



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
RICHARD DE LA TOUR  
delivered on 23 March 2023<sup>1</sup>

**Joined Cases C-829/21 and C-129/22**

**TE,**

**RU, legally represented by TE**

**v**

**Stadt Frankfurt am Main (C-829/21)**

(Request for a preliminary ruling from the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse, Germany))

**and**

**EF**

**v**

**Stadt Offenbach am Main (C-129/22)**

(Request for a preliminary ruling from the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany))

(Reference for a preliminary ruling – Border control, asylum and immigration – Immigration policy – Directive 2003/109/EC – Status of third-country nationals who are long-term residents – Article 9(4) – Withdrawal or loss of status – Article 14 – Long-term resident acquiring the right to reside in the territory of a Member State other than the one which granted him or her long-term resident status – Renewal of the residence permit in that Member State – Conditions)

## **I. Introduction**

1. These requests for a preliminary ruling concern the interpretation of Article 9(4) and Article 14 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,<sup>2</sup> as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011.<sup>3</sup>

2. The requests have been made in proceedings between, in Case C-829/21, TE, a Ghanaian national, and RU, her daughter, who was born in Germany, and Stadt Frankfurt am Main (the City of Frankfurt am Main, Germany), and, in Case C-129/22, EF, a Pakistani national, and Stadt Offenbach am Main (the City of Offenbach am Main, Germany).

<sup>1</sup> Original language: French.

<sup>2</sup> OJ 2004 L 16, p. 44.

<sup>3</sup> OJ 2011 L 132, p. 1 ('Directive 2003/109').

3. Those proceedings concern, in Case C-829/21, the refusal by the competent authority responsible for foreign nationals to renew TE's residence permit and to issue a residence permit to RU, her minor child, and, in Case C-129/22, the refusal by the competent authority responsible for foreign nationals to renew EF's residence permit, on the ground that TE, on the one hand, and EF, on the other, had lost their status of long-term resident third-country national granted in Italy, on account of their absence from the territory of that Member State for a period exceeding six years.

4. At the request of the Court, this Opinion will focus on the second question referred for a preliminary ruling in Case C-829/21.<sup>4</sup> By that question, the Court is asked to clarify, in the context of a procedure for the renewal of a residence permit in a Member State other than that which granted long-term resident status, the relevant point in time for assessing the existence of that status.

5. In this Opinion, at the end of my analysis, I shall propose that the Court should rule that, in the context of a procedure for the renewal of a residence permit in a Member State other than that which granted long-term resident status to a third-country national, the relevant point in time for assessing the existence of that status is the date on which the application for renewal and the documentary evidence were submitted, and not a point in time during the administrative stage of examining that application or, where appropriate, the judicial stage of challenging the decision refusing renewal.

## II. Legal framework

### A. *European Union law*

6. Recital 21 of Directive 2003/109 states:

'The Member State in which a long-term resident intends to exercise his/her right of residence should be able to check that the person concerned meets the conditions for residing in its territory ...'

7. Article 2(b), (c) and (d) of that directive contains, for the purposes of that directive, the following definitions:

- '(b) "long-term resident" means any third-country national who has long-term resident status as provided for under Articles 4 to 7;
- (c) "first Member State" means the Member State which for the first time granted long-term resident status to a third-country national;
- (d) "second Member State" means any Member State other than the one which for the first time granted long-term resident status to a third-country national and in which that long-term resident exercises the right of residence.'

<sup>4</sup> In Case C-129/22, the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) does not explicitly ask this question, but refers to the order for reference in Case C-829/21.

8. Article 8 of that directive, entitled ‘Long-term resident’s [EU] residence permit’, provides in paragraphs 1 and 2 thereof:

‘1. The status as long-term resident shall be permanent, subject to Article 9.

2. Member States shall issue a long-term resident’s [EU] 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.’

9. Article 9 of Directive 2003/109, entitled ‘Withdrawal or loss of status’, provides, in paragraphs 4 and 5 thereof:

‘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 4, Member States who have granted the status shall provide for a facilitated procedure for the re-acquisition of long-term resident status.

...’

10. Under Article 14(1) of that directive:

‘A long-term resident shall acquire 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 conditions set out in this chapter are met.’

11. Article 15 of that directive, entitled ‘Conditions for residence in a second Member State’, provides:

‘1. As soon as possible and no later than three months after entering the territory of the second Member State, the long-term resident shall apply to the competent authorities of that Member State for a residence permit.

...

4. The application shall be accompanied by documentary evidence, to be determined by national law, that the persons concerned meets the relevant conditions, as well as by their long-term resident permit and a valid travel document or their certified copies.

...’

12. Article 19 of Directive 2003/109, entitled ‘Examination of applications and issue of a residence permit’, provides in paragraph 2 thereof:

‘If the conditions provided for in Articles 14, 15 and 16 are met ..., the second Member State shall issue the long-term resident with a renewable residence permit. This residence permit shall, upon application, if required, be renewable on expiry. The second Member State shall inform the first Member State of its decision.’

13. Article 22 of that directive, entitled ‘Withdrawal of residence permit and obligation to readmit’, provides, in paragraph 1(b) thereof:

‘Until the third-country national has obtained long-term resident status, the second Member State may decide to refuse to renew or to withdraw the resident permit and to oblige the person concerned and his/her family members, in accordance with the procedures provided for by national law, including removal procedures, to leave its territory in the following cases:

...

(b) where the conditions provided for in Articles 14, 15 and 16 are no longer met.’

### ***B. German law***

14. Paragraph 38a 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)<sup>5</sup> of 25 February 2008, in the version applicable to the disputes in the main proceedings, entitled ‘Residence permit for long-term residents in other Member States of the European Union’, provides, in subparagraph 1 thereof:

‘A residence permit shall be issued to a foreign national who has long-term resident status in another Member State of the European Union if he or she wishes to reside in the Federal territory for a period exceeding 90 days ...’

15. Paragraph 51(9)(4) of that law provides that the long-term resident’s EU residence permit is to expire only if the foreign national resides outside the Federal territory for a period of six years.

16. Paragraph 52(6) of that law provides that a residence permit issued pursuant to Paragraph 38a thereof must, in principle, be revoked if the foreign national loses his or her status as a long-term resident in another Member State of the European Union.

## **III. The facts in the main proceedings and the questions referred for a preliminary ruling**

### ***A. Case C-829/21***

17. TE, a Ghanaian national, entered Germany on 3 September 2013 from Italy.

<sup>5</sup> BGBl. 2008 I, p. 162, ‘the AufenthG’.

18. She holds a long-term resident's EU residence permit issued in Italy and bearing the words 'illimitata' (unlimited (duration)) and 'Soggiornante di Lungo Periodo – [EU]' (long-term (EU) resident).

19. In accordance with Paragraph 38a of the AufenthG, on 5 December 2013, the authority responsible for foreign nationals of the city of Offenbach (Germany), which had competence at that time, granted her a residence permit valid for one year.

20. On 5 August 2014, TE gave birth to RU who suffered from a very serious heart defect requiring operations and follow-up examinations, which made it impossible for TE to carry on working. In the light of that situation, TE had to have recourse to social security benefits to support her family.

21. By decisions of 30 January 2015 of the authority responsible for foreign nationals of the city of Offenbach, the applications of TE and RU, submitted on 12 November 2014 and seeking, respectively, the renewal and issue of a residence permit, were rejected on the ground that the means of subsistence of those persons were not secure in accordance with Paragraph 5(1)(1) of the AufenthG. TE and RU were asked to leave German territory and were threatened with removal to Italy or Ghana.

22. The action for an injunction brought by TE and RU against those decisions was rejected by the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main, Germany) by judgment of 20 November 2015.

23. TE and RU then appealed against that judgment to the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse, Germany).

24. By decision of 11 March 2016, the latter court allowed the appeal on the ground that that court had serious doubts as to the merits of the judgment at first instance in view of the importance of the medical treatment required by RU, a circumstance which, according to that court, was capable of constituting an exception to the general rule laid down in Paragraph 5(1)(1) of the AufenthG.

25. On 1 November 2017, the proceedings before the referring court were stayed.

26. On 7 September 2020, the city of Frankfurt am Main resumed those proceedings. It currently argues that it is no longer possible to issue TE with a residence permit under Paragraph 38a of the AufenthG. She has not resided in Italy for more than six years and therefore no longer has long-term EU resident status. Nor could a residence permit be issued to TE under Paragraph 9a of the AufenthG, since TE and RU live in an apartment financed by social services, which does not constitute 'appropriate accommodation' within the meaning of that provision.

27. In those circumstances, the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Paragraph 38a(1) of 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], 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], 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/], 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*?

## **B. Case C-129/22**

28. EF, a Pakistani national, entered the Federal Republic of Germany on 1 April 2014 from Italy.

29. He holds a long-term resident's EU residence permit issued in Italy and bearing the words 'illimitata' (unlimited (duration)) and 'Soggiornante di Lungo Periodo – [EU]' ((EU) long-term residence).

30. In accordance with Paragraph 38a of the *AufenthG*, on 10 July 2014, the authority responsible for foreign nationals of the *Landkreis Offenbach* (*Offenbach district, Germany*), which had competence at that time, granted him a residence permit valid for one year.

31. That residence permit was then renewed continuously; most recently on 28 May 2019 by the city of *Offenbach am Main*, which now has competence, until 13 July 2021.

32. EF’s application for renewal of his residence permit under Paragraph 38a of the AufenthaltG, lodged by him on 17 March 2021, was rejected by decision of the city of Offenbach am Main on 27 April 2021, essentially on the ground that he had lost long-term resident status, since he had not resided in Italy for more than six years.

33. On 6 May 2021, EF brought an action against that decision before the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) seeking, inter alia, to require the city of Offenbach am Main to renew his residence permit in accordance with Paragraph 38a of the AufenthaltG.

34. The city of Offenbach-on-Main maintains the position set out in its decision of 27 April 2021, that is to say that EF has lost long-term resident status, since he has not resided in Italy for more than six years.

35. In those circumstances, the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can a third-country national who has been granted long-term resident status under Directive [2003/109] by a first Member State (*in casu*, the Italian Republic) require the second Member State (*in casu*, the Federal Republic of Germany) to renew a residence permit issued to him or her in implementation of Article 14 et seq. of Directive [2003/109] without providing evidence of the continuing existence of long-term resident status?

If the answer is in the negative:

(2) Must long-term resident status be presumed to continue to exist in the second Member State for the sole reason that the third-country national holds a long-term resident’s EU residence permit issued by the first Member State for an unlimited period, even though he or she has not resided for six years in the territory of the Member State which granted him or her that status?

If the answer is in the negative:

(3) Is the second Member State empowered, in the context of the renewal of the residence permit, to assess whether long-term resident status has been lost in accordance with the second subparagraph of Article 9(4) of Directive [2003/109] and to refuse renewal where appropriate, or is the first Member State competent to determine the subsequent loss of that status?

If the answer is in the positive:

(4) In that case, does the examination of the ground for loss of status under the second subparagraph of Article 9(4) of Directive [2003/109] need to be transposed into national law in such a way that the constituent facts leading to loss of long-term resident status in the first Member State are specified, or is it sufficient for national law to provide, without referring specifically to [that] directive, that the second Member State may refuse the residence permit “if the foreign national loses his or her long-term resident status in another Member State of the European Union”?

36. The European Commission submitted written observations in both cases.

37. By decision of the President of the Court of 8 November 2022, those cases were joined for the purposes of the oral procedure and the decision of the Court.

#### IV. Analysis

38. By the last part of its second question (in Case C-829/21), on which the Court of Justice has asked that this Opinion be focused, the referring court asks, in essence, what should be the relevant point in time for assessing the existence of long-term resident status in the first Member State for the purpose of renewing the residence permit in the second Member State.

39. More specifically, the referring court seeks to ascertain whether, in court proceedings against a refusal to renew a residence permit in a Member State other than the one which granted long-term resident status to a third-country national, the relevant point in time should be the date of the application for renewal of the residence permit or the date of the most recent decision of an authority or court concerning that application.

40. First of all, I would point out that it is clear from the mechanism established by Directive 2003/109 that it is precisely because a first Member State has granted long-term resident status to a third-country national under Article 4 of that directive that the person concerned may acquire the right to reside in the territory of a second Member State.

41. Article 14 of that directive provides that possession of long-term resident status by the person concerned in a first Member State is a precondition for acquiring the right to reside in the territory of other Member States and is necessary for obtaining a residence permit in a second Member State. The right of residence granted in the second Member State is therefore derived from long-term resident status in the first Member State.

42. Moreover, it follows from a combined reading of Article 9, Article 14 and Article 22(1)(b) of Directive 2003/109 that, so long as the third-country national has not obtained long-term resident status or where he or she has lost it or had it withdrawn, the second Member State may refuse to renew the residence permit and oblige the person concerned to leave its territory.

43. Accordingly, there is no doubt that a person must have long-term resident status on the date of the application for renewal of a residence permit in the second Member State.

44. In Case C-129/22, the question of the relevant point in time for assessing the existence of long-term resident status in the first Member State therefore does not arise. EF entered Germany on 1 April 2014. The six-year period provided for in the second subparagraph of Article 9(4) of Directive 2003/109 appears to have expired on 1 April 2020. The latest application for renewal of EF's residence permit in Germany was dated 17 March 2021. Accordingly, EF's residence permit could not be renewed in Germany. However, it is for the competent authorities, pursuant to the last subparagraph of Article 9(4) of that directive, to verify with the authorities of the first Member State whether or not that status has been maintained.

45. In Case C-829/21, the Court seeks, more specifically, guidance on the issue of the relevant date, in court proceedings against a refusal to renew a residence permit in the second Member State, for the purposes of assessing the existence of long-term resident status in the first Member State.



46. In that regard, it seems to me that three different dates could be considered relevant for the purposes of assessing the existence of that status. That date could be the date of the application for renewal of the residence permit in the second Member State, the date on which the administration decides on that application, or the date on which a court rules on the action against the refusal to renew the residence permit.

47. As regards the second and third options, I am of the view that the possibility of renewing the residence permit of a long-term resident in the second Member State should not be dependent on the speed or length of the application and decision-making process of the competent authorities of that Member State.

48. The right of residence which the long-term resident seeks to enjoy – assuming that the application for renewal of the residence permit was actually lodged while the person concerned had long-term resident status in the first Member State – cannot depend either on the happenstance of the dates on which decisions are made, or on the passage of time, as is the case in Case C-829/21.

49. It was only after a stay of proceedings of almost three years (from 1 November 2017 to 7 September 2020) that the respondent in the main proceedings argued that TE had not resided in Italy for more than six years and that her long-term resident status had already expired there.

50. Accordingly, it seems to me that making the right of residence in the second Member State dependent on the date of the most recent decision of an authority or court and, consequently, on the greater or lesser speed with which the application for renewal of the residence permit is processed by the competent authority, calls into question the effectiveness of Directive 2003/109.

51. That approach would run counter not only to the objective of that directive, which aims at approximating the rights of third-country nationals who hold a long-term residence permit to those enjoyed by EU citizens,<sup>6</sup> but also to the principles of equal treatment and legal certainty.

52. With regard in particular to judicial proceedings directed against the administration's refusal to renew a third-country national's residence permit, it would be contrary to Article 47 of the Charter of Fundamental Rights of the European Union and to the right to an effective remedy if mounting the legal challenge provided for in Article 20 of Directive 2003/109 could result in the long-term resident third-country national losing his or her right of residence in the second Member State as a result of the lapses of time which such litigation generated and which appear to have been beyond the control of the applicant.<sup>7</sup>

53. Moreover, in the context of such judicial proceedings, the legality of the act concerned must be assessed on the basis of the facts and points of law existing at the date of adoption of that act. The competent authority must take as the relevant moment for the purpose of assessing whether the third-country national has long-term resident status in the first Member State the moment when the application for renewal of the residence permit and the documentary evidence were submitted, in accordance with Article 15(4) of Directive 2003/109.

<sup>6</sup> See recital 2 of Directive 2003/109.

<sup>7</sup> See, by analogy, Opinion of Advocate General Hogan in *Bundesrepublik Deutschland (Family Member)* (C-768/19, EU:C:2021:247, point 69).

54. Accordingly, any loss of long-term resident status in the first Member State occurring during the administrative procedure or during the judicial proceedings subsequent to a refusal to renew cannot be relied upon against the third-country national in judicial proceedings on the basis of the lapse of time between the date of applying for renewal of the residence permit in the second Member State and the date on which the court rules on the legality of the administration's decision to reject that application.

55. Nevertheless, the loss of long-term resident status during the administrative procedure or during judicial proceedings is not without consequences. There is nothing to prevent the administration, subsequently, after having verified that long-term resident status has not been extended in the first Member State pursuant to the last subparagraph of Article 9(4) of Directive 2003/109, from finding that the third-country national has had his or her long-term resident status withdrawn or has lost it pursuant to the second subparagraph of Article 9(4) of that directive, and from refusing to renew or from withdrawing his or her residence permit pursuant to Article 22 of that directive.

56. However, that refusal to renew or that withdrawal must form the subject matter of a new decision by the competent authority, which may give rise to a new challenge and cannot therefore take place in the context of the initial procedure.

57. In the light of those considerations, I propose that the Court rule that Article 9(4) and Article 14 of Directive 2003/109 must be interpreted as meaning that, in the context of a procedure for the renewal of a residence permit in a Member State other than that which granted long-term resident status to a third-country national, the relevant point in time for assessing the existence of that status is the date on which the application for renewal and the documentary evidence were submitted, and not a point in time during the administrative stage of examining that application or, where appropriate, the judicial stage of challenging the decision refusing renewal.

## **V. Conclusion**

58. In the light of all the foregoing considerations, I propose that the Court answer the second question referred for a preliminary ruling in Case C-829/21 by the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse, Germany) as follows:

Article 9(4) and Article 14 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011,

must be interpreted as meaning that in the context of a procedure for the renewal of a residence permit in a Member State other than that which granted long-term resident status to a third-country national, the relevant point in time for assessing the existence of that status is the date on which the application for renewal and the documentary evidence were submitted, and not a point in time during the administrative stage of examining that application or, where appropriate, the judicial stage of challenging the decision refusing renewal.