



Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE

delivered on 21 October 2021¹

Case C-432/20

ZK

intervener:

Landeshauptmann von Wien

(Request for a preliminary ruling from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria))

(Reference for a preliminary ruling – Area of freedom, security and justice – Immigration policy – Directive 2003/109/EC – Article 9(1)(c) – Loss of the status of long-term resident third-country national – Absence from the territory of the European Union for a period of 12 consecutive months – Interruption of that period of absence – Irregular and short-term stays in the territory of the European Union)

I. Introduction

1. In the present case, which concerns a request for a preliminary ruling under Article 267 TFEU, the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) refers three questions to the Court for a preliminary ruling on the interpretation of Article 9(1)(c) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,² as amended by Directive 2011/51/EU of the European Parliament and of the Council³ ('Directive 2003/109').

2. The request has been made in proceedings between ZK, a Kazakh national, and the Landeshauptmann von Wien (Head of Government of the Province of Vienna, Austria) concerning the latter's refusal to renew ZK's permit of status as a long-term resident third-country national. The reason given for the rejection was that between August 2013 and August 2018, ZK had only stayed in the European Union for a few days each year. The referring court submits that the Austrian legislation applicable to the present case, which provides that short, intermittent stays in the European Union are not sufficient to prevent loss of that legal status on grounds of absence from EU territory for more than 12 months, is not compatible with Article 9(1)(c) of Directive 2003/109. Under that provision, a third-country national loses the right

¹ Original language: French.

² OJ 2004, L 16 p. 44.

³ OJ 2011, L 132, p. 1.

to long-term resident status in the event of ‘absence from the territory of the [European Union] for a period of 12 consecutive months’. According to the referring court, the Austrian legislation referred to above goes beyond what is required and permitted by EU law.

3. The present case gives the Court the opportunity to rule on a novel question of law, namely the conditions laid down in Article 9(1)(c) of Directive 2003/109 for the withdrawal by national authorities of the status of long-term resident third-country national. More specifically, the Court will have to clarify the requirements as to the duration and quality of residence in EU territory with which every third-country national must comply to be able to retain the legal status conferred on him or her by Directive 2003/109. The Court’s answer to those questions referred is likely to have an impact on the integration of third-country nationals into the area of freedom, security and justice envisaged by the EU Treaties.

II. Legal framework

A. European Union law

4. Recitals 2, 4, 6, 10 and 12 of Directive 2003/109 state:

‘(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, 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.

...

(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 [European] 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.

...

(10) A set of rules governing the procedures for the examination of application for long-term resident status should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States’ administrations, as well as being transparent and fair, in order to offer appropriate legal certainty to those concerned. They should not constitute a means of hindering the exercise of the right of residence.

...

(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.’

5. Article 1 of that directive provides:

‘This Directive determines:

- (a) the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto; and
- (b) the terms of residence in Member States other than the one which conferred long-term status on them for third-country nationals enjoying that status.’

6. Under Article 4 of that directive, entitled ‘Duration of residence’:

‘1. 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.

...

3. Periods of absence from the territory of the Member State concerned shall not interrupt the period referred to in paragraph 1 and shall be taken into account for its calculation where they are shorter than six consecutive months and do not exceed in total 10 months within the period referred to in paragraph 1.

...’

7. Article 8 of Directive 2003/109, entitled ‘Long-term resident’s [EU] residence permit’, provides:

‘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.

...’

8. Article 9 of that directive, 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:

...

- (c) in the event of absence from the territory of the [European Union] for a period of 12 consecutive months.

2. By way of derogation from paragraph 1(c), Member States may provide that absences exceeding 12 consecutive months or for specific or exceptional reasons shall not entail withdrawal or loss of status.

...

5. With regard to the cases referred to in paragraph 1(c) and 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.

...'

9. Article 11 of Directive 2003/109, entitled 'Equal treatment', states:

'1. Long-term residents shall enjoy equal treatment with nationals as regards:

...

(b) education and vocational training, including study grants in accordance with national law;

...

(d) social security, social assistance and social protection as defined by national law;

(e) tax benefits;

(f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing;

(g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;

...

2. With respect to the provisions of paragraph 1, points (b), (d), (e), (f) and (g), the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.

...'

B. Austrian law

10. The relevant provisions of national law are contained in the Niederlassungs- und Aufenthaltsgesetz (Law on establishment and residence;⁴ 'the NAG').

⁴ BGBl. I, 100/2005.

11. Paragraph 2(7) of the NAG reads as follows:

‘Short stays in Austria and abroad, in particular for the purpose of visits, do not interrupt the duration of residence or establishment giving rise to or terminating rights. ...’

12. Paragraph 20 of the NAG, entitled ‘Duration of validity of residence permits’, provides:

...

(3) Holders of a “long-term resident – EU” residence permit (Paragraph 45) shall – without prejudice to the limited period of validity of the document corresponding to these residence permits – be established permanently in Austria. That document is to be issued for a period of five years and, in so far as no measures under the Fremdenpolizeigesetz 2005 (2005 Law on policing foreign nationals) are enforceable, is to be renewed, upon application, even after expiry, by way of derogation from Paragraph 24.

(4) A residence permit under subparagraph 3 shall expire if the foreign national resides outside the territory of the [European Economic Area (EEA)] for more than 12 consecutive months. Having regard to particular considerations, such as serious illness, fulfilment of a social obligation or performance of a service comparable with compulsory military service or community service, a foreign national may reside outside the territory of the EEA for up to 24 months, if he or she has informed the authorities thereof in advance. Where the foreign national has a legitimate interest, the competent authority shall declare, upon application, that the residence permit has not expired. It is for the foreign national to prove that he or she resides in the territory of the EEA.

...’

III. Background to the dispute, the main proceedings and the questions referred for a preliminary ruling

13. On 6 September 2018, ZK, a Kazakh national, submitted an application for renewal of his long-term residence permit. That application was rejected by decision of 9 July 2019 of the Landeshaupmann von Wien (Head of Government of the Province of Vienna, Austria).

14. On 12 August 2019, ZK brought an action against that decision before the referring court.

15. The referring court notes that, although ZK has, in the period between August 2013 and August 2018 and thereafter, never stayed outside EU territory for a period of 12 consecutive months or longer, it is common ground that during that period, ZK had been present in the European Union for only a few days a year. That last circumstance was used by the defendant administrative authority as grounds to refuse to renew the applicant’s residence permit.

16. It is clear from the order for reference that the applicant produced, before the referring court, a legal analysis carried out by the European Commission’s group of experts on legal migration, which concludes that the condition of application relating to absence from EU territory, provided for in Article 9(1)(c) of Directive 2003/109, is to be interpreted narrowly, as meaning that only physical absence from that territory for a period of 12 consecutive months entails the

loss of long-term resident status under that provision. According to that analysis, it is, in that regard, irrelevant whether a long-term resident was also physically established in that territory or had his or her usual place of residence there during the material period.

17. The referring court submits that such an analysis, with which it tends to agree, supports the applicant's arguments. If that analysis were accepted, even short stays or, as in the present case, even those of just a few days a year, would suffice to preclude the application of Article 9(1)(c) of Directive 2003/109 and the applicant would accordingly maintain his status as a long-term resident.

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

- '(1) Must Article 9(1)(c) of Directive [2003/109] be interpreted as meaning that any physical stay, no matter how short, of a third-country national who is a long-term resident in the territory of the [European Union] during a period of 12 consecutive months precludes loss of the status of long-term resident third-country national under this provision?
- (2) If the Court answers Question 1 in the negative: what qualitative and/or quantitative requirements must [stay] in the territory of the [European Union] for a period of 12 consecutive months satisfy in order to preclude loss of the status of long-term resident third-country national? Do stays during a period of 12 consecutive months in the territory of the [European Union] preclude loss of the status of long-term resident third-country national only if the third-country nationals concerned had their habitual residence or centre of interests in the territory of the [European Union] during that period?
- (3) Are rules of the legal systems of the Member States, which provide for loss of the status of long-term resident third-country national where such third-country nationals resided in the territory of the [European Union] for a period of 12 consecutive months, but had neither their habitual residence nor centre of interests there, compatible with Article 9(1)(c) of Directive [2003/109]?'

IV. Procedure before the Court

19. The order for reference, dated 28 August 2020, was lodged at the Registry of the Court of Justice on 14 September 2020.

20. The referring court requested that the Court deal with the order for a preliminary ruling under the urgent procedure, pursuant to Article 107(1) of the Rules of Procedure of the Court of Justice.

21. By decision of the Court of 28 September 2020, and after hearing the Advocate General, that request was refused.

22. The Austrian Government and the European Commission lodged written observations within the period specified under Article 23 of the Statute of the Court of Justice of the European Union.

23. The legal representatives of ZK, the Austrian Government and the Commission submitted observations at the hearing on 15 July 2021.

V. Legal assessment

A. Preliminary remarks

24. Third-country nationals migrate to the European Union for various reasons, such as economic or family reasons, to pursue an education or to obtain international protection. Some of those people remain in the territory of Member States for many years and forge links with the Member State concerned. That is why the integration of third-country nationals who are long-term residents in the Member States is regarded as a key element in promoting economic and social cohesion within the European Union, a fundamental objective stated in Article 3 TEU. It should also be borne in mind that Article 79(1) TFEU provides for the development of a common immigration policy aimed, *inter alia*, at ‘ensuring ... fair treatment of third-country nationals residing legally in Member States’.⁵

25. One of the first pieces of legislation adopted by the European Union in the field of immigration was Directive 2003/109. The objective of that directive is to grant a ‘European’ status to third-country nationals residing legally in the European Union on a long-term basis. In order to ensure their integration, that directive seeks to approximate the rights of those persons to those enjoyed by EU citizens, in particular by establishing equal treatment with EU citizens in a wide range of economic and social matters. The rights conferred on them remain more limited in scope than those of EU citizens,⁶ but nevertheless include provisions on freedom of movement offering the right to reside for a period exceeding three months in the territory of Member States other than the one which granted them long-term resident status. Furthermore, a holder of long-term resident status has access to the labour market provided that his or her activities do not entail involvement in the exercise of public authority or that jobs are not reserved for nationals, EU citizens or citizens of the EEA. In the field of social protection, Member States may decide to limit long-term residents’ access to ‘core benefits’.

26. Access to long-term resident status is restricted to third-country nationals who have resided legally and continuously in the territory of a Member State for a period of five years. Anyone whose residence may be regarded as temporary is excluded. Member States retain broad discretion over the conditions conferring entitlement to long-term resident status.⁷ In addition to the conditions relating to stable, regular and sufficient resources and the possession of sickness insurance, which are also required of EU citizens residing in another Member State, there is an optional condition relating to ‘integration conditions’ which makes it possible to limit access to long-term resident status. Proof of a sufficient knowledge of the language of the Member State, to varying degrees of proficiency, is the main condition of integration required in all the Member States.

⁵ Iglésias Sánchez, S., ‘Free movement of third country nationals in the European Union? Main features, deficiencies and challenges of the new mobility rights in the area of freedom security and justice’, *European Law Journal*, Vol. 15, No 6, pp. 798 and 799, explains that the recognition of third-country nationals’ right to movement was inspired by the two intertwined rationales of promoting social integration and attracting qualified workers, in competition with the United States of America and Canada.

⁶ Halleskov, L., ‘The Long-Term Residents Directive: a fulfilment of the Tampere objective of near-equality?’, *European Journal of Migration and Law*, Vol. 7, No 2, 2005, p. 200.

⁷ Balleix, C., *La politique migratoire de l’Union européenne*, Paris 2013, p. 218.

27. The EU legislature seeks to attain the objective of long-term integration of third-country nationals by harmonising the conditions for *the granting* and *the withdrawal (or loss)* of long-term resident status. However, it is important to note that the present case differs from other cases already dealt with by the Court in that it instead concerns the second aspect, that is to say, the interpretation of the conditions for the withdrawal (or loss) of that status on the grounds of continuous absence from EU territory, under Article 9(1)(c) of Directive 2003/109. While it follows from that provision that a third-country national loses long-term resident status if he or she is absent from EU territory for a period of 12 consecutive months, it does not specify how to deal with short, sporadic stays and, in particular, whether they are capable of preventing that legal consequence from arising.

B. Consideration of the questions referred

28. By its three questions, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain which criteria must be used to determine whether a long-term resident has been ‘absent’ from EU territory for a period of 12 consecutive months within the meaning of Article 9(1)(c) of Directive 2003/109, since such absence as a rule entails loss of entitlement to long-term resident status. In particular, the referring court asks whether any stay during that period, however brief, may interrupt that absence and thus prevent loss of that status or whether the person concerned must instead have his or her usual place of residence or centre of interests in that territory during that period.

1. Recourse to various methods of interpretation

29. Since Article 9(1)(c) of Directive 2003/109 makes no reference to national law, it must be assumed that the concept of ‘absence’ is an independent concept of EU law which must be given a uniform interpretation, taking into account the wording of that provision and the objectives pursued by the rules of which it forms part and its context.⁸

(a) Literal interpretation

30. As regards the wording of that provision, it must be observed that there is some variation between the different language versions.

31. On the one hand, a significant number of language versions⁹ refer to an ‘absence’ from EU territory for the period of 12 consecutive months, which might suggest that mere physical presence would put an end to that absence. On the other hand, other language versions¹⁰ refer to the fact of not ‘residing’ in that territory for that period; use of that verb may imply a somewhat more ‘solid’ presence without, however, excluding stays of only a few days.

⁸ See, to that effect, judgment of 18 October 2012, *Singh* (C-502/10, EU:C:2012:636, paragraph 42).

⁹ See, by way of example, the Bulgarian (‘отсъствие’), Spanish (‘ausencia’), Danish (‘fraværende’), Estonian (‘äraolek’), Greek (‘απουσία’), English (‘absence’), French (‘absence’), Italian (‘assenza’), Polish (‘nieobecność’) and Swedish (‘bortovaro’) versions.

¹⁰ See, for example, the German (‘sich aufgehalten’) and Dutch (‘verblijven’) versions. However, both language versions of Article 9(2), which offers the possibility of derogation from its first paragraph, also use expressions equivalent to that of absence, namely ‘Abwesenheit’ and ‘afwezigheid’ respectively.

32. However, it seems to me that, apart from those slight linguistic nuances, the wording of Article 9(1)(c) of Directive 2003/109 does not, on its own, make it possible to determine unequivocally the exact scope of the concept of ‘absence’. No clear conclusion can be drawn from a literal interpretation of that provision. It is therefore necessary to have recourse to the other methods of interpretation recognised in the Court’s case-law.¹¹

(b) Systematic interpretation

(1) An exception to the general rule conferring a particular legal status on long-term residents must be interpreted restrictively

33. The context of Article 9 of Directive 2003/109 provides some useful pointers in clarifying the scope of that provision. First, Article 8(1) thereof provides that long-term resident status is to be permanent, ‘subject to Article 9’. Thus, since the permanent nature of that status is the ‘general rule’, Article 9(1)(c) of that directive appears to be an ‘exception’ and must therefore be *interpreted restrictively*, in keeping with a principle of interpretation recognised in the Court’s case-law.¹²

34. Moreover, it should be borne in mind that Directive 2003/109 establishes *an individual right* for third-country nationals to obtain long-term resident status and other rights which stem from the grant of that status, once the conditions laid down for that purpose have been satisfied¹³ and the respective procedures have been complied with.¹⁴ As already stated in the introduction to this Opinion,¹⁵ the directive *harmonises exhaustively* the conditions for obtaining long-term resident status. The same applies to the conditions for withdrawal of that status listed in Article 9 of Directive 2003/109.¹⁶ As a result, Member States cannot introduce additional conditions¹⁷ or interpret Article 9(1)(c) of Directive 2003/109 broadly without jeopardising the retention of long-term resident status.

35. In that respect, it seems to me imperative to protect acquired rights so that the provisions of Article 4(1) and Article 8(1) of that directive, which confer a particular legal status on long-term residents, are not deprived of their effectiveness. The fact that the EU legislature also included procedural guarantees in Article 10, which lays down, *inter alia*, the obligations to state the reasons for any decision to withdraw that status and to inform the third-country national

¹¹ See, in that regard, Lenaerts, K. and Gutiérrez-Fons, J.A., *Les méthodes d’interprétation de la Cour de justice de l’Union européenne*, Brussels, 2020.

¹² See, to that effect, judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 32).

¹³ See judgment of 26 April 2012, *Commission v Netherlands* (C-508/10, EU:C:2012:243, paragraph 68), and Opinion of Advocate General Bot in *Singh* (C-502/10, EU:C:2012:294, points 29 and 35), in which the Advocate General considers that the provisions at issue must be interpreted as meaning that Member States are under an *obligation* to grant that status if the relevant conditions are met.

¹⁴ See, in that regard, judgment of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraphs 45 to 48). As Peers, S., *EU Justice and Home Affairs Law, Volume I: EU Immigration and Asylum Law*, 4th edition, Oxford, 2016, p. 425, states, long-term resident status is not granted automatically but requires the person concerned to apply to the competent national authorities.

¹⁵ See point 27 of this Opinion.

¹⁶ Thym, D., ‘Long Term Residents Directive 2003/109/EC’, *EU Immigration and Asylum Law*, 04/2016, p. 473, paragraph 1, observes that Directive 2003/109 harmonises exhaustively the conditions for the acquisition and withdrawal (or loss) of long-term resident status. Consequently, once the third-country national has acquired that status, he or she is entitled to retain it even if he or she subsequently no longer satisfies the conditions laid down in Articles 5 and 6 of Directive 2003/109. Similarly, withdrawal (or loss) of that status can occur only if the conditions referred to in Article 9 of the directive are met.

¹⁷ See, to that effect, Boelaert-Suominen, S., ‘Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back’, *Common Market Law Review*, Vol. 42, No 4, 2005, p. 1025.

concerned of the remedies available and the time within which he or she may act, shows the importance that must be attached to the protection of that legal status. All those considerations also weigh in favour of a restrictive interpretation of that provision.

(2) *Any restrictions on equal treatment do not affect long-term resident status*

36. Article 11(2) of Directive 2003/109 provides an indication in support of the argument that the retention of long-term resident status does not require that the person concerned be resident in the territory of the Member State concerned or in EU territory. First, Article 11(1) thereof provides that long-term residents are to enjoy equal treatment with nationals as regards a wide range of matters. Second, Article 11(2) thereof authorises the Member State concerned to restrict equal treatment to third-country nationals whose registered or usual place of residence is in its territory. It must be observed, however, that they retain their long-term resident status despite that restriction of equal treatment.

37. That provision clearly shows that a distinction is to be drawn between, on the one hand, the advantages which a third-country national may enjoy by virtue of the fact that he or she has his or her registered or usual place of residence in the territory of the Member State concerned and, on the other hand, his or her long-term resident status. Not having a registered or usual place of residence in the territory of the Member State concerned may have negative consequences as regards the scope of benefits conferred under Directive 2003/109 and the national law transposing it, but does not necessarily entail the loss of that legal status.

(3) *The conditions for maintaining long-term resident status are less stringent than for granting it*

38. In essence, Directive 2003/109 governs two distinct aspects: the acquisition and the maintenance of long-term resident status. Third-country nationals are required to make an effort to integrate if they are to acquire that status. In setting a period of five years of continuous residence, the EU legislature assumes that a third-country national is bound to be integrated into the society of the host Member State after that period. As the Court observed in the judgment in *Singh*, ‘it is the duration of the legal and continuous residence of [five] years which shows that the person concerned *has put down roots* in the country and therefore the long-term residence of that person’.¹⁸ Once that objective of integration has been achieved, a third-country national having established a close link with the host Member State – confirmed from a legal point of view by the grant of long-term resident status – the requirements for maintaining it become less stringent.

39. Thus, the conditions for the granting and maintenance of long-term resident status differ considerably. Article 4(1) of Directive 2003/109 requires continuous ‘residence’ of five years in the Member State concerned for the grant of that status,¹⁹ whereas withdrawal is conditional on an ‘absence’ from EU territory of 12 consecutive months, without it being specified where exactly the third-country national must reside. It follows that continuous residence in EU territory is no longer necessary after the expiry of the five-year period laid down for obtaining long-term resident status.

¹⁸ Judgment of 18 October 2012, *Singh* (C-502/10, EU:C:2012:636, paragraph 46). Emphasis added.

¹⁹ See, in that regard, judgment of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094, paragraph 30), in which the Court observed that the residence requirement is essential for the grant of long-term residence status.

(4) *Interpretation taking into account the broader context*

40. In so far as the objective of Directive 2003/109 is to approximate the rights of those nationals to those enjoyed by EU citizens, it is possible to interpret Article 9(1)(c) of Directive 2003/109 by taking into account the broader context, namely the provisions of Directive 2004/38 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States.²⁰ The Court's case-law shows that the provisions of Directive 2004/38 lend themselves to a comparative analysis with those of Directive 2003/109, which allows useful conclusions to be drawn for the purposes of interpretation, notwithstanding certain differences which can be explained in particular by their specific legislative objectives.²¹

41. In that regard, attention should be drawn to Article 16(1) of Directive 2004/38, which provides that EU citizens who have resided legally for a continuous period of five years in the host Member State are to have the right of permanent residence there. This provision bears a *particular similarity* to Article 4(1) of Directive 2003/109 in that it likewise requires third-country nationals to be legally and continuously resident for five years in order to acquire long-term resident status.

42. The same applies to the provisions governing loss of the right of residence. Under Article 16(4) of Directive 2004/38, 'once acquired, the right of permanent residence shall be lost only through *absence* from the host Member State for a period exceeding two consecutive years' (emphasis added). In that connection, it must be recalled that in the judgment in *Dias*,²² which specifically concerned the interpretation of Directive 2004/38, the Court ruled that an EU citizen's loss of the right of permanent residence by reason of absences of more than two consecutive years from the host Member State may be justified because, after an absence of that duration, 'the link with the host Member State is *loosened*'.

43. Article 9(1)(c) of Directive 2003/109 is based on the same reasoning, in that it must be assumed that a third-country national's link with the European Union, established through efforts to integrate made over the course of the five years provided for in Article 4(1) thereof, is 'loosened' where that third-country national is absent for more than 12 consecutive months.

44. It must be observed in that context that the Commission's proposal prior to the adoption of Directive 2003/109 also initially provided for an absence of two consecutive years.²³ The origin of that provision thus demonstrates the initial intention to align the provisions governing permanent residence of EU citizens and that of third-country nationals.

45. Taking into account all the abovementioned factors, it seems to me possible to reject the Austrian Government's interpretation, requiring the third-country national actually to 'habitually reside' in the territory of the Member State concerned or in EU territory.

²⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004, L 158, p. 77).

²¹ Judgment of 3 October 2019, *X (Long-term residents – Stable, regular and sufficient resources)* (C-302/18, EU:C:2019:830, paragraph 32 et seq.).

²² Judgment of 21 July 2011, *Dias* (C-325/09, EU:C:2011:498, paragraph 59). Emphasis added.

²³ See Article 10(1)(a) of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final) (OJ 2001, C 240 E, p. 79).

(c) Teleological interpretation

46. Since Directive 2003/109, as is apparent from recital 4 thereof, seeks to promote the integration of third-country nationals who are long-term residents in the interests of promoting economic and social cohesion,²⁴ it is important to ensure that the legal status of long-term resident is granted only to those who are eligible for it, namely, everyone who has a sufficiently close, genuine link with the European Union and its Member States, established through successful integration over five years of continuous legal residence.

47. On the other hand, Article 9(1)(c) of Directive 2003/109 implies that long-term resident status must be withdrawn where the individuals concerned no longer have that link to the host Member State. There is no legitimate reason for retaining the legal status of long-term resident where that link is ‘dissolved’, given that the objective pursued by Directive 2003/109 is no longer achieved. All those considerations must be taken into account when interpreting the provision in question.

48. An interpretation in the light of the legislative objective referred to in the preceding points has the consequence that Article 9(1)(c) of Directive 2003/109 must be applied in a nuanced manner, depending on the circumstances of each particular case. In order to provide the referring court with useful interpretive guidance, I consider it appropriate to explain, with the help of a number of practical examples, how a teleological interpretation influences the application of that provision.

2. Consequences for the application of Article 9(1)(c) of Directive 2003/109

(a) Mandatory loss of long-term resident status after the expiry of a period of 12 consecutive months

49. At the outset, it must be observed that absence for a period of 12 consecutive months entails, as a *general rule*, the loss of entitlement to long-term resident status, as provided for in Article 9(1)(c) of Directive 2003/109.²⁵ Not only does the unequivocal wording of that provision leave no room for interpretation in that regard, from the perspective of the third-country national’s integration, it may also be inferred that the link with the host Member State has usually ‘dissolved’ after such a long period.

50. Such a legal consequence does not seem to me disproportionate given that it follows from Article 9(5) of Directive 2003/109 that Member States which have granted long-term resident status must provide for a ‘facilitated procedure’ for its re-acquisition. It is therefore still possible for the person concerned to restore the link with the host Member State, in the mutual interest of both parties.

51. I would point out that such a legal consequence is the result of a situation in which the host Member State has not made use of the exception referred to in Article 9(2) of Directive 2003/109. Under that provision, by way of derogation from paragraph 1(c), Member States may provide that ‘absences exceeding 12 consecutive months’ or for ‘specific or exceptional reasons’

²⁴ See point 24 of this Opinion.

²⁵ Thym, D., ‘Long Term Residents Directive 2003/109/EC’, *EU Immigration and Asylum Law*, 04/2016, p. 474, paragraph 6, interprets that provision as entailing the ‘automatic’ loss of long-term resident status.

are not to entail withdrawal or loss of the status.²⁶ It follows that Member States are given considerable leeway in the implementation of that provision, thereby allowing the legal consequence arising from the interpretation supported above to be avoided.

(b) Legal treatment of short, sporadic stays

52. As long as the person concerned mostly resides in EU territory for that 12-month period, no difficulty should arise as regards the application of Directive 2003/109, since it is clear that the conditions laid down in Article 9(1)(c) thereof are not satisfied. By contrast, the question arises as to how to deal with a situation in which the person concerned resides in EU territory sporadically for short periods during the year.

53. In my view, even such a short, sporadic presence in EU territory should be capable of preventing loss of the right to long-term resident status, provided that it can be established with certainty that the individual concerned still has ‘roots’ in the country, within the meaning of recital 6 of Directive 2003/109. In other words, a third-country national who has long-term resident status must demonstrate *a sufficiently close ‘link of integration’ with the host Member State*. Where that condition is not met, it seems to me that the general rule, entailing loss of long-term resident status,²⁷ must apply.²⁸

54. In so far as Article 4 of Directive 2003/109, read together with Article 8 thereof, specifies that the right of permanent residence is to be granted if, pursuant to Article 5 thereof, the third-country national provides evidence that the conditions for acquiring that status are met, it appears to me logical and fair to consider that it is, in turn, for the national authorities to examine all the relevant circumstances of the particular case and, where appropriate, *to prove that there is no such link* before taking a decision to withdraw that status from the person concerned. In my view, it is imperative to place the *burden of proof* on the national authorities as regards the existence of facts in the specific case such as to justify recourse to Article 9(1)(c) of Directive 2003/109 in order that the abovementioned provisions, conferring a particular legal status on long-term residents, are not deprived of their effectiveness.

55. Such an approach seems to me sufficient to ensure that long-term resident status is not used for purposes other than those intended by the EU legislature. In particular, it is necessary to prevent an undue advantage being derived from that status, for example, the choice of a national court with the aim of ensuring the application of law more favourable to the interests of the person concerned (‘forum shopping’), the receipt of social benefits, facilitation of unlawful activities, and so on.²⁹ Since Directive 2003/109 is addressed to the Member States, which are required to transpose it into their domestic legal systems, it is for them to play the crucial role of ensuring that its objectives are achieved.

²⁶ See, in that regard, the Report from the Commission to the European Parliament and the Council on the implementation of Directive [2003/109] (COM(2019) 161 final, p. 6), from which it is apparent that Austria has availed itself of the option provided for in Article 9(2) of Directive 2003/109 by providing that an absence of 12 consecutive months from EU territory as a general rule leads to a loss of status but a longer absence may be permitted in exceptional circumstances.

²⁷ See point 49 of this Opinion.

²⁸ See, in that regard, Thym, D., ‘Long Term Residents Directive 2003/109/EC’, *EU Immigration and Asylum Law*, 04/2016, p. 475, paragraph 7, which takes the view that, given the objective pursued by Directive 2003/109 of promoting the integration of third-country nationals and ensuring that they have ‘put down roots’ in the host Member State, short visits should not generally be capable of interrupting the 12-month period. By contrast, the author favours a less ‘formalistic’ approach if an *individual assessment of the situation* of the person concerned warrants a decision to maintain long-term resident status.

²⁹ See, by analogy, judgment of 14 March 2019, *Y.Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 64), concerning the withdrawal of long-term resident status based on fraud.

56. In particular, the requirement to be present in EU territory, which is apparent from Article 9(1)(c) of Directive 2003/109, reflects the idea that third-country nationals who are long-term residents must maintain a ‘genuine’, and not merely ‘formal’, link with the Member State concerned if they are to be able to retain that status permanently.

57. In that regard, however, it must be pointed out that excessively stringent requirements cannot be imposed in respect of the existence of such a sufficiently close, genuine link of integration, since the third-country national’s ‘roots’ in the Member State concerned have already been thoroughly assessed by the national authorities during the procedure for acquiring long-term resident status. Moreover, it seems to me that the imposition of excessively strict requirements would hinder attainment of the objective of approximating the legal status of third-country nationals to that of nationals of the Member States.³⁰

58. Thus, as has already been stated above, an overly broad interpretation of the conditions governing withdrawal or loss of long-term resident status would be liable to frustrate the objective of ensuring the integration of third-country nationals. The approach proposed in this Opinion relates only to cases in which the retention of that legal status no longer appears warranted on the ground that it does not contribute to the economic and social cohesion pursued by the EU legislature.

59. In view of the fact that the task of assessing an integration link may prove particularly complicated in practice, I propose to provide the referring court with some guidance in the form of criteria demonstrating whether the third-country national intends to participate in the economic and social life of the host Member State. The competent national authorities could use that *list of criteria* in the exercise of their discretion. That list of criteria to be developed by case-law should be understood as *indicative* and *non-exhaustive*. Since all integration into society is based on territorial, time and qualitative factors,³¹ I consider that that list should be composed of criteria derived from those categories.

60. Although at first sight Article 9(1)(c) of Directive 2003/109 focuses on a ‘territorial’ criterion, it seems to me that the concept of ‘absence’ should be interpreted in a manner which better meets the requirements of a globalised society such as ours. Mere ‘physical’ presence in the European Union may be misleading if the person concerned is not really integrated into society. In that context, it must not be forgotten that a person’s integration into a foreign society is a complex process of acculturation, the key elements of which, according to the common basic principles for immigrant integration policy set out by the Council in 2004 and confirmed by the Stockholm Programme,³² are interaction and increased exchanges between immigrants and citizens of the Member State concerned and the promotion of intercultural dialogue.

³⁰ See, by analogy, judgment of 26 April 2012, *Commission v Netherlands* (C-508/10, EU:C:2012:243, paragraph 65), in which the Court stated that the discretion granted to Member States by Directive 2003/109 as regards the charges levied on third-country nationals and their family members for the issue of residence permits is not unlimited. Referring to its case-law, the Court pointed out that the Member States may not apply national rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

³¹ See, in that regard, judgment of 21 July 2011, *Dias* (C-325/09, EU:C:2011:498, paragraph 64), in which, concerning the interpretation of Article 16(1) of Directive 2004/38, the Court held that ‘the integration objective which lies behind the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on *territorial and time factors* but also on *qualitative elements*, relating to the level of integration in the host Member State’ (emphasis added).

³² The Stockholm Programme – An open and secure Europe serving and protecting citizens (OJ 2010, C 115, p. 1). See Council press release 14615/04 of 19 November 2004, Council Note 17024/09 of 2 December 2009 and Commission communication of 1 September 2005 entitled ‘A Common Agenda for Integration. Framework for the Integration of Third-Country Nationals in the European Union’ (COM(2005) 389 final).

61. Conversely, a relatively short stay by a person with a range of deep personal and/or professional ties, established in the course of the integration process described above, may suffice to avoid loss of long-term resident status. It is for the national authorities to examine the circumstances of the particular case in the light of the criteria proposed below.

(c) Non-exhaustive indicative list of criteria demonstrating a genuine link with the European Union

62. First, the national authorities will be required to establish the *length of the absence* from the European Union, which must take into account any stays that may interrupt that absence, including short stays. More specifically, factors such as the *ratio* between periods of absence and presence, the cumulative length and *frequency* of those absences and the *reasons* which led the holder of long-term resident status to leave the host Member State may provide *prima facie* evidence of his or her level of integration.

63. Thus, it must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or professional interests of the person concerned.³³ That should generally be ruled out for periods of residence abroad justified by *specific or exceptional reasons of a temporary nature*, by analogy with the scenarios listed in Article 4(3)(2) of Directive 2003/109, which the Member States may not take into account as a period of ‘absence’ when calculating the ‘continuous’ five-year period of residence in their territory, one of the legal conditions for obtaining long-term resident status. Reasons for temporary residence abroad may be, for example, holidays or business trips of a similar length, stays for the temporary care of relatives, stays to complete military service or stays during education or vocational training which are only limited in time, but certainly not stays which entirely move the education or training abroad. Nonetheless, *additional evidence* will be necessary if a sufficiently close, genuine link with the host Member State is to be identified.³⁴

64. Apart from the *physical presence* of the person himself or herself, which for the reasons set out in this Opinion, can only serve as a starting point for a more detailed assessment of the circumstances of the particular case, I consider that the existence of *assets* in the form of bank accounts and private ownership of immovable property or undertakings established in the Member States may prove useful.³⁵ Financial investments may indicate that an individual has ‘put down roots’ in a country’s economy and has a personal interest in participating in its development.

65. Moreover, it is possible that having spent a significant part of his or her life in the European Union and having become familiar with the host Member State’s traditions, customs and language will have allowed the third-country national to develop *family ties* with EU citizens, for example as a result of a marriage from which children may have been born. That type of family relationship with members of the local population may be of particular importance in the assessment to be carried out by the national authorities.

³³ See, by analogy, judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 33), concerning the interpretation of Article 28(3) of Directive 2004/38. That provision affords EU citizens enhanced protection against any expulsion decision taken by the host Member State if they have resided in the host Member State for the 10 years preceding the expulsion decision. Given that that provision is silent as to the extent to which absences from the host Member State preclude the person concerned from enjoying that enhanced protection, it is incumbent on the Court to provide the national authorities with useful criteria.

³⁴ See, in that context, the Opinion of Advocate General Szpunar in *P and S* (C-579/13, EU:C:2015:39, point 92), in which he refers to all the ties which a person who has lived in a given environment for a long time has created and which enable him or her to become integrated. He mentions ‘marriage or family, living with neighbours, work, hobbies and activities in non-governmental organisations’.

³⁵ See, by analogy, the Opinion of Advocate General Tanchev in *Hummel Holding* (C-617/15, EU:C:2017:13, point 85), in which he mentions ‘the defendant’s establishment’ as a criterion for establishing jurisdiction in civil procedure.

66. The same applies to *professional relationships*, for example in the form of business relationships or academic contacts which have been created over time. The pursuit of *economic activity* is certainly linked to that criterion,³⁶ to which Directive 2003/109 seems to attach particular importance on the ground that, first, Article 5(1)(a) thereof requires the third-country national to have stable and regular resources which are sufficient to maintain himself or herself and the members of his or her family without recourse to the social assistance system of the Member State concerned and, second, Article 11(1)(a) and (c) guarantees equal treatment as regards access to the host Member State's labour market and recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures. All those measures are plainly intended to promote the third-country national's professional development in the European Union for the benefit of that individual and society as a whole.

67. Moreover, in so far as Directive 2003/109 seeks to promote economic and social cohesion, it seems to me that the individual's *social engagement* in the host Member State should not be underestimated. Active membership of political parties and social organisations pursuing charitable or civic aims or participation in voluntary activities may provide evidence of a genuine attachment to the local community where the person concerned has lived.

68. Similarly, the existence of *tax obligations*, perhaps linked to the existence of assets or to the exercise of an economic activity in the host Member State, seems to me capable of demonstrating the intention of a third-country national who has acquired long-term resident status to assume responsibilities towards society and to contribute to its development.³⁷

69. Lastly, it seems to me that it should also be possible to take into account *unlawful activities* that may be attributed to the holder of long-term residence status which, as a 'negative' criterion, could thus demonstrate a lack of 'roots' or, at the very least, an attitude inimical to integration into the host Member State's society.³⁸ However, in order to comply with the principle of proportionality, both the gravity and the nature of the offence need to be duly taken into account when assessing the particular case. It follows that, although a criminal record may influence a decision concerning the withdrawal or loss of long-term resident status, an overall examination of the situation of the holder of long-term resident status is required.

70. I would emphasise, however, that the possibility of applying that 'negative' criterion must in no way be interpreted as meaning that national authorities are no longer obliged to comply with the provisions of Article 6 and Article 12 of Directive 2003/109. On the contrary, those provisions retain their full effect in their respective fields of application, that is, when the power is exercised to refuse to grant long-term resident status or to expel a long-term resident on grounds of public policy or public security. The use of those powers is subject to certain conditions which the Court recently reiterated in the judgment in *Subdelegación del Gobierno en Barcelona (Long-term residents)*.³⁹

³⁶ See, in that context, the Opinion of Advocate General Hogan in *Land Oberösterreich (Housing assistance)* (C-94/20, EU:C:2021:155, point 75), in which he emphasises the importance of acquiring knowledge of the language as a means of ensuring the access of third-country nationals to the labour market and vocational training.

³⁷ See, by analogy, judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 22), in which the Court refers to 'the place where [the taxpayer's] personal and financial interests are centred' as a criterion for assessing the taxpayer's ability to pay, which in general corresponds to his or her 'usual abode'.

³⁸ See, in that regard, the Opinion of Advocate General Trstenjak in *Dias* (C-325/09, EU:C:2011:86, point 106), in which she argues, in relation to the interpretation of Article 16 of Directive 2004/38, that an EU citizen's unlawful conduct may diminish his or her degree of integration in the host Member State from a qualitative point of view.

³⁹ Judgment of 3 September 2020, *Subdelegación del Gobierno en Barcelona (Long-term residents)* (C-503/19 and C-592/19, EU:C:2020:629, paragraph 43).

71. In so far as the approach proposed in this Opinion is characterised by a flexibility which takes into account of the particular case, allowing the national authorities to find, after an overall assessment of all the relevant circumstances of the third-country national's specific situation, that even a short stay prevents the loss of long-term resident status, it must be observed that that approach precludes national legislation such as that in the present case which provides for the loss of that status when the holder does not have his or her registered or usual place of residence in the European Union.

72. Accordingly, the national authorities responsible for carrying out that overall assessment cannot legitimately conclude that there is no genuine link with the European Union merely on account of the fact that the individual concerned does not fulfil that condition. Rather, the authorities must take account of a wide range of relevant criteria, such as those listed by way of example in the preceding points. The place of registered or usual residence does not seem to me, in itself, appropriate to serve as an indicator of a third-country national's level of integration in the host Member State's society. The Court's case-law on Directive 2004/38 clearly shows that an individual's integration can be assessed only on the basis of various criteria, among which social and cultural factors are particularly important.⁴⁰ For the reasons already stated above, namely the objective pursued by the legislature of approximating those nationals' rights to the rights enjoyed by EU citizens,⁴¹ it is my view that those considerations must influence the interpretation of Directive 2003/109.

73. In summary, it can be concluded that the proposed approach is based on an interpretation of Article 9(1)(c) of Directive 2003/109 which takes due account of the wording of that provision and the objectives pursued by the legislation of which it forms part and its legislative context, in keeping with the methodology recognised in the Court's case-law. I am convinced that only a flexible approach, such as the one I have presented, which relies on the discretion of national authorities while providing practical criteria allowing them to assess a genuine link with the European Union, can ensure that the diversity of circumstances those authorities face on a daily basis is adequately addressed.

VI. Conclusion

74. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria):

- Article 9(1)(c) 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 precluding national legislation which provides for loss of status of long-term resident third-country national where the holder of that status does not have his or her registered or usual place of residence in the European Union.
- That provision must also be interpreted as meaning that, in cases where a third-country national who is a long-term resident has his or her usual place of residence outside the European Union, the competent national authorities enjoy a degree of discretion in assessing whether a short stay in EU territory during a period of 12 consecutive months precludes loss

⁴⁰ See, to that effect, judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 26).

⁴¹ See point 40 of this Opinion.

of status of long-term resident third-country national under that provision. In particular, Member States may consider, in accordance with the directive, that short stays prevent loss of that status only if the third-country national has also maintained a genuine link with the European Union during his or her absence.

- In order to establish the existence of such a genuine link with the European Union, account must be taken of all the relevant aspects of the third-country national's specific situation, including the cumulative duration and frequency of his or her absences, the reasons which led him or her to leave the host Member State and the existence of assets, family ties, professional relationships, social commitments and tax obligations in that Member State.