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Practical case

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E. K., is a Ghanaian national. Her son, who was born on 10 February 2002, has Netherlands nationality. On 9 September 2013, E. K. obtained, under Article 20 TFEU, a residence permit in the Netherlands bearing the endorsement ‘family member of a Union citizen’.

On 18 February 2019, on the basis of the national legislation transposing Directive 2003/109 into domestic law, she submitted an application for a long-term resident’s EU residence permit. That application was refused by the State Secretary for Justice and Security, who took the view, inter alia, that the right of residence under Article 20 TFEU was temporary and that, for that reason, E. K. could not be granted the residence permit applied for. The complaint lodged by E. K. against that decision was declared unfounded.

E. K. brought an action against that refusal decision before the referring court, the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, Netherlands).

That court is uncertain, first of all, as to the temporary nature of a right of residence obtained under Article 20 TFEU. In particular, the question arises, first, as to whether a right of residence may be qualified as ‘temporary’ only if it is established that that right will end on a specific date, known in advance, and, second, as to whether or not the temporary nature of the right of residence under Article 20 TFEU may be linked to the intention of the third-country national who holds it, E. K. having stated, inter alia, her intention to settle permanently in the territory of the Kingdom of the Netherlands. Next, that court observes that E. K. and the State Secretary for Justice and Security disagree as to whether the determination of whether or not the right of residence under Article 20 TFEU is temporary falls within the competence of the Member States or whether, on the contrary, the concept of ‘temporary right of residence’ must be given a uniform interpretation at EU level. Finally, the same court questions whether Article 3(2)(e) of Directive 2003/109 has been correctly transposed into Netherlands law.

Analyse and conclude about the case, taking into consideration the analyses of the way in which the directive had been transposed into Netherlands law. What would you do as a judge?

Relevant law:

European Union law

Article 20 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.

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

‘(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 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.

...

(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.’

Article 3 of that directive, entitled ‘Scope’, reads as follows:

‘1. This Directive applies to third-country nationals residing legally in the territory of a Member State.

2. This Directive does not apply to third-country nationals who:

...

(e) reside 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;

...’

Article 4 of the same directive, entitled ‘Duration of residence’, provides, in paragraph 1 thereof:

‘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.’

Article 5 of Directive 2003/109, entitled ‘Conditions for acquiring long-term resident status’, provides:

‘1. Member States shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members:

(a) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions prior to the application for long-term resident status;

(b) sickness insurance in respect of all risks normally covered for his/her own nationals in the Member State concerned.

2. Member States may require third-country nationals to comply with integration conditions, in accordance with national law.’

Netherlands law

The Vreemdelingenwet 2000

Article 8 of the Wet tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000) (Law providing for a comprehensive review of the Law on foreign nationals (Law on foreign nationals 2000)) of 23 November 2000 (Stb. 2000, No 495), in the version applicable to the dispute in the main proceedings, provides:

‘A foreign national is lawfully resident in the Netherlands only:

...

(e) by virtue of his/her status as a Union national, so long as the person resides in the Netherlands on the basis of arrangements established under the FEU Treaty or the Agreement on the European Economic Area (EEA)’.

Article 45b of that law reads as follows:

‘1. An application for the grant of a long-term resident’s EU residence permit shall be refused where, immediately before the application is made, the foreign national:

(...)

(b) has a formally limited right of residence;

(c) is resident on the basis of a special privileged status;

(...)

2. Without prejudice to paragraph 1, an application for the grant of a long-term resident’s EU residence permit may be refused only where the foreign national:

(a) has not been lawfully resident for a continuous period of five years immediately prior to submitting the application referred to in Article 8,

(...)

4. Rules concerning the application of paragraphs 1 and 2 may be established by or pursuant to a general administrative measure.’

The Vreemdelingenbesluit 2000

Article 3.5 of the Besluit tot uitvoering van de Vreemdelingenwet 2000

(Vreemdelingenbesluit 2000) (Decree implementing the Law on foreign nationals (Decree on foreign nationals 2000)) of 23 November 2000 (Stb. 2000, No 497), in the version applicable to the dispute in the main proceedings, states:

‘1. The right of residence on the basis of an ordinary, fixed-term residence permit shall be temporary or non-temporary.

2. The right of residence shall be temporary if the residence permit is granted subject to a restriction relating to:

(a) residence as a family member, where the reference person:

1° has a temporary right of residence, or

- 2° holds a temporary residence permit on grounds of asylum;
- (b) seasonal work;
- (c) a temporary intragroup transfer;
- (d) the cross-border provision of services;
- (e) an apprenticeship;
- (f) studies;
- (g) the search for and performance of work, whether salaried or not;
- (h) an exchange, whether or not under an agreement;
- (i) medical treatment;
- (j) temporary humanitarian grounds;

3. In performance of obligations arising from treaties or binding decisions of organisations governed by international law, a ministerial regulation may determine cases where, by way of derogation from paragraph 2, the right of residence is non-temporary.

4. If it is granted subject to a restriction other than those listed in paragraph 2, the residence permit shall be non-temporary, unless it was provided otherwise when it was granted.'

