



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 4 October 2018¹

Case C-557/17

**Y.Z.,
Z.Z.,
Y.Y.,**

Staatssecretaris van Veiligheid en Justitie

(Request for a preliminary ruling from the Raad van State, Council of State, Netherlands)

(Reference for a preliminary ruling — Directive 2003/86/EC — Right to family reunification — Directive 2003/109/EC — Status of third-country nationals who are long-term residents — Withdrawal of residence permit or loss of status on grounds of fraud — Lack of knowledge)

I. Introduction

1. In the present case, the Raad van State (Council of State, Netherlands), by the first question it has referred, enquires whether a residence permit issued to a family member of a third-country national under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification,² obtained on the basis of fraudulent information provided by the sponsor,³ can be withdrawn where the holder of that permit was unaware of the fraudulent nature of that information. In a similar vein, by its second question, the referring court asks whether, in order to lose long-term resident status, as it arises under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,⁴ the holder of that status must have been aware of the fraud, in so far as the status in question would have been obtained on the basis of fraudulent information.

2. Indeed, as Advocate General Elmer noted in his Opinion in *Kol* (C-285/95, EU:C:1997:107, point 19), to allow the fraud committed in order to obtain a residence permit to be used ‘would be to reward culpable conduct, which would encourage, rather than discourage, others to give fraudulent declarations to the immigration authorities of the Member States.’ Nevertheless, in the case in the main proceedings, the beneficiaries of the residence permits that are the subject matter of the questions referred were unaware of the fraudulent nature of the information provided in support of the applications made to obtain those permits. They are therefore suffering the consequences of fraud committed by someone else.

¹ Original language: French.

² OJ 2003 L 251, p. 12.

³ Article 2(c) of Directive 2003/86 defines ‘sponsor’ as follows: ‘a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her’.

⁴ OJ 2004 L 16, p. 44.

3. The Court of Justice has already had to rule on how the fact that a Turkish worker had fraudulently acquired his own residence permit affected the rights his family members enjoyed under the first paragraph of Article 7 of Decision No 1/80 of the [EEC-Turkey] Association Council, of 19 September 1980 on the development of the Association between the European Community and Turkey.⁵ However, it has never been asked whether, where fraudulent documents have been used to support applications for residence permits on the basis of, on the one hand, family reunification, and on the other, long-term residence, the permits obtained in that way can be withdrawn retroactively on the grounds of fraud, in situations in which the holders of those permits were unaware that those documents were fraudulent. The present case will therefore provide the Court with an opportunity to clarify this point that requires it to examine the relationship between fraud and fraudulent intent.

II. Legal framework

A. EU law

4. According to Article 16(2)(a) of Directive 2003/86:

‘Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member’s residence permits, where it is shown that:

- (a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used’.

5. Under Article 17 of Directive 2003/86, ‘Member States shall take due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they ... withdraw or refuse to renew a residence permit ...’

6. Article 9(1)(a) of Directive 2003/109, entitled ‘withdrawal or loss of status’, provides:

‘1. Long-term residents shall no longer be entitled to maintain long-term resident status in the following cases:

- (a) detection of fraudulent acquisition of long-term resident status’.

⁵ See judgment of 18 December 2008, *Altun* (C-337/07, EU:C:2008:744, paragraphs 51 to 64). In that judgment the Court of Justice held that the fraudulent conduct of the Turkish worker in question was capable of having legal effects in respect of his family members. The Court specified that those effects must, however, be determined with regard to the date on which the national authorities of the host Member State adopted a decision to withdraw the residence permit of that worker. As apparent from paragraph 59 of *Altun*, the competent authorities are therefore required to ascertain whether those family members have, as at that date, acquired an autonomous right of access to the employment market of the host Member State and, as a corollary, a right to reside there. In paragraph 60 of that judgment, the Court added that any other solution would be contrary to the principle of legal certainty.

B. National law

7. Article 18(1)(c) of the Vreemdelingenwet 2000 (Law on Foreign Nationals 2000, ‘the Vw 2000’) in conjunction with Article 19 of that law, implements Article 16(2)(a) of Directive 2003/86. Article 18(1)(c) of the Vw 2000 reads as follows:

‘An application to extend the validity of a fixed-term residence permit under Article 14 may be refused where ... the foreign national has provided inaccurate information or has failed to provide information where that information would have led to the initial application for a permit or for extension being refused’.

8. Article 19 of the Vw 2000 provides:

‘A fixed-term residence permit may be withdrawn on the grounds referred to in Article 18(1) with the exception of the ground under Article 18(1)(b), ...’

9. Under Article 20(1) of the Vw 2000:⁶

‘Our minister has the following powers:

- (a) to approve, to reject or not to consider applications for the grant of residence permits of indefinite duration;
- (b) to withdraw a residence permit of indefinite duration ...’

10. Article 21(1) and (3) of the Vw 2000 provides as follows:

‘1. Pursuant to Article 8(2) of [Directive 2003/109], an application to obtain or amend a residence permit of indefinite duration under Article 20 may only be refused where the foreign national:

- (a) has not been legally resident, within the meaning of Article 8, for a continuous period of five years immediately prior to that application;

...

- (d) jointly with the family member with whom he or she resides or otherwise, has sufficient resources, on an independent and sustainable basis;

...

- (h) has provided inaccurate information or has failed to provide information where that information would have led to the initial application for a permit or for amendment or extension being refused.

...’

⁶ As it applied on 21 March 2007, when the long-term residence permits were obtained.

III. The dispute in the main proceedings, the questions referred and the procedure before the Court of Justice

11. The applicant Y.Z. ('the father'), a third-country national, was issued with several residence permits under national law, in connection with his ostensible activities as manager of a company, which were discovered to be fictitious.⁷ It is common ground that the father obtained his residence documents fraudulently.

12. On 31 January 2002, on the basis of the right to family reunification, the applicant Z.Z. ('the son'), born in 1991, and the applicant Y.Y. ('the mother'), both third-country nationals, were issued with ordinary fixed-term residence permits, within the meaning of Article 2(d) of Directive 2003/86⁸ ('residence permits for the purpose of family reunification'). By decisions of 21 March 2007, the mother and the son were granted ordinary residence permits of indefinite duration, from 18 October 2006, bearing the entry 'long-term EU resident' ('the long-term resident residence permits'), in accordance with Articles 7 and 8 of Directive 2003/109.

13. By decisions of 29 January 2014, the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, the Netherlands, 'the State Secretary'), with retroactive effect, withdrew both the residence permits for the purpose of family reunification granted to the mother and the son and, under Article 9(1)(a) of Directive 2003/109, the long-term resident residence permits issued to them ('the 29 January 2014 withdrawal decisions'). The State Secretary ordered them to leave the Netherlands immediately and issued a prohibition on return against them. The grounds of the 29 January 2014 withdrawal decisions were that the residence permits for the purpose of family reunification of the mother and the son had been issued on the basis of fraudulent declarations made by the father's purported employer, in order to prove that the father had sufficient stable and regular resources, as required under Article 7(1)(c) of Directive 2003/86. The long-term resident residence permits issued to the mother and the son had likewise also been obtained fraudulently in so far as, on the one hand, they had been issued on the basis of an incorrect assumption that the mother and the son had been staying legally by virtue of their stay for the purpose of family reunification and, on the other hand, the father's fraudulent employer declarations had also been produced as evidence that they had sufficient stable and regular resources under Article 5(1)(a) of Directive 2003/109. According to the State Secretary, whether or not the mother and the son were aware of the fraud committed by the father and whether or not they were aware of the fraudulent nature of the declarations was irrelevant to answering the question of whether their residence permits had been obtained fraudulently. It was likewise irrelevant that the son, who was a minor at the time the applications for residence permits were made, did not sign those applications himself.

14. By a decision of 4 May 2015 the State Secretary dismissed the objections filed against the 29 January 2014 decisions. By a decision of 31 May 2016 the rechtbank Den Haag zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, Netherlands) partially set aside and partially upheld those decisions. The father, the mother and the son, and also the State Secretary, appealed that decision to the Raad van State (Council of State).

15. According to the father, the mother and the son, the rechtbank Den Haag zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) had failed to take account of the fact that neither the mother nor the son had at any time themselves committed fraudulent acts. They also contend that the principle of legal security safeguarded by EU law precludes their long-term resident residence permits from being withdrawn. They cite the judgment of 18 December 2008, *Altun* (C-337/07, EU:C:2008:744), in that regard.

⁷ It appears that the company was indeed registered but never actually carried on any activity.

⁸ Within the meaning of Article 14 of the Vw 2000.

16. The referring court argues that the question of who used fraud appears to be irrelevant in the light of the wording of Article 16(2)(a) of Directive 2003/86 and of Article 9(1)(a) of Directive 2003/109. It notes, however, on the one hand, that the expressions ‘false or misleading information’ and ‘fraud was otherwise committed’, in Article 16(2)(a) of Directive 2003/86, and the term ‘fraudulent’ in Article 9(1)(a) of Directive 2003/109, suggest that there must be a certain requirement of intent or fault. On the other hand, the referring court observes that, in the Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (‘the guidance for application of Directive 2004/38’),⁹ fraud is defined as a ‘deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive’. According to the referring court, the case-law of the Court of Justice, for its part, does not provide sufficient points of reference in order to interpret the term ‘fraud’.

17. Under those circumstances the Raad van State (Council of State) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Must Article 16(2)(a) of [Directive 2003/86] be interpreted as precluding the withdrawal of a residence permit granted for the purpose of family reunification in the case where the acquisition of that residence permit was based on fraudulent information but the family member was unaware of the fraudulent nature of that information?
- (2) Must Article 9(1)(a) of [Directive 2003/109] be interpreted as precluding the withdrawal of long-term resident status in the case where the acquisition of that status was based on fraudulent information but the long-term resident was unaware of the fraudulent nature of that information?’

IV. Analysis

A. Interpretation of Article 16(2)(a) of Directive 2003/86

18. By its first question, the referring court enquires, in essence, whether, in order to withdraw the residence permits for the purpose of family reunification of the mother and the son, it is relevant, within the meaning of Article 16(2)(a) of Directive 2003/86, whether the mother and the son were aware that the father’s declarations of employment were fraudulent.¹⁰

19. According to settled case-law, individuals cannot rely on EU law for fraudulent or wrongful ends.¹¹ That principle, which the Court of Justice has repeatedly upheld irrespective of the sector concerned, is a general principle of EU law and applies regardless of whether or not it is implemented in EU or national legislation.¹² According to the Court’s case-law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or

⁹ COM(2009) 313 final of 2 July 2009, section 4, ‘Abuse and fraud’, p. 15.

¹⁰ As apparent from the information provided by the referring court, the son, who was born in 1991, was therefore 11 years old when the State Secretary made the 31 January 2002 decision. However, even though the son was a minor, the referring court posed its question in general terms.

¹¹ See, amongst others, judgments of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 49, fraudulent use of a social security certificate creating a presumption of compliance with EU law); of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27); of 22 December 2010, *Bozkurt* (C-303/08, EU:C:2010:800, paragraph 47: document fraud relating to the residence conditions of a Turkish migrant worker); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68: VAT fraud); of 23 September 2003, *Akrich* (C-109/01, EU:C:2003:491, paragraph 57: marriage of convenience with a citizen of an EU Member State); of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 24: freedom to provide services); of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296, paragraph 24: free movement of workers); and of 3 December 1974, *van Binsbergen* (33/74, EU:C:1974:131, paragraph 13: freedom to provide services). See also the guidance for application of Directive 2004/38, COM(2009) 313 final of 2 July 2009, section 4, ‘Abuse and fraud’, p. 15.

¹² See, to that effect, judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraphs 27, 28 and 30), and of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraphs 38 to 48).

abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis.¹³ The Court appears to apply that case-law both in the case of fraud as where there is abuse of rights.¹⁴ It is for the national courts, in each case, on the basis of objective evidence, to take account of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of EU law on which they seek to rely, provided that they assess such conduct in the light of the objectives pursued by those provisions.¹⁵

20. That general principle that fraud and abuses of rights are prohibited applies likewise to lawful immigration. It is apparent from the Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification ('the Directive 2003/86 guidance')¹⁶ that 'it [is] imperative to take action against abuse and fraud of the rights conferred by [Directive 2003/86]. In the interests of both society and of genuine applicants, the Commission encourages [Member States] to take firm action in line with the provisions of Articles 16(2) and 16(4).'

21. In the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraphs 50 to 53), the Court of Justice stated that 'findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor.'¹⁷ The objective factor consists in the fact that the conditions for obtaining the advantage under EU law are not met.¹⁸ The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the conditions laid down by the applicable rules with a view to obtaining the advantage in question.¹⁹ The fraudulent procurement may thus result from a 'deliberate action', such as representing facts which do not reflect the reality of the situation, or from a 'deliberate omission', such as the concealment of relevant information, with the intention of evading the conditions governing the application of the rules in question.²⁰

22. Whether the constituent elements of fraud are present in the circumstances of the case in the main proceedings should be ascertained in the light of that case-law.

13 See, to that effect, judgments of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 35); of 4 June 2009, *Pometon* (C-158/08, EU:C:2009:349, paragraph 28); of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 56); and of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 93).

14 See, to that effect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 34).

15 See, to that effect, judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 52), and of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, *Centros*, paragraph 25).

16 See, to that effect, the guidance for application of Directive 2003/86, COM(2014) 210 final of 3 April 2014, paragraph 7, 'Abuse and fraud', p. 27.

17 That case concerned fraudulent use, by an undertaking, of a certificate that establishes a presumption that posted workers are properly affiliated to the social security scheme of the Member State in which the undertaking that posted those workers is established, and that is binding on the competent institution of the Member State to which those workers are posted and necessarily implies that the social security scheme of the latter Member State cannot apply. Although on the date on which the certificates were issued the undertaking met all the administrative conditions, that is to say, it effectively carried out an activity in Bulgaria, the certificates were obtained fraudulently by means of a representation of facts which did not reflect the reality of the situation, with the intention of evading the conditions laid down in EU legislation in respect of the posting of workers.

18 See, to that effect, judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 51). The requirements for granting a residence permit for the purpose of family reunification are set out in Chapter IV of Directive 2003/86, entitled 'Requirements for the exercise of the right to family reunification'.

19 See, to that effect, judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 52). In its guidance for application of Directive 2004/38, which the referring court cites, the Commission highlights the need for a subjective element, and envisages fraud, defined in Article 35 of Directive 2004/38, as a 'deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive'. Moreover, according to that guidance, persons who have been issued with a residence document *only as a result of fraudulent conduct* in respect of which they have *been convicted*, may have their rights under the directive refused, terminated or withdrawn. See, also, judgments of 27 September 2001, *Gloszczuk* (C-63/99, EU:C:2001:488), and of 5 June 1997, *Kol* (C-285/95, EU:C:1997:280), which concern fraudulent acts committed personally and in which the residence documents of the persons concerned were withdrawn as a result.

20 See, to that effect, judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraphs 53 and 58).

23. It is apparent from the order for reference that false or fraudulent documents were used, when the application for family reunification was made, as documentary evidence²¹ to prove that the condition under Article 7(1)(c) of Directive 2003/86 concerning the obligation to have sufficient stable and regular resources was satisfied. Accordingly, were it to be found that the condition under that article was not satisfied without those documents, the objective element necessary to find that there was fraud, as defined in the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63), would be established. I note in that regard that, in the judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 72), the Court of Justice held that, *in principle*, it is the resources of the sponsor that are the subject of the individual examination of applications for family reunification required by Directive 2003/86, not those of the third-country national for whom a right of residence is sought. In common with the European Commission in its guidance for application of Directive 2003/86, I am of the view that, by using the expression ‘in principle’ the Court implies, at the very least, that there may in specific cases be exceptions to the rule that the sponsor’s resources must be taken into account, where particular circumstances justify those exceptions.²²

24. According to the definition given in the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 52), applied to the circumstances of the case in the main proceedings, the subjective element necessary in order to find fraud corresponds to the *intention of the person concerned* to evade or circumvent the conditions to be issued with a residence permit for the purpose of family reunification with a view to obtaining the advantage attached to it. It is apparent from that definition that the subjective element must be assessed in relation to the person seeking to obtain the advantage that arises under the provisions of EU law. In the circumstances of the case in the main proceedings, that assessment must therefore relate to the person who applied for family reunification.

25. In that respect, the fact that Article 16(2)(a) of Directive 2003/86 is worded in the passive voice (‘false or falsified documents were used’ and ‘fraud was otherwise committed’) does not mean, as the referring court, the European Commission and the Polish Government suggest, that there is nothing to be gained from knowing who used the fraud. Indeed, to my mind, the reason for that wording is that, according to Article 5(1) of Directive 2003/86, the Member States can decide whether the application for family reunification is to be submitted by the sponsor or by the family member.

26. In the main proceedings, then, the application for family reunification seems to have been submitted by the father, as sponsor. If that is in fact the case, the subjective element of the fraud would also be established, since the father was aware that the documents he submitted in support of his application for family reunification were fraudulent.

21 It is apparent from the guidance for application of Directive 2003/86 that for every application, its accompanying documentary evidence and the ‘appropriateness’ and ‘necessity’ of interviews and other investigations need to be assessed on a case-by-case basis as part of an individual examination of each application for family reunification, see COM(2014) 210 final of 3 April 2014, p. 10.

22 See, to that effect, guidance for application of Directive 2003/86 (COM(2014) 210 final, of 3 April 2014, p. 15).

27. However, I note that, even where fraud within the meaning of Article 16(2)(a) of Directive 2003/86 is established, before they decide to withdraw the residence permit or order the removal of the sponsor or members of his or her family, the competent Member State authorities are required to carry out an assessment under Article 17 of that directive.²³ That article requires the Member States, in particular, to take ‘due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin ...’²⁴

28. It should be borne in mind that it follows from the Court’s case-law that Article 17 of Directive 2003/86 requires that applications for reunification be examined on a case-by-case basis,²⁵ and that the competent national authorities, when implementing Directive 2003/86, and therefore also when they make a decision to withdraw a residence permit for the purpose of family reunification, must make a balanced and reasonable assessment of all the interests in play.²⁶ A permit cannot therefore be withdrawn automatically.

29. The referring court has not asked any questions regarding the assessment under Article 17 of Directive 2003/86 or as to whether the removal order affecting the mother and the son is lawful. I will therefore confine myself to the following two remarks.

30. First, the assessment carried out under Article 17 of Directive 2003/86 must, to my mind, properly take into consideration the fact that the mother and the son are not personally responsible for the fraud but suffer its consequences. Indeed, Article 17 requires Member States to ensure that withdrawal and removal orders contemplated by the competent national authorities are proportionate, which must be assessed in the light of all the factual and personal circumstances of the particular case.²⁷

31. Secondly, it is apparent from recital 2 of Directive 2003/86 that the directive recognises the fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union. Article 7 of the Charter of Fundamental Rights, which contains rights corresponding to those guaranteed by Article 8(1) of the ECHR, recognises the right to respect for private and family

23 It is apparent from the referring court’s case file that the latter found, on a balance of interests under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘the ECHR’), that the son’s interests were outweighed, and confirmed the decision of the State Secretary. The father must have known that the son’s private life had developed during a stay which the father knew to be precarious, and that, therefore, his right of residence was precarious. The decision took into account in that regard the fact that the son had lived in China until he was 11, that he had gone to school there, that he spoke Chinese and could write a little of that language, that after he had come to live in the Netherlands he would go once a year to China and that, together with his parents who were also to return to China, he was going to be able to make a life there. It was also observed that it was open to the son to apply for a residence permit for the purpose of continuing his studies in the Netherlands. The State Secretary correctly found that neither the length of the son’s stay in the Netherlands, and the resulting ties to that country, nor the fact that he is studying in the Netherlands, were special circumstances such as to give rise to a finding that the State Secretary was bound under Article 8 ECHR to allow a child’s private life to continue. In contrast, the interests of the mother in relation to her residence documents were not weighed in the balance.

24 In its Recommendation Rec(2002) 4, on the legal status of persons admitted for family reunification, the Committee of Ministers to Member States stated: ‘When considering the withdrawal, refusal to renew a residence permit or the expulsion of a family member, Member States should have proper regard to criteria such as the person’s place of birth, his age of entry on the territory, the length of residence, his family relationships, the existence of family ties in the country of origin and the solidity of social and cultural ties with the country of origin. Special consideration should be paid to the best interest and wellbeing of children.’

25 See, to that effect, judgments of 21 April 2016, *Khachab* (C-558/14, EU:C:2016:285, paragraph 43); of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 48); and of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453, paragraph 60).

26 See, to that effect, judgments of 21 April 2016, *Khachab* (C-558/14, EU:C:2016:285, paragraph 43), and of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 81); and my Opinion in *C and A* (C-257/17, EU:C:2018:503, point 75), and in *K and B* (C-380/17, EU:C:2018:504, point 70).

27 See, to that effect, the guidance for application of Directive 2003/86 (COM(2014) 210 final, of 3 April 2014, p. 29) which recommends that the following principles should be respected: all the individual circumstances of a case must be identified and the weight given to individual and public interests must be similar to that in comparable cases. Also, the balancing of relevant individual and public interests must appear reasonable and proportional.

life.²⁸ The assessment under Article 17 of Directive 2003/86 must therefore be carried out in the light of that right, having regard for, on the one hand, ‘*the duration of ... residence*’²⁹ in the Member State concerned by the holder of the right to family reunification and, on the other hand, ‘*the existence of family, cultural and social ties with his/her country of origin*’.³⁰

32. Taking account of the duration of residence as an element when weighing up the interests in play relates to the assumption that the longer a person has been residing in a particular State, the stronger his or her ties with that State and the weaker the ties with his or her country of origin will be.³¹ Against that background, the special situation of third-country nationals who have spent most of their life in the Member State concerned, were brought up there and received their education there, amongst other circumstances, must be taken into account.³² Whether or not the person concerned has family, cultural or social ties with his or her country of origin, on the other hand, is assessed on the basis of circumstances such as, amongst others, whether there is a family circle in that country, travel to or periods of residence in that country and how well the person concerned speaks its language.³³

33. In the main proceedings, it is apparent from the order for reference that the sponsor has lived in the Netherlands for more than 17 years, and the mother and the son for more than 16 years, and that the son was only 11 years old when he arrived in the Netherlands.³⁴ It is therefore not inconceivable that, during that period, they established close ties with the Netherlands and that, conversely, they now have practically no or at least very weak ties with their country of origin. Under those circumstances, it is conceivable that the consequences of withdrawing their residence permits for the purpose of family reunification and of any expulsion would be excessively onerous, if not disproportionate.

28 See, to that effect, judgments of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 75 and 76), and of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 44).

29 Article 17 of Directive 2003/86, emphasis added.

30 Article 17 of Directive 2003/86, emphasis added.

31 The situation is obviously not the same where the person concerned arrived in the host country when he or she was a child or young person as where he or she only came as an adult. See, to that effect, in relation to removal orders, judgment of the Court of Human Rights of 18 February 1991, *Moustaquim v. Belgium* (Grand Chamber) (CE:ECHR:1991:0218JUD001231386, § 45): in that case, Mr Moustaquim was less than two years old when he arrived in Belgium, from that time on he had lived there for about 20 years with his family or not far away from them, in Belgium, and had returned to Morocco only twice, for holidays); judgment of the Court of Human Rights of 9 December 2010, *Gezginci v. Switzerland* (CE:ECHR:2010:1209JUD001632705, § 69): in that case the applicant had entered Switzerland in 1990 and had been there lawfully for 18 consecutive years until he was expelled. According to the Court of Human Rights, it was clear that this was a very long period in an individual’s life and, specifically, more than two thirds of the lifetime of the applicant, who was born in 1983).

32 See, amongst others, judgment of the Court of Human Rights of 18 October 2006, *Üner v. Netherlands* (Grand Chamber) (CE:ECHR:2006:1018JUD004641099, § 58); of 23 June 2008, *Maslov* (Grand Chamber) (CE:ECHR:2008:0623JUD000163803, §§ 73, 74 and 86): the applicant had arrived in Austria in 1990 at the age of six, and had spent the rest of his childhood and adolescence in that country; and of 23 September 2008, *Bousarra v. France* (CE:ECHR:2010:0923JUD002567207, §§ 46 and 47). See also, judgment of the Court of Human Rights of 19 February 1998, *Dalia v. France* (CE:ECHR:1998:0219JUD002610295, §§ 42 to 45): the expulsion of long-term residents may be analysed both in terms of ‘private life’ and ‘family life’, giving a degree of significance in that regard to the extent to which the persons concerned are socially integrated, mentioned in the judgment of the Court of Human Rights of 9 October 2003, *Slivenko v. Latvia* (CE:ECHR:2003:1009JUD004832199, § 96).

33 See, for example, judgments of the Court of Human Rights of 23 June 2008, *Maslov* (Grand Chamber) (CE:ECHR:2008:0623JUD000163803, §§ 96 and 97), in which it was found that the applicant’s ties with his country of origin, Bulgaria, were weak, in so far as he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria, and he was unable to read or write Cyrillic as he had never gone to school in Bulgaria, and of 30 November 1999, *Baghli v. France* (CE:ECHR:1999:1130JUD003437497, § 48), in which, in contrast, the ECtHR, after establishing that the applicant had not shown that he had close ties with either his parents or his brothers and sisters living in France, that he had retained his Algerian nationality, spoke Arabic, had performed his military service in his country of origin and had gone there on holiday several times and that he had never evinced a desire to become French, found that, even though his main family and social ties were in France, there was evidence that the applicant had preserved ties, going beyond mere nationality, with his native country.

34 It is worth noting on that point that, also regarding expulsion, in its Recommendation Rec(2000) 15 concerning the security of long-term migrants, the Committee of Ministers to Member States, states in paragraph 4, ‘As regards the protection against expulsion ... (b) In application of the principle of proportionality as stated in Paragraph 4.a, Member States should duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant. More particularly, Member States may provide that a long-term immigrant should not be expelled: — after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years’ imprisonment without suspension; — after ten years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of five years of imprisonment without suspension. After twenty years of residence, a long-term immigrant should no longer be expellable’.

34. On the basis of all the foregoing, the answer to the first question referred should be that Article 16(2)(a) of Directive 2003/86 must be interpreted as not precluding withdrawal of a residence permit granted, as a derived right, for the purpose of family reunification, acquired on the basis of fraudulent information, where it has been established, in relation to the person who applied for family reunification, that he or she intended to circumvent or evade the conditions for obtaining that permit, even where the holder of that permit was unaware of the fraudulent nature of that information. The competent Member State authorities must, before withdrawing a residence permit, assess all the interests in play, in accordance with Article 17 of Directive 2003/86, and must conduct that assessment in the light of all the relevant circumstances of the case, including the fact that the holder of the residence permit neither committed the fraud that led to the permit being granted nor was aware of it.

B. Interpretation of Article 9(1)(a) of Directive 2003/109

35. By its second question referred for a preliminary ruling, the referring court asks the Court of Justice essentially whether Article 9(1)(a) of Directive 2003/109 must be interpreted as precluding the withdrawal of the long-term resident status of the mother and the son, in the circumstances of the case in the main proceedings.³⁵

36. Specifically, the referring court enquires whether the State Secretary, when making the withdrawal decisions of 29 January 2014, should have taken into account the fact that the son and the mother were unaware of the fraudulent nature of the father's employer declarations submitted as supporting evidence in order to obtain that status.

37. As it states in recital 2, Directive 2003/109 is intended to implement the Tampere declaration of 15 and 16 October 1999, on conclusion of which the European Council stated that 'the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.' As can be seen in particular from recitals 4, 6 and 12 of Directive 2003/109, the integration of third-country nationals who are settled on a long-term basis in the Member States constitutes the principal purpose of that directive.³⁶ In pursuance of that objective, Directive 2003/109 guarantees third-country nationals who have acquired long-term resident status equal treatment with nationals of the Member State concerned, in the areas listed in Article 11(1)(a) to (h) of that directive, within the territory of the Member State concerned.

38. Furthermore, as the Court of Justice held in paragraphs 66 and 67 of the judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233), the system put in place by Directive 2003/109 makes the acquisition of the status of long-term resident conferred by that directive subject to a specific procedure and specific conditions. Thus, Article 4 of the directive provides that the Member States are to grant long-term resident status to third-country nationals who have resided legally and continuously on their territory for five years immediately prior to the submission of the relevant

³⁵ As emerges from the information provided by the referring court, the son, who was born in 1991, was therefore 16 years old at the time the State Secretary made the 21 March 2007 decision. However, the referring court posed its question in general terms.

³⁶ See, to that effect, judgments of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094), paragraph 32; of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369, paragraph 46 and the case-law cited); and of 2 September 2015, *CGIL and INCA* (C-309/14, EU:C:2015:523, paragraph 21);

application;³⁷ Article 5 of the directive makes the acquisition of long-term resident status conditional upon evidence that the third-country nationals who wish to enjoy that status have sufficient resources and sickness insurance; finally, Article 7 of the directive lays down the procedural requirements that must be complied with.

39. Article 9(1)(a) of Directive 2003/109, entitled ‘withdrawal or loss of status’, provides that detection of fraudulent acquisition of long-term resident status gives rise to loss of entitlement to that status.³⁸

40. Nothing in the wording of that article specifically establishes that the concept of ‘fraudulent acquisition’ requires intent.

41. However, as I called to mind in points 21 to 22 of this Opinion, as apparent from the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 50), findings of fraud involve ascertaining whether there is a consistent body of evidence that satisfies both an objective and a subjective factor. Therefore, only fraud committed physically and deliberately by the third-country national who made the application for long-term residence can be penalised.

42. The fact, as the Commission notes,³⁹ that obtaining long-term resident status has significant implications, in particular for residence in other Member States, does not cast doubt on the need, in order to find that there is fraud, to establish that the person applying to obtain that status intended to circumvent the applicable provisions. I would also observe that, in contrast to Article 16(2)(a) of Directive 2003/86, which includes as one of the grounds for withdrawal mere use of ‘false or misleading information’ or ‘false or falsified documents’, Article 9(1)(a) of Directive 2003/109 only mentions the situation of ‘fraudulent acquisition’. Without prejudice to how Article 16(2) of Directive 2003/86 should be construed, in my view the foregoing circumstances reveal the legislature’s intention to confine the loss of long-term resident status to which Article 9(1)(a) of Directive 2003/109 refers only to cases where a fraudulent intention is established. I would also emphasise that obtaining long-term resident status implies that the person concerned is highly integrated⁴⁰ and has a high level of personal investment⁴¹ in the host Member State and this, to my mind, means that the requirements for withdrawing that status must not be interpreted too broadly.

43. Lastly, whilst family members’ rights of entry and stay, granted for the purposes of family reunification, are rights derived from that of the sponsor, long-term resident status under Directive 2003/109 is a personal right, obtained pursuant to an application made by the person concerned in his or her own name. That distinction affords all the more reason in relation to long-term resident

³⁷ As apparent from the judgment of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094, paragraph 34): a third-country national may apply to acquire that status, pursuant to Article 7(1) of Directive 2003/109, only if *he personally* meets the condition of residing legally and continuously within the territory of the Member State concerned for five years prior to the relevant application.

³⁸ I note that, although the heading of Article 9 of Directive 2003/109 refers to possible withdrawal or loss of the status of long-term resident, the wording of that article refers only to instances of loss. Moreover, to the extent that it is distinct from *maintenance* of entitlement to that status, ‘loss’, in itself, appears to entail consequences only in the future, as Y.Z., Z.Z. and Y.Y. contend. That reading is confirmed by the English (‘no longer be entitled to maintain’), German (‘ist nicht mehr berechtigt, die Rechtsstellung eines langfristig Aufenthaltsberechtigten zu behalten’) and Italian (‘I soggiornanti di lungo periodo non hanno più diritto allo status di soggiornante di lungo periodo nei casi seguenti’) versions of Article 9(1) of Directive 2003/109. Since the Court of Justice has not been asked whether the long-term resident residence permits of the mother and the son could be withdrawn retroactively, I will not address that issue.

³⁹ See Chapter III of Directive 2003/109.

⁴⁰ Accordingly, discontinuity in the long-term resident’s presence in the territory of the Member State is a ground for losing long-term resident status, see Article 9(1)(c) of Directive 2003/109.

⁴¹ In that respect, I note also that, under Article 5(2) of Directive 2003/109, Member States may require third-country nationals to comply with integration conditions, in accordance with national law. See, to that effect, judgment of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369, paragraph 47): it cannot be disputed that the acquisition of knowledge of the language and society of the host Member State greatly facilitates communication between third-country nationals and nationals of the Member State concerned and, moreover, encourages interaction and the development of social relations between them. Nor can it be contested that the acquisition of knowledge of the language of the host Member State makes it less difficult for third-country nationals to access the labour market and vocational training.

status for rejecting the argument, advanced in particular by the Commission at the hearing and based on the maxim '*fraus omnia corrumpit*', according to which fraud committed by a third party is decisive for the purpose of withdrawing that status. The Court of Justice's long-standing protection of individual rights strongly militates against any such argument.

44. In the main proceedings, as regards the objective element required in order to find fraud, it is apparent from the order for reference that the mother and the son did not, autonomously, have sufficient stable and regular resources within the meaning of Article 5(1)(a) of Directive 2003/109.⁴² Furthermore, as the referring court notes, given that the mother's and the son's residence permits for the purpose of family reunification were acquired on the basis of fraudulent documents, the legal residence condition laid down by Article 4(1) of Directive 2003/109 was, in principle, not fulfilled at the time the application for long-term resident status was made. This means that the mother and the son did not satisfy the conditions required by Directive 2003/109 and that, accordingly, the objective element necessary to find that there was fraud, as defined in the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63), is established.

45. According to the definition given in the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 52) applied to the circumstances of the case in the main proceedings, the subjective element needed to find that there is fraud corresponds to the applicant's intention to evade or circumvent the conditions for the issuing of long-term resident status with a view to obtaining the advantage attached to that status. Therefore, the mere fact that the mother and the son were aware of the fraud committed by the father and that they intended to benefit from it would have given rise to fraudulent acquisition within the meaning of Article 9(1)(a) of Directive 2003/109. The referring court indicates that the mother and the son were unaware of the fraudulent nature of the declarations of the father's employer that they submitted as supporting evidence seeking to show that they satisfied the condition under Article 5(1)(a) of Directive 2003/109. It therefore does not appear, in the main proceedings, that the mother and the son deliberately tried to circumvent that condition. It is nevertheless for the referring court to ascertain whether that is indeed so.

46. Subject to that verification, if there is no intention on the part of the mother and the son to circumvent the conditions for granting long-term resident status, it cannot be found that there was fraud.

47. At this stage, it is important to note that the grounds for loss or withdrawal of long-term resident status that are set out, exhaustively, in Article 9 of Directive 2003/109, do not include a subsequent finding that the conditions for granting that status were not met. Under Article 8(1) of that directive, 'the status as long-term resident shall be permanent, subject to Article 9', thereby implying that, with the exception of the situations listed exhaustively in Article 9,⁴³ that status cannot be lost or withdrawn.⁴⁴ Indeed, it is apparent from the *travaux préparatoires* for Directive 2003/109, long-term resident status must offer its holder maximum legal certainty.⁴⁵

42 The condition relating to sufficient stable and regular resources (Article 7(1) of Directive 2003/109) must be established *at the time the person concerned acquires* long-term resident status. At that time, the applicant provides evidence that he or she has and will continue to have a certain level of resources on a regular basis.

43 It is clear from the *travaux préparatoires* that the list in Article 9 of Directive 2003/109 is exhaustive. See, to that effect, the commentary on Article 10 of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 127 final (OJ 2008, E 240, p. 79).

44 On the other hand, it is possible to wonder whether the competent Member State authorities can withdraw a residence permit for the purpose of family reunification where it is found, subsequently, that the conditions required by Directive 2003/86 are not satisfied, in so far as Article 16(1)(a) of that directive provides that they can withdraw that permit 'where the conditions laid down by this Directive are not or are no longer satisfied'.

45 See the commentary on Article 10 of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final) (OJ 2008, E 240, p. 79).

48. Admittedly, in its judgment of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094, paragraphs 30 and 34), the Court of Justice held that the condition laid down in Article 4(1) of Directive 2003/109 requiring legal and continuous residence within the territory of the Member State concerned for five years prior to submission of the relevant application is an essential condition for acquiring the long-term resident status provided for in that directive. Nevertheless, that judgment related only to refusal of an application for long-term resident status. The judgment does not indicate that the long-term resident status is lost if it is subsequently found that the condition in question was not met.

49. Accordingly, in the absence of a finding of fraud, there was no legal basis in Directive 2003/109 for withdrawing the long-term resident status of the mother and the son.

50. It is apparent from all the foregoing considerations that Article 9(1)(a) of Directive 2003/109 must be interpreted as precluding withdrawal of long-term resident status where the holder of that status was unaware of the fraudulent nature of the information he or she submitted in support of his or her application and on the basis of which that status was granted.

V. Conclusion

51. In the light of all the foregoing, I propose that the Court should reply as follows to the questions referred by the Raad van Staat (Council of State, Netherlands):

- (1) Article 16(2)(a) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as not precluding withdrawal of a residence permit granted for the purpose of family reunification, acquired on the basis of fraudulent information, where it has been established, in relation to the person who applied for family reunification, that he or she intended to circumvent or evade the conditions for obtaining that permit, even where the holder of that permit was unaware of the fraudulent nature of that information. The competent Member State authorities must, before withdrawing a residence permit, assess all the interests in play, in accordance with Article 17 of Directive 2003/86, and must conduct that assessment in the light of all the relevant circumstances of the case, including the fact that the holder of the residence permit neither committed the fraud that led to the permit being granted nor was aware of it.
- (2) Article 9(1)(a) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as precluding withdrawal of long-term resident status where the holder of that status was unaware of the fraudulent nature of the information he or she submitted in support of his or her application and on the basis of which that status was granted.