

Case C-829/21

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 December 2021

Referring court:

Hessischer Verwaltungsgerichtshof (Germany)

Date of the decision to refer:

17 December 2021

Applicants:

TE

RU, represented for legal purposes by TE

Defendant:

Stadt Frankfurt am Main

Subject matter of the main proceedings

Right of residence – Third-country nationals who are long-term residents – Directive 2003/109/EC – Renewal of a residence permit in a Member State other than the one which granted long-term resident status – Requirements – National authority’s power of review – Scope – Mutual recognition

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Paragraph 38a(1) of the Aufenthaltsgesetz (Law on residence; ‘the AufenthG’), which, under national law, must be interpreted as meaning that an onward-migrating long-term resident must also have long-term resident status in

the first Member State at the time of renewal of his or her residence permit, consistent with the provisions of Article 14 et seq. of Directive 2003/109/EC, which merely provide that a long-term resident has the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the other conditions set out in Chapter III of the directive are met?

2. When deciding on an application for renewal under Paragraph 38a(1) of the AufenthG, is the Ausländerbehörde (authority responsible for foreign nationals) entitled under the provisions of Article 14 et seq. of Directive 2003/109/EC, where the other requirements for a temporary renewal are met and the foreign national has, in particular, stable and regular resources, to establish – in such a way as to deprive that foreign national of his or her rights – that he or she has in the meantime, that is to say, after moving to the second Member State, lost his or her status in the first Member State in accordance with the second subparagraph of Article 9(4) of Directive 2003/109/EC? Is the relevant point in time for that decision the date of the most recent decision of an authority or court?

3. If Questions 1 and 2 are answered in the negative:

Does the long-term resident bear the burden of proving that his or her right of residence as a long-term resident in the first Member State has not expired?

If that question is answered in the negative, is a national court or authority entitled to review whether the residence permit granted to the long-term resident for an unlimited period is no longer valid, or would this be contrary to the principle of mutual recognition of administrative decisions under EU law?

4. Can a lack of evidence of appropriate accommodation be held against a third-country national who has entered Germany from Italy on the basis of a long-term resident's residence permit granted for an unlimited period and who has stable and regular resources, even though Germany has not made use of the authorisation in the second subparagraph of Article 15(4) of Directive 2003/109/EC, and it was necessary to place that third-country national in social housing only because no child benefit will be paid to her as long as she does not hold a residence permit under Paragraph 38a of the AufenthG?

Provisions of EU law relied on

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Article 9(4) and Article 14(1) and (2)

Provisions of national law relied on

Aufenthaltsgesetz (Law on residence; ‘the AufenthG’), Paragraph 2(4), point 1 of Paragraph 5(1), Paragraph 9a(1) and (2) and Paragraph 38a

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant TE, who was born in Ghana in 1990, entered the territory of the Federal Republic of Germany from Italy in 2013. She holds a ‘permesso di soggiorno’, which additionally specifies ‘illimitata’ and ‘soggiornante di lungo periodo-CE’. She received, in accordance with Paragraph 38a of the AufenthG, a residence permit that was valid until 5 December 2014. On 5 August 2014, TE gave birth to her daughter RU, who suffered from a very serious heart defect and had to undergo several operations and follow-up examinations. Therefore, it was impossible for TE to carry on working, and the family received social benefits. After an application for renewal and an application for a residence permit were refused by administrative decisions of the authority responsible for foreign nationals of 30 January 2015, the applicants were asked to depart from the territory and were threatened with removal to Italy (TE) and Ghana (RU), respectively. As grounds, the authority responsible for foreign nationals stated that, with regard to the lack of secure means of subsistence, the case is not atypical within the meaning of point 1 of Paragraph 5(1) of the AufenthG. By judgment of 20 November 2015, the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) dismissed the action brought against those administrative decisions. In the proceedings relating to that action, TE submitted various documents showing that RU suffered from severe heart problems, received inpatient treatment from 25 August 2015 to 17 September 2015 and underwent surgery.
- 2 On application of the applicants, the present Chamber, by decision of 11 March 2016, granted leave to appeal against the judgment of the Administrative Court of Frankfurt am Main due to serious doubts as to the correctness of the decision. According to the Chamber, it was clear that RU’s need for care was far greater than that of healthy children of the same age. There was reason to take the view that the family situation of the lone parent, TE, and the demands imposed on her by the support and care required by RU constituted a circumstance that could justify an exception to the general prerequisite for granting residence under point 1 of Paragraph 5(1) of the AufenthG – secure means of subsistence.
- 3 The proceedings were suspended from 1 November 2017 to 7 September 2020. On 7 September 2020, the defendant reopened the proceedings.

The essential arguments of the parties in the main proceedings

- 4 The defendant submits that it is no longer possible to grant a residence permit for onward-migrating long-term residents to TE under Paragraph 38a of the AufenthG

because TE has not resided in Italy for more than 6 years and therefore her right of residence as a long-term resident has expired in that country. Therefore, the granting of a residence permit under the first sentence of Paragraph 38a of the AufenthG is precluded. According to the defendant, the granting of a residence permit under Paragraph 9a of the AufenthG is precluded by the fact that the applicants lived in a dwelling financed by the Sozialamt (Social Assistance Office) and therefore did not have appropriate accommodation.

- 5 The applicants contend that the EU long-term residence permit issued by the Republic of Italy is still valid, as it is a residence permit granted for an unlimited period. The applicants lived in a dwelling financed by the Social Welfare Office of the City of Frankfurt am Main. TE does not receive any cash benefits from the social welfare authorities and has regular and stable resources through two employment relationships. If she were to be granted a residence permit, she would not only be able to apply for social housing but would also receive child benefit, thereby enabling her to find a dwelling on the open market.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 6 The action can succeed only if TE is either entitled to renew her long-term resident's residence permit irrespective of whether she still had long-term resident status in Italy at the time of the most recent hearing of the court ruling on the merits, or if the defendant was wrong to review and find against the continuing validity of the long-term resident's residence permit granted in Italy (Questions 1 and 2) and to take the date of the most recent administrative or judicial decision on the merits as the relevant point in time for its decision. If the Court of Justice answers Questions 1 and 2 in the negative, it must be clarified whether the applicants bear the burden of proving that TE's residence status in Italy has not expired (Question 3) and whether the national courts are entitled to review the validity of the residence permit granted by the first Member State for an unlimited period. Lastly, it must be clarified whether a lack of evidence of appropriate accommodation can be held against the applicants, even though Germany has not made use of the authorisation in the second subparagraph of Article 15(4) of Directive 2003/109/EC ('Directive 2003/109') (Question 4).
- 7 The first sentence of Paragraph 38a(1) of the AufenthG requires that a foreign national must have long-term resident status in another Member State. In the case of requests seeking the issue of directions, the most recent administrative or judicial decision on the merits must, in principle, be taken as the basis for the relevant factual and legal situation. If an EU long-term residence permit from another Member State is submitted – as in the present case, in the form of a residence permit valid for an indefinite period from Italy – the onward-migrating long-term resident meets, in principle, all the formal requirements for the granting of a residence permit in accordance with Article 19(2) of Directive 2003/109 or, in Germany, Paragraph 38a of the AufenthG. In that respect, the authority responsible for foreign nationals is not entitled to review whether the conditions

for granting such a permit were met in the country of origin, in this case Italy, as this would contradict the principle of mutual recognition of administrative decisions under EU law. In principle, therefore, the foreign national discharges his or her duty to cooperate if, in the case of onward migration and the establishment of residence in a second Member State, he or she provides evidence, in accordance with Article 15(4) of Directive 2003/109, in conjunction with Article 8 thereof, that he or she held a long-term resident's residence permit at the time of onward migration (Article 8(2) of Directive 2003/109).

- 8 There can be no doubt that TE meets those requirements.
- 9 Since, in the meantime, TE has not resided for more than 6 years in Italy, but rather in Germany, the question arises as to whether, due to the passage of time, the factual and legal situation has changed to TE's disadvantage, and whether, with regard to the application for renewal, the defendant – without knowledge of the rules on the expiry of a permanent residence permit that apply in Italy – is entitled to assume, in such a way as to deprive TE of her rights, that the permanent residence permit granted for an unlimited period in Italy is no longer valid in accordance with Article 9(4) of Directive 2003/109, that is to say, to take not the point in time of onward migration but the date of the administrative or judicial decision as the relevant point in time for its decision.
- 10 The Chamber takes the view that the question as to the expiry of long-term resident status in the first Member State must be strictly separated from the question as to an onward-migrating long-term resident's right of renewal. If, at the time of onward migration and application for a residence permit, the third-country national unequivocally has long-term resident status in the second Member State in accordance with Article 14 et seq. of Directive 2003/109, the question as to whether he or she has the right to renew his or her residence permit depends solely on whether the conditions of Article 14 et seq. of Directive 2003/109 are met, but not on the – continuing – existence of his or her resident status in the first Member State. The relevant point in time for the question as to whether he or she has long-term resident status is the point in time of the onward migration and (first) application for his or her residence permit in the second Member State, not the point in time – in the case of an application for renewal – of the most recent administrative or judicial decision. Otherwise, this would mean that a temporary renewal would be possible for the onward-migrating long-term resident only within a period of six years, which cannot be inferred from Directive 2003/109. Rather, Article 19(2) of Directive 2003/109 provides that, if the conditions provided for in Articles 14, 15 and 16 are met, then, subject to the provisions relating to public policy, public security and public health in Articles 17 and 18, the second Member State is to issue the long-term resident with a renewable residence permit. This residence permit is, upon application, if required, renewable on expiry. The second Member State is to inform the first Member State of its decision. The requirements of Articles 17 and 18 of Directive 2003/109 do not preclude the renewal of the residence permit in the present case.

- 11 TE does not fulfil the grounds for exclusion under Article 9(1) of Directive 2003/109. Since Article 9(6) of Directive 2003/109 provides for the renewal of a long-term resident's residence permit, it is to be assumed that multiple temporary renewals are also possible in the first Member State until the third-country national has acquired long-term resident status. That this would have to be assessed differently in the case of onward migration to another Member State cannot be inferred from Directive 2003/109 any more than can the assumption that a temporary renewal is possible only within the 6-year period referred to in the second subparagraph of Article 9(4) of Directive 2003/109. Recital 22 of that directive also militates against it. Therefore, the decisive question is whether renewal of a residence permit granted to a long-term resident on a temporary basis is possible irrespective of the period of time referred to in the second subparagraph of Article 9(4) of Directive 2003/109.
- 12 In the event that Questions 1 and 2 are answered in the negative, the Chamber takes the view, by way of Question 3, that the duty to cooperate incumbent on a third-country national who has been granted a long-term resident's residence permit for an unlimited period would be excessive if he or she were required to prove that the residence permit granted to him or her for an unlimited period has not expired. Such duties to cooperate do not follow from Directive 2003/109 either.
- 13 Moreover, against the background of the principle of mutual trust between Member States, the question arises in the present case as to whether the national authorities and courts are entitled to review the validity of the residence permit granted by the first Member State for an unlimited period. This is because EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (see CJEU, judgment of 19 March 2019, *Ibrahim*, C-297/17, paragraph 83). The principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see CJEU, judgment of 19 March 2019, *Ibrahim*, C-297/17, paragraph 84; CJEU, judgment of 19 March 2019, *Jawo*, C-163/17, paragraph 80).
- 14 By Question 4, the Chamber seeks to ascertain whether a lack of evidence of appropriate accommodation can be held against the onward-migrating long-term resident in the case where – as in the present case – the second Member State has not transposed the second subparagraph of Article 15(4) of Directive 2003/109 and that person was placed in social housing only because he or she is not entitled

to apply for social housing and child benefit as long as he or she does not hold a residence permit under national law (Paragraph 38a of the AufenthG). Moreover, entitlement to placement in social housing would not preclude the existence of the required secure means of subsistence under national law. In accordance with Paragraph 2(4) of the AufenthG, in the general conditions for granting a residence permit, appropriate accommodation requires no more than what is sufficient to house a housing applicant in publicly funded social housing.

WORKING DOCUMENT