

Case C-624/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 November 2020

Referring court:

Rechtbank Den Haag, zittingsplaats Amsterdam (Netherlands)

Date of the decision to refer:

24 November 2020

Applicant:

E.K.

Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject of the action in the main proceedings

At issue in the main proceedings is whether a right of residence on the basis of Article 20 of the Treaty on the Functioning of the European Union is, by its nature, temporary and therefore precludes the acquisition of a long-term resident's EU residence permit.

Subject and legal basis of the request for a preliminary ruling

Interpretation of Article 20 TFEU and Article 3(2)(e) of Directive 2003/109. Question whether the Member States are competent to determine for themselves whether a right of residence on the basis of Article 20 TFEU is temporary. If that question is governed by Union law, the questions arise 1) whether there is a difference between derived rights of residence on the basis of Directive 2004/38 and on the basis of Article 20 TFEU; 2) whether a derived right of residence on the basis of Article 20 TFEU is temporary, and 3) whether Directive 2003/109 has been correctly transposed into Netherlands law.

Questions referred

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 a non-temporary nature, or should it be interpreted in conformity with Union law?
2. If interpretation must be in conformity with Union law, does a distinction [then] exist, when applying Directive 2003/109/EC, between the various dependents' residence rights to which third-country nationals are entitled on the basis of Union law, including the dependent's right of residence granted to a family member of a Union citizen on the basis of the Residence Directive 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?

Provisions of Union law cited

Treaty on the Functioning of the European Union: Article 20

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): Article 3(2)(e).

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): Articles 7, 16.

Provisions of national law cited

Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000; 'Vw 2000'): Article 8(e), Article 14 and Article 45b.

Brief summary of the facts and the procedure in the main proceedings

- 1 The applicant was born on 30 November 1960 and has Ghanaian nationality. Her son, born on 10 February 2002, has Netherlands nationality.
- 2 On 9 September 2013, on the basis of Article 20 TFEU, the applicant was granted an EU residence document bearing the endorsement 'Family member of a citizen of the Union'. Since 2017, this is also referred to in the Netherlands as a Chavez-Vilchez right of residence.¹
- 3 On 18 February 2019, the applicant submitted an application for a long-term resident's EU residence permit.
- 4 By decision of 30 August 2019, the defendant rejected the applicant's application for a long-term resident's EU residence permit and for an ordinary fixed-term residence permit. The objection lodged against that rejection was declared unfounded by decision of 12 December 2019.
- 5 On 8 January 2020, the Rechtbank (District Court) received the applicant's notice of appeal against that decision.

Main submissions of the parties to the main proceedings

- 6 According to the defendant, it follows from the Singh,² Chavez-Vilchez³ and K.A.⁴ judgments that it is within the competence of the Member States to determine the rights and conditions of legal residence in their territory. It is therefore for the Member State to determine whether or not the right of residence on the basis of Article 20 TFEU should be deemed to be temporary.
- 7 The defendant further claims that the applicant does not fall within the scope of Directive 2003/109. A right of residence on the basis of Article 20 TFEU is, by its nature, temporary, since such a right of residence ceases as soon as the Union citizen's dependence on the third-country national ceases. It therefore constitutes residence on temporary grounds within the meaning of Article 3(2)(e) of Directive 2003/109.
- 8 The Chavez-Vilchez right of residence is of a temporary nature because that right of residence does not concern the rights of the applicant, but the rights of her child. The aim is to ensure that the applicant's child does not have to leave the

¹ Reference to the judgment of the Court of Justice of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354.

² Judgment of 18 October 2012, C-502/10, EU:C:2012:636, paragraphs 39-42.

³ Chavez-Vilchez judgment, paragraph 64.

⁴ Judgment of 8 May 2018, C-82/16, EU:C:2018:308, paragraphs 53-54.

European Union. The right of residence is based on the relationship of dependency between the applicant and her minor child, which is, by definition, of a temporary nature. As a result, the applicant does not qualify for a national ordinary fixed-period residence permit.

- 9 The applicant claims, first, that it does not follow from the *Chavez-Vilchez* and *K.A.* judgments that it is for the Member States to determine the nature of the right of residence. The term ‘temporary right of residence’ must be interpreted uniformly within the Union. The applicant refers in that regard to the *Singh* judgment.
- 10 The applicant further claims that it does not follow from Directive 2003/109 that her derived right of residence is temporary. Only rights of residence which are clearly defined in advance as being temporary, such as rights of residence of students and au pairs, are excluded from that Directive. It does not follow from Directive 2003/109 that it is only in the case of autonomous, independent residence permits that a long-term resident’s EU residence permit must be granted.
- 11 In addition, she claims that the possible ending of the dependency relationship in the future does not make her right of residence temporary. After all, her intention is to settle permanently. She does therefore fall within the scope of Directive 2003/109. In her view, the rejection of her application is contrary to Article 3 of that Directive.
- 12 The applicant further argues that the defendant is not competent to refuse her a permit. According to Article 45b(1)(a) of the Vw 2000, a long-term resident’s EU residence permit can only be refused if the person concerned has a temporary residence permit on the basis of Article 14 of the Vw 2000. The applicant does not hold a national residence permit but has an EU right of residence. None of the grounds for refusal laid down in Article 45b Vw 2000 are present and the defendant was therefore not entitled to refuse the application.

Brief summary of the reasons for the referral

- 13 The answer to the question of whether the right of residence on the basis of Article 20 TFEU is of a temporary nature is important in determining whether the defendant was entitled to reject the applicant’s application for a long-term resident’s EU residence permit.
- 14 According to the Rechtbank, that question cannot be answered without reasonable doubt. In the case-law of the Court of Justice, the Rechtbank has found indications that the right of residence on the basis of Article 20 TFEU is not of a temporary nature. By contrast, on 23 September 2020 (NL:RVS:2020:2272), the Afdeling bestuursrechtspak (Administrative Jurisdiction Division) of the Raad van State (Council of State) held that a right of residence derived from a minor child terminates, in principle, as soon as the child reaches the age of majority or as soon

as the child is no longer dependent on the care of the third-country national. According to the Raad van State, it is thus established in advance that the right of residence is temporary.

Do Member States have the competence to determine the nature of the right of residence?

- 15 First of all, the parties are divided on the question of whether the nature of the right of residence on the basis of Article 20 TFEU is a national matter or whether it must be interpreted in conformity with Union law. The Rechtbank sees no indications in the judgments of the Court of Justice referred to by the defendant that the interpretation of the nature of that right of residence is a matter of national law. In fact, according to the Rechtbank, it follows from that case-law that the question of whether a right of residence on the basis of Article 20 TFEU is of a temporary nature, must be interpreted uniformly within the European Union. It follows from those judgments that the determination of the rules governing a right of residence on the basis of Article 20 TFEU is a national matter, but not that the determination of the nature of the right of residence is also a national matter. As the Court of Justice considered in paragraph 54 of the *K.A.* judgment, those are rules of a procedural nature, such as rules on the way in which a third-country national can show that he is entitled to a Chavez-Vilchez right of residence. However, the question of whether the right of residence is of a temporary nature goes to the heart of the matter. The Rechtbank therefore questions whether it would be desirable for this to be decided by the Member States. After all, that would mean that a right of residence on the basis of Article 20 TFEU could lead to a permit on the basis of Directive 2003/109 being granted in one Member State and not in another Member State. That would create undesirable legal inequality. That is why the Rechtbank raises question 1.
- 16 If the Court of Justice were to determine that the nature of the right of residence is a question governed by Union law, the Rechtbank asks the Court of Justice to answer the following questions as well.

Is the right of residence on the basis of Article 20 TFEU of a temporary nature?

– *Derived rights of residence*

- 17 The defendant has taken the position that the fact that the right of residence on the basis of Article 20 TFEU is derived from the rights of a Union citizen, means that such a right of residence can never lead to permanent residence. That right exists only in order to ensure that the Union citizen does not have to leave the territory of the Union. It does not create any autonomous rights.

- 18 The Rechtbank finds that the Court of Justice has held in various judgments⁵ that European Union law does not confer any autonomous rights on third-country nationals. Any rights conferred on them by the Treaty provisions on citizenship of the Union are not autonomous rights, but rights derived from the exercise of the right of a citizen of the Union to move and reside in the Union. That applies not only to rights derived from Article 20 TFEU, but also to rights derived from Directive 2004/38 (judgments in *Eind*,⁶ *Dereci*,⁷ *Lida*,⁸ *O. and B.*⁹ and *Rendón Marín*¹⁰).
- 19 However, the derived rights conferred on the basis of Directive 2004/38 on a third-country national who is a member of the family of a citizen of the Union may lead to permanent residence (see Article 16 of that Directive). That is subject to the condition that the third-country national who is a family member of a Union citizen has, like the Union citizen himself, had five years of legal residence in the host Member State on the basis of article 7 of Directive 2004/38.
- 20 The question is therefore whether a distinction can be made between derived rights on the basis of directives and derived rights on the basis of Article 20 TFEU. In his Opinion in *Rendón Marín* and *CS*,¹¹ the Advocate General also referred to possible inconsistencies in the treatment of the derived right of residence, depending on whether that right flows from Directive 2004/38 or from Article 20 TFEU, as interpreted in *Ruiz Zambrano*.¹²
- 21 On the other hand, the Rechtbank notes that the Member States themselves created the derived right of residence on the basis of Directive 2004/38. Furthermore, they themselves also agreed that third-country nationals who are members of the family of a citizen of the Union may be eligible for permanent residence on the basis of Directive 2004/38. Those rights are in fact laid down in Directive 2004/38. However, the derived right of residence on the basis of Article 20 TFEU has been developed in the case-law of the Court of Justice. That could be indicative of a difference in treatment between those derived rights of residence. The Rechtbank questions whether that is desirable. Moreover, the fact

⁵ *Chavez-Vilchez* judgment, paragraph 62; judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraphs 72 and 73, and 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraphs 27 and 28.

⁶ Judgment of 11 December 2007, C-291/05, EU:C:2007:771, paragraph 23.

⁷ Judgment of 15 November 2011, C-256/11, EU:C:2011:734, paragraph 55.

⁸ Judgment of 8 November 2012, C-40/11, EU:C:2012:691, paragraphs 66-68.

⁹ Judgment of 12 March 2014, C-456/12, EU:C:2014:135, paragraph 36.

¹⁰ Judgment of 13 September 2016, C-165/14, EU:C:2016:675, paragraph 36.

¹¹ Opinion of Advocate General Szpunar in the *Rendón Marín* and *CS* cases, C-165/14 and C-304/14, EU:C:2016:75, paragraph 152.

¹² Judgment of 8 March 2011, C-34/09, EU:C:2011:124.

that other derived rights of residence may lead to permanent residence is, in the view of the Rechtbank, an indication that the mere fact that the right of residence on the basis of Article 20 TFEU is a derived right of residence is not in itself sufficient to establish that it is, by its nature, a temporary right of residence.

– *Directive 2003/109*

- 22 It is settled case-law of the Court of Justice that the content of the concept of ‘legal residence’ in Directive 2003/109 and the conditions or rights pertaining thereto may be determined by the Member States.¹³ If a third-country national has had five years of continuous legal residence prior to the application, a permit may be granted on the basis of that Directive. According to Article 3(2)(e) of Directive 2003/109, that Directive does not apply to third-country nationals who reside in a Member State 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.
- 23 It follows from the *Singh* judgment (paragraphs 45-50) that, in order to determine the nature of the right of residence, it is important to assess whether the third-country national has any intention to settle on a long-term basis in the Member State concerned. If that is the case, it is an indication that the right of residence is not of a temporary nature.
- 24 The examples given in Directive 2003/109 have in common that the third-country national concerned does not have any intention to settle in the Member State on a long-term basis. In each of those cases, the residence is of limited duration, with no close links being established with the Member State and the links with the country of origin being maintained.¹⁴
- 25 In determining whether a right of residence is of a temporary nature, the intention of the third-country national to settle in a country is therefore important. The question is why that would be any different for a right of residence on the basis of Article 20 TFEU than for any other right of residence that could lead to an EU right of residence.
- 26 Indeed, according to Directive 2003/109, the intention of the third-country national to establish himself permanently in the Member State must be taken into account. The aim of that Directive is, in fact, the integration of third-country nationals in the Member State of residence. In the case of a right of residence on the basis of Article 20 TFEU, the third-country national has acquired the right of residence in order to ensure that the Union citizen can effectively exercise his

¹³ See, for example, the *Singh* judgment, paragraph 39.

¹⁴ See also the Opinion of Advocate General Bot in the *Singh* case, C-502/10, EU:C:2012:294, paragraph 48.

citizenship rights. In practice, however, the consequence of this is that the third-country national also undertakes activities which enable him or her to participate in society on a long-term basis, such as entering into employment contracts of indefinite duration, purchasing a house and investing time in building up and maintaining a social network. Moreover, in the case of a right of residence on the basis of Article 20 TFEU, the third-country national who is the parent of a Union citizen will, precisely because of the child who is a Union citizen – who, inter alia, goes to school, makes friends and plays sport in the Member State – establish strong and lasting links with the Member State. The integration of the parent in the Member State is, in fact, an important part of the child's upbringing there.

- 27 Even in the defendant's assertion that the relationship of dependency ends at some point in the future, namely, when the child who is a Union citizen reaches the age of eighteen, and the right of residence is therefore of a temporary nature, the Rechtbank does not at this stage see any basis for the conclusion that a right of residence on the basis of Article 20 TFEU is, by its nature, temporary. It is thus unclear whether the aforementioned right of residence does in fact end as soon as the child who is a Union citizen reaches the age of eighteen. It is conceivable that an eighteen-year-old child who is still attending school may still have a relationship of dependency with his or her carer parent. Furthermore, there are other grounds for residence that may cease to exist at some point. Not all of those grounds for residence are of a temporary nature.
- 28 In view of the doubts that exist on the question of whether the right of residence on the basis of Article 20 TFEU is temporary in nature, the Rechtbank raises question 2 and question 3.

Has Article 3(2)(e) of Directive 2003/109 been correctly transposed into Netherlands law?

- 29 If the answer to the third question is in the affirmative, the following is important.
- 30 Article 3(2)(e) of Directive 2003/109 was transposed into Netherlands law by Article 45b of the Vw 2000. According to that Article, a temporary right of residence on the basis of a residence permit for a fixed period as referred to in Article 14 of the Vw 2000 (i.e. a national residence permit for a fixed period) is a ground for refusal of an EU permit as a long-term resident. A right of residence on the basis of Article 20 TFEU is not covered by that provision; after all, it is a right of residence on the basis of EU law. According to the Rechtbank, that means that Article 3(2)(e) of Directive 2003/109 has not been correctly transposed. The Netherlands appears to have chosen to interpret Article 3(2)(e) of the Directive in a more restrictive manner than is permissible.
- 31 The question is how the Rechtbank should deal with this. According to settled case-law of the Court of Justice, although a directive has been incorrectly transposed and the national court has to interpret it in conformity with the directive, that interpretation in conformity with the directive cannot serve as the

basis for an interpretation of national law *contra legem*.¹⁵ In the present case, national law appears to be more favourable to the third-country national than Directive 2003/109. Under national law, rights of residence which are of a temporary nature but are based on Union law cannot result in the refusal of a long-term resident's EU permit, whereas on the basis of that Directive, those rights of residence in fact exclude the third-country national from the scope of application of that Directive. The Rechtbank therefore asks the Court of Justice to give a preliminary ruling on question 4 as well.

WORKING DOCUMENT

¹⁵ Judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25.