 - (c) in the event of absence from the territory of the Community for a period of 12 consecutive months. **[Or. 5]**
- (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.
- (3) Member States may provide that the long-term resident shall no longer be entitled to maintain his/her long-term resident status in cases where he/she constitutes a threat to public policy, in consideration of the seriousness of the offences he/she committed, but such threat is not a reason for expulsion within the meaning of Article 12.
- (4) The long-term resident who has resided in another Member State in accordance with Chapter III shall no longer be entitled to maintain his/her long-term resident status acquired in the first Member State when such a status is granted in another Member State pursuant to Article 23.

In any case after six years of absence from the territory of the Member State that granted long-term resident status the person concerned shall no longer be entitled to maintain his/her long-term resident status in the said Member State.

By way of derogation from the second subparagraph the Member State concerned may provide that for specific reasons the long-term resident shall maintain his/her

status in the said Member State in case of absences for a period exceeding six years.

(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.

The said procedure shall apply in particular to the cases of persons that have resided in a second Member State on grounds of pursuit of studies.

The conditions and the procedure for the re-acquisition of long-term resident status shall be determined by national law.

(6) The expiry of a long-term resident's EC residence permit shall in no case entail withdrawal or loss of long-term resident status.

(7) Where the withdrawal or loss of long-term resident status does not lead to removal, the Member State shall authorise the person concerned to remain in its territory if he/she fulfils the conditions provided for in its national legislation and/or if he/she does not constitute a threat to public policy or public security.
[Or. 6]

4. Provisions of national law:

(Emphasis added by the Administrative Court, Vienna)

Paragraph 20 of the NAG is worded as follows:

Period of validity of residence permits
Paragraph 20.

(1) Temporary residence permits shall be issued for a period of 12 months or for a longer duration specified in this federal law, save where a shorter duration of the residence permit is applied for or the travel document does not have the relevant period of validity.

(1a) Residence permits under Paragraph 8(1)(2), (4), (5), (6), (8), (9) or (10) shall be issued for a period of three years where the foreign national:

1. has completed Module 1 of the integration agreement (Paragraph 9 of the Integrationsgesetz (Law on integration); 'IntG') and
2. was established continuously and legally in Austria in the preceding two years,

save where a shorter duration of the residence permit is applied for or the travel document does not have the relevant period of validity.

(2) The period of validity of a residence permit shall begin on the date of issue, and the period of validity of a renewed residence permit, on the date following the final day of the last residence permit, where no more than six months have elapsed since then. Legal residence in Austria in the period between the expiry of the last residence permit and the beginning of the period of validity of the renewed residence permit shall be established of [the competent authority's] own motion by administrative decision and free of charge at the same time as the issuing thereof.

(3) Holders of a 'long-term resident – EU' residence permit (Paragraph 45) 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, in so far as no measures under the Fremdenpolizeigesetz 2005 (2005 Law on policing foreign nationals; 'FPG') are enforceable, is to be renewed, upon application, even after expiry, by way of derogation from Paragraph 24.

(4) A residence permit under subparagraph 3 shall expire if the foreign national resides outside the territory of the 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, [Or. 7] a foreign national may reside outside the territory of the EEA for up to 24 months, if he/she has informed the authorities thereof in advance. Where the foreign national has a legitimate interest, the authority shall declare, upon application, that the residence permit has not expired. It is for the foreign national to prove that he/she resides in the territory of the EEA.

(4a) By way of derogation from the first sentence of subparagraph 4, a 'long-term resident – EU' residence permit which has been issued to the holder of an 'EU Blue Card' residence permit or to his/her family members shall expire only if the foreign national resides outside the territory of the EEA for more than 24 consecutive months.

(5) Subparagraph 4 shall not apply to the holder of a 'long-term resident – EU' residence permit, where

1. his/her spouse, civil partner or parent is an Austrian national who has a contract of employment with an Austrian regional authority and whose place of employment is abroad, or

2. his/her spouse, civil partner or parent is an Austrian national who has a contract of employment with an Austrian body governed by public law and whose place of employment is abroad, in so far as the activity of that body abroad is in the interests of Austria, and

he/she has notified the authority in advance of the intention to give up establishment (Paragraph 2(2)). It is for the foreign national to prove that the

requirements laid down in subparagraphs 5(1) and (2) have been satisfied. A 'long-term resident – EU' residence permit is to be renewed, upon application, even after establishment has been given up.

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 rights. The same shall apply in the event that a foreign national has left the territory of Austria as a consequence of a decision under the FPG that has subsequently been annulled.

C. Applicant's suggestion that infringement proceedings be initiated

5. Following preliminary correspondence with the European Commission's Directorate-General for Migration and Home Affairs, Unit C.2, Legal Pathways and Integration, the applicant's legal representative formally brought, on 29 January 2020, an action concerning far-reaching infringement of Article 9(1)(c) of Directive 2003/109/EC by the Austrian residence authorities and suggested that infringement proceedings be initiated. Inter alia, the [Or. 8] Commission's legal representative stated, by way of information, that the Administrative Court, Vienna, was considering initiating preliminary ruling proceedings pursuant to Article 267 of the Treaty on the Functioning of the European Union ('TFEU').
6. On 18 February 2020 the Commission's expert group on legal migration (Contact Group Legal Migration) met. The purpose of the Contact Group is to promote exchanges of views between the Commission and the Member States on the interpretation and application of EU law. The agenda included items on the interpretation of Articles 5 and 9 of Directive 2003/109/EC.
7. Prior to approval of the minutes and their publication on the Commission website, the Commission communicated the draft minutes to the legal representative and asked to be notified of any request for a preliminary ruling from the Administrative Court, Vienna.

D. Preliminary view of the European Commission

8. As the minutes of the meeting of 18 February 2020 show, the Commission takes the view, as regards the interpretation of Article 9(1)(c) of Directive 2003/109/EC, that the wording (and the condition for loss of the right) '*in the event of absence from the territory of the Community for a period of 12 consecutive months*' is narrow and must be interpreted as meaning that only '*physical absence*' from the territory of the Community for 12 consecutive months is to entail loss of the status of long-term resident third-country national. On the other hand, it is irrelevant whether the long-term resident third-country national was also physically

established in the territory of the Community or had his/her habitual residence there at the material time.

9. As grounds, the Commission stated, with reference to recital 2 of Directive 2003/109/EC, that the purpose of the directive was to grant third-country nationals who are long-term residents a set of uniform rights which are as near as possible to those enjoyed by Union citizens. Therefore, even a short physical stay in the territory of the Community within a 12-month period precludes the application of the condition for loss of the right under Article 9(1)(c) of Directive 2003/109/EC.

E. Reference for preliminary ruling

10. According to the case file, which is not disputed in this regard, at no time did the applicant [**Or. 9**] reside for 12 consecutive months or longer outside the territory of the Community between August 2013 and August 2018 (or thereafter). The stays in the territory of the Community lasted – as is also undisputed – only a few days each year. However, the Commission’s view outlined in the preceding section supports the action. Contrary to what the defendant authority contends, even short stays (of just a few days) of the applicant in the territory of the Community per 12-month period preclude fulfilment of the condition for loss of the right under Article 9(1)(c) of Directive 2003/109/EC. On this view, the applicant continues to enjoy a long-term right of residence in Austria.

F. Urgent preliminary ruling procedure

11. Chapter 2 in Title V of Part Three of the TFEU contains provisions on policies on border checks, asylum and immigration. Under Article 79(1) TFEU, the Union is to develop a common immigration policy aimed in particular at ensuring fair treatment of third-country nationals residing legally in Member States. For this purpose, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, are to adopt measures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification (Article 79(2)(a) TFEU).
12. According to its preamble, Directive 2003/109/EC is based in particular on former Article 63(3) and (4) of the Treaty establishing the European Community (now: Article 79 TFEU).
13. The main proceedings pending before the Administrative Court, Vienna, raise questions concerning the interpretation of the condition for loss of the right under Article 9(1)(c) of Directive 2003/109/EC and thus one of the areas covered by Title V of Part Three of the TFEU. An urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedure of the Court of Justice is therefore permissible.

14. The applicant, who, like his wife and four minor children, was most recently established in the United Kingdom on the basis of a British residence permit valid for several years, has a substantial legal interest in swift clarification of his status in Austria, particularly since he has already made preparations for family reunification procedures under Paragraph 46(1)(2)(a) of the NAG to enable his family members to be reunited in Vienna on ‘Red-White-Red Card plus’ residence permits.
15. This is all the more so as the BREXIT transition regime (subject to an extension which at present is unlikely) expires on 31 December 2020. [Or. 10]
16. Under Paragraph 21(1) of the NAG, the relevant applications must be made abroad, before entering Austrian territory, to the competent local diplomatic services (in this case the Austrian Embassy in London (‘London Embassy’)).
17. On account of the far-reaching measures to contain the COVID-19 pandemic, the London Embassy accepted – according to the submission of the applicant – only applications for visas and residence permits from close relatives of Austrian nationals and other EEA nationals up until 11 August 2020. After being set a relevant time limit for making an application by the London Embassy, the applicant’s family members are, according to the information provided by the applicant, expected to make applications under Paragraph 46(1)(2)(a) of the NAG in the second half of August or the first half of September. For these residence permits to be issued, the applicant’s status as a third-country national who is a long-term resident within the meaning of Directive 2003/109/EC must be maintained.
18. Under Paragraph 38 of the Allgemeines Verwaltungsverfahrensgesetz (General Law on administrative procedure; ‘AVG’) the authority (in this case: the Governor of Vienna) is entitled to assess preliminary questions which arise in the preliminary investigation proceedings, on which other administrative authorities or courts would have to rule as principal issues, in accordance with the view it has itself gained of the relevant circumstances, and to base its decision on that assessment – or to stay proceedings pending a final decision on the preliminary question, where the preliminary question already forms the subject matter of pending proceedings before the competent administrative authority or the court having jurisdiction.
19. In the light of the foregoing, it must be assumed that the Governor of Vienna will suspend the family reunification procedures to be initiated shortly, pending the decision of the Administrative Court, Vienna, in the proceedings.
20. If the Court of Justice were to answer the questions referred to it by the Administrative Court, Vienna, in a standard preliminary ruling procedure, according to the average duration of proceedings (most recently published in the 2018 Annual Report of the Court of Justice),¹ clarification of the questions raised

¹ see https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf

in the following section on the interpretation of Article 9(1)(c) of Directive 2003/109/EC could not be expected until December 2021 / January 2022. The authority's decision on the reunification of the applicant with his wife and children in Vienna which is sought would thus be postponed at least until spring 2022. **[Or. 11]**

21. On the other hand, if the applicant's status could be clarified in an urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedure of the Court of Justice, the Court of Justice could answer the questions referred to it by the Administrative Court, Vienna, as early as this year (the average duration of proceedings in an urgent preliminary ruling procedure most recently was just over three months) and the latter could confirm the applicant's status as a long-term resident third-country national as early as the beginning of 2021. In that case, the authority's decisions on reunification of the applicant's family members could be expected in spring 2021.

[...] [national procedural law]

[...]

Administrative Court, Vienna

[...]