

Anonymised version

Translation

C-130/24 – 1

Case C-130/24

Request for a preliminary ruling

Date lodged:

16 February 2024

Referring court:

Verwaltungsgericht Düsseldorf (Germany)

Date of the decision to refer:

16 January 2024

Applicant:

YC

Defendant:

Stadt Wuppertal

8 K 8657/22

ORDER

In the administrative proceedings in the case of
Ms YC, [...]

applicant,

[...]:

v

Stadt Wuppertal, [...]

defendant,

c o n c e r n i n g Law relating to foreign nationals (residence for family purposes)
in the present case: right of residence under Article 20 TFEU

on 16 January 2024
[...],
[the] Eighth Chamber
of the
Verwaltungsgericht
Düsseldorf
(Administrative Court,
Düsseldorf, Germany)

made the following

o r d e r:

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

- 1. Does the right of residence under Article 20 TFEU depend on whether a visa procedure, which is required by law for the issue of a national residence permit, can reasonably be carried out at a later stage within a short period of time that can be reliably limited?**
- 2. Does the right of residence under Article 20 TFEU arise by virtue of EU law, with the result that that right only needs to be certified by the national authorities, or must such a right of residence be granted constitutively by the national authorities?**
- 3. In the event that the right of residence arises automatically by virtue of EU law: at which point in time does the right arise?**
- 4. In the event that the right of residence must be granted by national authorities: at which point in time must it be granted with retroactive effect?**

G r o u n d s

I.

- 1 The applicant, who was born on 6 February 1988, is a national of the Republic of Cameroon. She holds a passport which is valid until 23 March 2028.

- 2 On 25 September 2019, the applicant was issued with a national visa for study purposes (visa category D) by the Polish diplomatic mission abroad, which was valid until 23 September 2020. She entered the Schengen area with that visa on 28 September 2019 and began a course of study in Poland.
- 3 Subsequently, the applicant travelled from Poland to Germany and, on 1 August 2020, she registered herself in the jurisdiction of the defendant (Ausländerbehörde (Authority responsible for foreign nationals)). She intended to take up employment in the Bundesfreiwilligendienst (Federal Volunteer Service) on 1 October 2020 and asked the defendant by telephone about the options available to her.
- 4 The defendant asked the applicant to leave the territory and issued her with a border crossing certificate after the applicant had indicated her intention to leave the territory voluntarily. On 6 November 2020, the applicant was issued with a written request to leave the territory without delay.
- 5 The applicant did not leave Germany. However, she could no longer be contacted by the authorities at the address which she had provided. It was not until 23 June 2021 that the applicant again made contact with the defendant.
- 6 On 24 September 2021, the applicant's child was born. That child has German citizenship derived from the father.
- 7 The applicant lives with her child in the same household. The child's father has little contact with his child. He visits the child only on weekends and pays child maintenance in the amount of EUR 200.00 per month. In addition, for occupational reasons, the father of the child is unable to care for his child for periods of several weeks. The applicant has sole custody of the child.
- 8 On 12 April 2022, the applicant applied for a residence permit for the purpose of care and custody.
- 9 The defendant refused that application. Consequently, on 13 December 2022, the applicant brought an action.
- 10 In the course of the judicial proceedings, the defendant has contended that the issue of a residence permit is precluded. The applicant disappeared between December 2020 and the end of June 2021. It maintains that she has therefore committed an offence under point 2 of Paragraph 95(1) of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal territory, 'the AufenthG'). According to the defendant, it follows that there is an interest in expulsion under point 2 of Paragraph 5(1) of the AufenthG, which precludes the issue of a residence permit and from which there may be no derogations. In addition, a condition for the issue of a residence permit is entry with the required visa. That condition, it argues, has not been satisfied. According to the defendant, it is reasonable for the applicant to carry out the visa

procedure belatedly, which would take less than one month. She could leave the country together with her German child and complete the visa procedure in Cameroon. Doing so would not jeopardise the best interests of the child. It contends that, furthermore, the conditions for a right of residence under Article 20 TFEU are not satisfied. If they were to leave the territory together to carry out the visa procedure belatedly, the German national, who is not subject to compulsory education, would have to leave the territory of the European Union for only a short period of time and therefore the substance of the right would not be affected by that departure. An interruption of contact with the child's father for less than one month is considered to be acceptable.

- 11 By an interim (non-final) judgment of 23 November 2023, the defendant was ordered to issue the applicant with a residence permit under point 3 of the first sentence of Paragraph 28(1) of the AufenthG from the date of the judgment.
- 12 The dispute is thus still pending before the referring court in so far as it is claimed that the applicant also has a right of residence for the period prior to 23 November 2023. Under national law, a residence permit cannot be issued for the period before 23 November 2023.

II.

1.

- 13 The relevant legal framework of the case consists of the following provisions:

EU Law

Article 20 of the Treaty on the Functioning of the European Union (TFEU)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

- (a) the right to move and reside freely within the territory of the Member States;
- (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

National law

The AufenthG, available at https://www.gesetze-im-internet.de/aufenthg_2004/AufenthG.pdf/ and, in its English-language version, at https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.pdf.

Paragraph 5 of the AufenthG – General conditions of issue

- (1) A residence permit shall in general be issued on condition that:
 1. means of subsistence are ensured,
 - 1a. the foreign national's identity and, if he or she is not entitled to return to another State, nationality are established,
 2. there is no interest in expulsion,
 3. in so far as the foreign national has no entitlement to the issue of a residence permit, the foreign national's residence does not impair or jeopardise the interests of the Federal Republic of Germany for any other reason, and
 4. the passport requirement under Paragraph 3 is fulfilled.
- (2) The issue of a residence permit, an EU Blue Card, an ICT card, a settlement permit or a permanent EU residence permit is also subject to the condition that the foreign national:
 1. entered with the required visa and
 2. has already provided the relevant information for the issue of the permit in the visa application.

Those requirements may be waived where the substantive requirements for the grant of a residence permit are satisfied or where, having regard to the particular circumstances of the case, it would be unreasonable to carry out the procedure for the grant of a visa at a later stage. ...

Paragraph 27 of the AufenthG – Principle of family reunification

- (1) For the purpose of protecting marriage and the family in accordance with Article 6 of the Grundgesetz (Basic Law), residence permits may be

issued to and extended for foreign nationals who are family members in order to establish and maintain family life within the Federal territory (family reunification).

...

(3) A residence permit for the purpose of family reunification may be refused if the person with whom the family reunification is to take place is dependent on benefits under Book II or Book XII of the Sozialgesetzbuch (Social Code) to support other family members or other members of the household. Point 2 of paragraph 5(1) may be waived.

Paragraph 25 of the AufenthG – Residence on humanitarian grounds

...

(5) A residence permit may be issued to a foreign national who is subject to an enforceable obligation to leave the territory if his or her departure is not possible for legal or factual reasons and the obstacles to his or her departure are not likely to disappear in the foreseeable future. ...

Paragraph 28 of the AufenthG – Family reunification to join German nationals

(1) A residence permit is to be issued to the foreign

1. spouse of a German national,
2. unmarried minor child of a German national,
3. parent of an unmarried minor German national for the purpose of care and custody,

if the German national has his or her habitual residence in the Federal territory. By way of derogation from point 1 of Paragraph 5(1), a residence permit must be issued in the cases referred to in points 2 and 3 of the first sentence. As a general rule, by way of derogation from point 1 of Paragraph 5(1), it should be issued in cases covered by point 1 of the first sentence.

Paragraph 54 of the AufenthG – Interest in expulsion

...

(2) The interest in the expulsion in accordance with Paragraph 53(1) shall be significant if the foreign national

...

9. has committed an infringement, other than an isolated or minor infringement, of legal provisions or of judicial or administrative decisions or orders; or has committed outside the Federal territory an offence which is regarded as a serious intentional offence within the Federal territory.

Paragraph 95 of the AufenthG – Penal provisions

- (1) Any person who
 - ...
 - 2. resides in the Federal territory without the necessary residence permit as required under the first sentence of Paragraph 4(1), where
 - (a) he or she is subject to an enforceable requirement to leave the territory,
 - (b) he or she has not been granted a period within which to leave or that period has expired, and
 - (c) his or her deportation has not been suspended,
 - ...
- shall be liable to a custodial sentence of up to one year or a fine.

2.

- 14 The legal proceedings must be stayed. Pursuant to Article 267 TFEU, a preliminary ruling on the questions set out in the operative part of the order must be requested from the Court of Justice of the European Union (Court of Justice). Those questions concern the interpretation of Article 20 TFEU. Since the questions concern the interpretation of EU law, the Court of Justice has jurisdiction.
- 15 The questions referred for a preliminary ruling are material to the decision and require clarification by the Court of Justice.
- 16 For the purposes of the legal assessment of the subject matter of the dispute which is still pending, as to whether the applicant also has a right of residence for the period before 23 November 2023 (date of the interim judgment), it is essential to ascertain whether a right of residence arose under Article 20 TFEU, whether that right of residence arises automatically by virtue of EU law and from what point in time it arose.
- 17 The court is convinced that national law precludes the issue of a residence permit under the AufenthG before 23 November 2023. Until that date, there was an interest in expulsion within the meaning of point 9 of Paragraph 54(2) of the AufenthG as a result of the offence committed under point 2 of Paragraph 95(1) of

the AufenthG. That was the case until 23 November 2023, and therefore the general condition of issue laid down in point 2 of Paragraph 5(1) of the AufenthG was not satisfied. The court believes that it is only after 23 November 2023 that that condition could have been waived. The issue of a residence permit on humanitarian grounds under Paragraph 25(5) of the AufenthG was also precluded for that reason.

Question 1:

- 18 Some national case-law is based on the premiss that the conditions for a right of residence under Article 20 TFEU are satisfied only if a visa procedure cannot reasonably be carried out at a later stage within a short period of time that can be reliably limited,

Bundesverwaltungsgericht (Federal Administrative Court, Germany; 'BVerwG'), judgment of 12 July 2018 – 1 C 16.17 – ECLI:DE:BVerwG:2018:120718U1C16.17.0, paragraph 35; also Oberverwaltungsgericht Magdeburg (Higher Administrative Court, Magdeburg, Germany; 'OVG'), order of 21 September 2022-3 M 68/22 – ECLI:DE:OVGST:2022:0921.2M68.22.00, paragraph 12: A right of residence under EU law in accordance with Article 20 TFEU is excluded where the foreign national is required to leave the territory of the European Union only for a short period of time that can be reliably limited in order to complete the visa procedure.

- 19 Reference is made to the judgment in *K.A.* in support of that finding. In that case, the Court of Justice held that the objective pursued by Article 20 TFEU would be defeated if a third-country national were compelled to leave, for an indefinite period, the territory of the European Union,

judgment of the Court of Justice of 8 May 2018, C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraph 57.

- 20 It is therefore inferred – including by the defendant –, *a contrario*, that leaving the territory of the European Union for a short period of time which can be reliably limited does not undermine the right under Article 20 TFEU and that the substance of the right is not affected.

- 21 The referring court has doubts in that regard. Those doubts are based on the fact that, on the one hand, in the judgment in *K.A.*, cited above, the Court of Justice did not answer the fourth question referred for a preliminary ruling (4(d)) and therefore the conclusion to the contrary drawn by the authority with responsibility for foreign nationals and in some national case-law is not binding. In that case, it was expressly asked whether the obligation to lodge a request ... in the country of origin, with the consequence that the Union citizen would, if necessary, have to leave the territory of the European Union in its entirety for a limited time, was a relevant factor. The decision was also taken in the particular situation of an existing entry ban in accordance with Article 11 of Directive 2008/115/EC of the

European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

- 22 By contrast, in its judgment in *XU*, the Court of Justice seems to emphasise that, in order for a right of residence derived from Article 20 TFEU to be recognised, it is sufficient only that it is established that no right of residence, under national law or secondary EU law, may be granted to a third-country national who is a family member of a Union citizen, provided that there is a relationship of dependency between that third-country national and that Union citizen such as would result in that Union citizen being obliged to leave the territory of the European Union in the event of removal of his or her family member, who is a third-country national, from that territory,

judgment of the Court of Justice of 5 May 2022, C-451/19, *XU and QP*, ECLI:EU:C:2022:354, paragraph 48.

- 23 The issue of a residence permit under point 3 of the first sentence of Paragraph 28(1) of the *AufenthG* for the purposes of family reunification necessarily requires, in accordance with point 1 of the first sentence of Paragraph 5(2) of the *AufenthG*, that the third-country national has previously entered the territory with the required visa, and therefore a visa for the purposes of family reunification. The second sentence of Paragraph 5(2) of the *AufenthG* provides for an exception to that requirement if, having regard to the particular circumstances of the case, it would be unreasonable to carry out the procedure for the grant of a visa at a later stage. Therefore, if the authority considers that it is reasonable to complete the visa procedure, in particular because that procedure can be reliably carried out at a later stage within a short period of time, the issue of a residence permit is precluded under national law. Consequently, Article 20 TFEU is applicable in principle.
- 24 In that context, it should also be noted that Article 20 TFEU, as a consequence of the status of citizen of the Union, confers a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation. That right is worthless without a right to enter the territory of the European Union,

judgments of the Court of Justice of 27 April 2023, C-528/21, *M.D.*, ECLI:EU:C:2023:341, paragraph 59, and of 22 June 2023, C-459/20, *X*, ECLI:EU:C:2023:499, paragraph 30.

- 25 In addition, under a principle of international law, which the law of the European Union cannot be found to infringe, a Member State must not refuse its own nationals the right to enter its territory and remain there; those nationals thus enjoy an unconditional right of residence,

judgment of the Court of Justice of 22 June 2023, C-459/20, X, ECLI:EU:C:2023:499, paragraph 41.

Question 2:

- 26 The national case-law is based primarily on the premiss that the right of residence under Article 20 TFEU arises directly by virtue of EU law and must therefore only be certified by the national authorities,

BVerwG, judgment of 12 July 2018 – 1 C 16.17 – ECLI:DE:BVerwG:2018:120718U1C16.17.0, paragraph 34: ‘*sui generis*’ right of residence; OVG Koblenz (Higher Administrative Court, Koblenz, Germany), orders of 13 January 2021 – 7 D 11208/20 – ECLI:DE:OVGRLP:2021:0113.7D11208.20.00, paragraph 24, and of 23 September 2021 – 7 A 10337/21 – ECLI:DE:OVGRLP:2021:0923.7A10337.21.00, paragraph 9; Verwaltungsgericht Brennen (Administrative Court, Brennen, Germany; ‘VG’), judgment of 30 May 2022 – 4 K 2202/19 – ECLI:DE:VGHB:2022:0530.4K2202.19.00, paragraph 36, Fleuß, ‘Unionsbürgerschaft und Freizügigkeit’, in *VerwArch* 2022, 201(243); also in respect of Austria, Oberster Gerichtshof (Supreme Court, Austria), judgments of 13 September 2017 – 10 ObS 64/17k –, and of 21 January 2020 – 10 ObS 178/19k – at ris.bka.gv.at.

- 27 The referring court has doubts in that regard. It is inclined to take the view that the right under Article 20 TFEU does not arise directly by virtue of EU law, but must first be conferred or granted constitutively by the national authorities,

VG Düsseldorf (Administrative Court, Düsseldorf, Germany), judgment of 29 October 2020 – 8 K 5234/19 – ECLI:DE:VGD:2020:1029.8K5234.19.00, paragraph 85; similarly VG Munich (Administrative Court, Munich, Germany), judgment of 12 October 2021 – M 4 K 20.2386 – ECLI:DE:VGMUENC:2021:1012.M4K20.2386.00, paragraph 102.

- 28 In that regard, the referring court considers that it has identified differences in the case-law of the Court of Justice as to how rights of residence under EU law are created.

- 29 With regard to the right of association and the rights conferred by Articles 6 and 7 of Decision No 1/80 of the Council of Association, the Court of Justice emphasises in respect of the Turkish worker ‘the existence, at least at that time, of a right of residence’, and that just the social rights granted necessarily ‘imply’ this,

judgment of the Court of Justice of 20 September 1990, C-192/89, *Sevince*, ECLI:EU:C:1990:322, paragraph 29, with regard to Article 6 of Decision No 1/80, in German: ‘ein Aufenthaltsrecht zusteht’; in French: ‘l’existence ... d’un droit de séjour’.

- 30 In that sense, the right also exists by virtue of EU law in the case of Article 7 of Decision No 1/80 of the Council of Association. The following was held in the judgment in *Bekleyen*: ‘necessarily imply the existence of a concomitant right of residence for that child’,

judgment of the Court of Justice of 21 January 2010, C-462/08, *Bekleyen*, ECLI:EU:C:2010:30, paragraph 17, in French: ‘l’existence d’un droit corrélatif de séjour’; in German: ‘setzen zwangsläufig das Bestehen eines entsprechenden Aufenthaltsrechts des Betroffenen voraus’.

- 31 In addition, in the judgment in *Baumbast*, which concerned rights of residence under Article 12 of the former Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, the Court of Justice also stated that Article 12 of Regulation (EEC) No 1612/68 ‘[entitles] the parent who is the primary carer of those children, irrespective of his nationality, to reside with them’,

judgment of the Court of Justice of 17 September 2002, C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493, paragraph 75.

- 32 The situation is similar in the judgment in *Chen*, which concerned a situation with a cross-border dimension. With regard to the former Article 18 of the EC Treaty and Council Directive 90/364/EEC of 28 June 1990 on the right of residence, the Court of Justice held: Where EU law grants the child a right of residence, it is ‘those same provisions’ which ‘allow’ a parent ‘to reside with the child in the host Member State’,

judgment of the Court of Justice of 19 October 2004, C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, paragraph 46, in French: ‘ces mêmes dispositions permettent au parent’; in German: ‘dieselben Vorschriften es dem Elternteil ... erlauben’.

- 33 By contrast, in the judgment in *Ruiz Zambrano*, the Court of Justice initially established a negative criterion. In that case it held that Member States are ‘preclude[d]’ from refusing a right of residence and a work permit. In the referring court’s view, that is different in nature to the rights of residence under EU law referred to above, such as those under Articles 6 and 7 of Decision No 1/80 of the Council of Association. Clearly, that right is not automatic. It is not implied and does not directly permit residence, since Member States may have the right to refuse a right of residence,

judgment of the Court of Justice of 8 March 2011, C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, paragraph 45.

- 34 In the judgment in *Chavez-Vilchez*, the Court of Justice also refers to a refusal of a right of residence,

judgment of the Court of Justice of 10 May 2017, C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, paragraph 72, in German: ‘bei der Verweigerung dieses Aufenthaltsrechts’; in French: ‘dans le cas d’un tel refus’.

- 35 At the same time, positive wording is used in respect of the competence of the Member States (‘precluding a Member State’): ‘from providing ... the right of residence’,

judgment of the Court of Justice of 10 May 2017, C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, paragraphs 73 and 78; similarly, judgment of the Court of Justice of 5 May 2022, C-451/19, *XU and QP*, ECLI:EU:C:2022:354, paragraph 48: in principle, [Article 20 TFEU] requires the Member State concerned to recognise that that third-country national has a derived right of residence.

- 36 Accordingly, the second question asks whether it falls within the competence of the Member States to ‘grant’ a right of residence under Article 20 TFEU, thus whether that right has not already arisen by virtue of EU law.

Questions 3 and 4:

- 37 If the right of residence arises by virtue of EU law, the referring court asks from what point in time that right arises.

- 38 In that regard, the question arises, first, whether the creation of a right requires an application. The Court of Justice appears to refer to such an application in the judgment in *K.A.*,

judgment of the Court of Justice of 8 May 2018, C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraph 57: ‘It is the duty [of that authority], on the contrary, to examine that application and to assess whether there exists, between the third-country national and Union citizen concerned, a relationship of dependency’.

- 39 However, it is also conceivable that the applicant’s right of residence has already arisen from the birth of the child. It also appears possible that the right arises once it has been established that a right of residence under national law or secondary EU law cannot be granted, for example by means of a prior decision – which may be mandatory – by the national authorities.

- 40 Ultimately, those questions are also raised where the right does not arise by virtue of EU law, but only by a national decision to create the right under Article 20 TFEU. Here too, the question must be answered as to the point in time from which the right must be granted retroactively.

- 41 The order is not open to appeal.

[...] [signature note]