INSIGHT

THE *X* CASE: THE INFLUENCE OF THE RESOURCE REQUIREMENT ON LONG TERM RESIDENTS' INTEGRATION AND NATIONAL AUTHORITIES' DISCRETIONARY POWERS

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ABSTRACT: In the *X* case (judgment of 3 October 2019, case C-302/18), the Court of Justice addressed for the first time the application of the resource requirement of the Directive 2003/09/EC, a precondition for the obtainment of the status of long-term resident by third-country nationals. In its ruling, the Court compared the provision of Art. 5, para. 1, let. a), on the Long-Term Residents Directive with the resource requirements listed in other relevant directives on legal migration. Then, the judges looked at the influence of the discretionary powers of national authorities over the achievement of the Directive's prime objective, namely the integration of legal migrants in their host societies. This *Insight* focuses on the stance taken by the Court against the disproportionate use of the resource requirement by Member State, whose strictness hinders the accessibility to the status of long term residents for legal migrants and therefore their integration in the host society. Moreover, the *Insight* analyses the contribution of the *X* ruling to the creation of a needed cohesive case law on intra-EU mobility and residence rights, especially regarding resource requirements.

KEYWORDS: third-country national long-term residents – Directive 2003/109/EC – resource requirement – integration – legal migration – mobility and residence rights.

I. INTRODUCTION

On 3 October 2019, the Third Chamber of the Court of Justice issued the judgment on the case *X*.[1] The case, that concerns the application of the Directive 2003/109/EC (Long-term Residents Directive), gave to the Court of Justice the chance to interpret for the first time the resource requirement of Art. 5, para. 1, let. a).[2] Looking at the case law on similar requirements in other EU directives addressing third country nationals' right of

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[1] Court of Justice, judgment of 3 October 2019, case C-302/18, *X*.

[2] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents.

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residence, the Court set a limit on the discretionary power of Member States to decide in which cases applicants fulfil the resource requirement. By doing so, the Court clearly stated that the origin of applicants' resources has no role in defining whether applicants possess "stable, regular and sufficient resources". With this interpretation, the Court defended the prime objective of the Long-Term Residents Directive, which concerns the integration of legal migrants, from disproportionate and out-of-scope preconditions.

This judgment, while cautiously phrased, confirms the importance given by EU law and the Court to legal statuses as part of third country nationals' integration path, and consequently strengthens the accessibility to the long-term resident status for legal migrants. At the same time, the *X* judgment is an important building block of a recent case law cohesively addressing the disproportionality of preconditions posed by national authorities over third country nationals' intra-EU mobility and residence rights.

II. Facts of the case and preliminary questions

The Court was requested to deliver a preliminary ruling by the Belgian Council for asylum and immigration proceedings, before which Mr. X, a Cameroonian national, brought an action against the rejection of his application for a long-term resident permit of stay, filed following the procedure provided by the Long-term Residents Directive.

Mr. X resided legally and continuously in Belgium since 2007, firstly on the ground of a student visa, renewed until 2016, and then on the ground of a work permit. In late 2016, Mr. X applied for the long-term resident status. As evidence of possession of stable, regular and sufficient means of subsistence, Mr. X produced the employment contracts, a tax assessment notice and pay slips of his brother. Furthermore, he provided a document signed by his brother, still living in Cameroon, stating that the former possessed sufficient resources to provide for himself and his family, and his commitment to avoid Mr. X to become a burden for the State. On 5 April 2017, the Belgian Asylum and Immigration Office rejected Mr. X's application, claiming that Mr. X did not have "his own resources", since he was unemployed since May 2016. Moreover, it considered his brother's commitment of coast-bearing an insufficient guarantee that he would fulfil the resource requirement of the Long-term Residents Directive.

The Council for Asylum and Immigration Proceedings, in charge of ruling over the action brought by Mr. X, stayed the proceedings before it and asked the Court of Justice to assess whether the "resources requirement" in Art. 5, para. 1, let. a), of the Long-term Residents Directive could be interpreted as concerning only the applicant's "own resources" and, if not, whether the origin of the resources should be taken in consideration when assessing the resources at the disposal of a third-country national. In conclusion, the referring Court asked whether a commitment of cost bearing produced by a relative of the applicant could be considered as a sufficient proof to satisfy the resource requirement of Art. 5, para. 1, let. a).

III. The ruling of the Court

The Third Chamber of the Court of Justice grounded its ruling on the interpretation of the concept of "resources" of Art. 5, para. 1, let. a), of the Long-term Residents Directive as an "autonomous concept" of EU law. The doctrine of autonomous concepts of EU law, which relies on a settled case law started in 1984 with the *Ekro Bv Vee - En Vleeshandel case*,[3] is used by the Court when a EU legal provision does not make any reference to the national law of the Member States. By using this doctrine, the Court aims at ensuring an independent and uniform application of EU law. Answering to the first question of the referring court in the *X case*, the Court analysed the wording, purpose and context of Art. 5, para. 1, let. a), to autonomously interpret the concept of "resources".

Looking at the wording of Art. 5, para. 1, let. a), the Court considered the translations of the concept of "resources" in Members States' national law to be ambiguous: in fact, while some national implementation measures adopted a term equivalent to the word "resources" referring to all the financial means available to the applicants, others adopted terms equivalent to the more specific concept of "income".[4] Consequently, the analysis of the wording did not suffice to determine the exact nature or origin of the "resources" to which Art. 5, para. 1, let. a), refers to.

Analysing the purpose of the provision, the Court recalled the principal objective of the Long-term Residents Directive, namely the integration of third-country nationals in the host country. Such objective is clearly stated in recitals 4, 6 and 12 of the Directive, and it is confirmed by settled case law.[5] The achievement of integration is strictly linked with the duration of stay of third country nationals in the host Member State: the longer they stay, the higher are their chances to achieve integration, since third country nationals are supposed to put down roots in the host country over time. Art. 4 of the Long-term Residents Directive, identifying the duration of stay (5 years) as prime criterion to have access to the status, is therefore the core provision of the legal text. Art. 5 introduces instead some limitations, under the form of preconditions, to the obtainment of the status. Such limitations however cannot pose unproportioned obstacles to the achievement of third country nationals' integration. In the past years, the Court has confirmed the predominance of this objective over the preconditions listed in Art. 5, with a focus on the optional integration conditions provided by Art. 5, para 2.[6] Confirming the approach adopted back then and applying it to the concept of "resources" listed in Art. 5, para. 1, let. a), the Court found the

[3] Court of Justice, judgment of 18 January 198, case C-327/82, *Ekro Bv Vee - En Vleeshandel*, para. 11.

[4] The Court referred to the Spanish, English, French and Italian versions adopting a term equivalent to "resources" and to the Dutch and German versions adopting a term equivalent to "income".

[5] In particular, the Court quotes Court of Justice: judgment of 26 April 2012, case C-508/10, *Commission v Netherlands*, para. 66; judgment of 17 July 2014, case C-469/13 *Tahir*, para. 33.

[6] Court of Justice, judgment of 4 June 2015, case C-579/13, *P and S*.

origin of the resources possessed by the applicant not to be a decisive criterion towards the achievement of the objective of integration.

The last part of the analysis, focused on the context of which Art. 5, para. 1, let. a), of the Long-term Residents Directive forms part, is the most reasoned and detailed section of the ruling. According to the AG Saugmandsgaard Øe, the list of conditions laid down in Art. 5 is exhaustive and the exclusion of resources not owned by applicants from the assessment excessive.[7] Also the Court interpreted the requirement of having stable, regular and sufficient resources as a substantive condition for obtaining the status of long-term resident: no additional conditions should be allowed. From this interpretation in principle, hinting at the direction in which the Court's interpretation of "resources" in the Long-term Residents Directive as autonomous concept was headed, the Court moved to the analysis of the specific contextual framework of the provision of Art. 5, para. 1, let. a). Here the judges made a comparison between the resource requirement of the Long-term Residents Directive and the ones laid down in Directive 2004/38/EC (Citizens Directive) and in Directive 2003/86/EC (Family Reunification Directive).[8]

Looking at the case law on Art. 7, para. 1, let. b), of the Citizens Directive,[9] the Court referred to the *Singh and Others* case,[10] where the obligation for Union citizens to rely only on their own resources when exercising their right of residence was deemed as an unnecessary requirement. Such requirement was considered to hinder the achievement of the objective of the Directive, namely the exercise of freedom of movement and residence ensured by Art. 21 TFEU.[11] The similarities with the case at stake could lead to an analogous interpretation. However, the Court acknowledged that the resource requirement of the Long-term Residents Directive is more demanding than the one in the Citizens Directive: the resources required to obtain the long-term resident status have to be not only "sufficient" but also "stable" and "regular".[12] Therefore, to complete its analysis, the Court relied on the case law on Art. 7, para. 1, let. c), of the Family Reunification Directive, where the resource requirement is worded the same way

[7] Opinion of AG Saugmandsgaard Øe delivered on 6 June 2019, case C-302/18, *X*, para. 46.

[8] 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; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[9] Art. 7, para. 1, let. b), Directive 2004/38 provides that "all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they [...] have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State".

[10] Court of Justice, judgment of 16 July 2015, case C-218/14, *Singh and Others* [GC].

[11] *Singh and Others* [GC], cit., para. 75.

[12] *X*, cit., para. 36.

as in the Long-term Residents Directive. In the context of family reunification, the Court interpreted the focus of national authorities over the origin of applicants' resources to be outside the scope of the resource requirement. In the *Khachab* and *Chakroun* cases,[13] the resource requirement of Art. 7, para. 1, let. c), of the Family Reunification Directive was interpreted as requiring national authorities to look not at the sources of the resources, but instead at their sustainability and sufficiency when assessing the individual situation of the applicants.

Thanks to the analysis of the purpose of the provision, combined with the overview of the comparable provisions of the Union Directive and the Family Reunification Directive, the Court concluded that the origin of the resources referred to in Art. 5, para. 1, let. a), of the Long-term Residents Directive is not a decisive criterion in assessing their stability, regularity and sufficiency.[14] The Court then rapidly answered to the other questions of the referring court. Quoting the opinion of the AG,[15] the Court left to national authorities the discretionary power to assess the applicants' individual circumstances and whether the resources coming from a third party or a family member would meet the requirement of permanence and continuity. To support national authorities in their assessment, the Court quoted the legally binding nature of a commitment of cost bearing, the family relationship between the applicant and the cost-bearer, and the nature and permanence of the resources of the former as possible relevant factors to be taken into account when carrying out the applicants' individual assessment.

In conclusion, the Court crossed out the possibility for Member States to look at the origin of applicants' resources when assessing their application for the long-term residence status. At the same time, it confirmed and provided guidance to the discretion enjoyed by national authorities when assessing whether the applicants' individual circumstances meet the requirements of Art. 5, para. 1, let. a), of the Long-term Residents Directive. Such ruling mirrors the opinion of the AG, who added a final comment on the practical consequences that the interpretation of the resources requirement could have on the specific situation of Mr. X. In his opinion, Mr. X's brother commitment of cost bearing lacked sufficient precision, legally binging and lasting force to reassure Belgian authorities that Mr. X would not become a burden for Belgian welfare state.[16] Consequently, even though Art. 5, para. 1, let. a), should generally be interpreted in favour of the applicant, in Mr. X's case it would not change the final outcome of his application. Indeed, such interpretation would only shift the reason of refusal to grant the status from the ownership of the resources to the unreliability of Mr. X brother's commitment of cost-bearing.

[13] Court of Justice: judgment of 21 April 2016, C-558/14, *Khachab*; judgment of 4 March 2010, C-578/08, *Chakroun*.

[14] *X*, cit., para. 41.

[15] Opinion of AG Saugmandsgaard Øe, *X,* cit., para. 77.

[16] *Ibid.*, para. 79.

IV. Comment

The ruling of the Court brings a much needed clarity over a key element of the Long-Term Resident Directive, which is present in all legal migration Directives: the resource requirement as precondition for the obtainment of a legal status and related rights. The Court, asked to give its interpretation over Art. 5, para. 1, let. a), of the Long-Term Residents Directive, purported to set a uniform interpretation over the resource requirements of the Long Term Residents Directive, the Union Citizens Directive and the Family Reunification Directive. Confronting the *X* ruling with the cases quoted by the Court in its judgment, it can be deduced that those requirements, despite being phrased differently and working as preconditions for the obtainment of different statuses and rights, must be interpreted in a similar and cohesive manner under the principle of proportionality. Moreover, with the *X* ruling the Court takes a strong stance taken in defence of the prime objective of the Directive, the integration of legal migrants, from the disproportionate abuse of the preconditions listed at Art. 5 of the Directive made by national authorities.

The Court *in primis* remarked that the Long-term Residents Directive explicitly refers to the integration of third country nationals as its main objective. The long-term resident status is conceived as an *instrument* to achieve integration. This conceptualisation is opposed to the recent widespread use of integration as a tool to assess the eligibility of third country nationals for entering and residing into the Member States' territory. In fact, applicants are admitted or granted to stay into the host state's territory as long as they can demonstrate that they are integrated in the society they want to reside in. Consequently, the legal entry and stay is conceived as an *award* for being successfully integrated.[17] The Long-term Residents Directive is not immune from this instrumental conceptualisation of integration: Art. 5, para. 2, gives Member States the option to require third country nationals to comply with integration conditions to obtain the status of long-term residents. The coexistence of the two conceptualisations of integration as both final objective and precondition of the status of long-term resident has been already addressed by the Court. In the recent past, the Court has indeed restated the prevalence, even if not unconditional, of the concept of integration as objective of the Directive. In the *Commission v Netherlands* case,[18] the Court stated that the final aim of the Long-term Residents Directive, integration, could not be hindered by disproportionate conditions. This way, applicants were guaranteed the *right* to obtain the long-term residence status once the conditions and procedures laid down in the directive are met. In the *P and S case*,[19] the Court put some boundaries to the discretionary powers of Member States when recurring to the condi-

[17] K. Groenendijk, *Legal Concepts of Integration in EU Migration Law,* in *European Journal of Migration and Law*, 2004, p. 111 *et seq*.

[18] Court of Justice, judgment of 26 April 2012, case C-508/10, *European Commission v. the Netherlands*.

[19] *P and S*, cit.

tions listed at Art. 5 to limit the accessibility of long-term resident status. While leaving to national authorities a large leeway to enforce the "integration measures" of Art. 5, para. 2,[20] the Court required such measures to be proportionate: the use of integration measures as a condition to obtain the status cannot jeopardise the objective of the status itself, namely the achievement of integration.

The *X case* further consolidates this case law, quoting the *Commission v the Netherlands* case,[21] and following the cautious reasoning adopted in *P and S*: the Court indeed counterbalanced the defence of the primacy of integration as objective of the Long-term Residents Directive with the recognition of the discretionary powers enjoyed by national authorities when carrying out the applications' assessments. While ruling in favour of Mr. X, the Court left to the Dutch authorities the power to assess whether such resources are stable, regular and sufficient. Here, the Court suggested some parameters on the basis of which the individual assessment could be carried out, quoting on the front-line the legally-binding nature of a commitment of cost-bearing. Knowing that Mr. X brother's letter of cost bearing has no legally-binding nature, one may argue that the Court with one hand has put a limit to the discretion of national authorities, while showing them with the other a way to circumvent it.

Finally, with the *X* case the Court is moving towards the achievement of a streamlined and coherent case law on intra-EU mobility and residence rights. Since the adoption of the post-2003 Directives on legal migration[22], the Court struggled to adopt a common position on the content and limits of the rights listed in these directives, especially when it comes to the resource requirements. However, the judges of the Court seem to have recently reached a common position on this matter. The day before the Third Chamber published its ruling on the *X* case, the First Chamber issued its ruling on another important case involving residence rights and resource requirements, the *Bajratari* case.[23] Here too, the Court ruled in favour of the applicant, an Albanian mother of a minor infant with Irish nationality, who requested for a residence permit in the UK on the basis of her son's status of EU citizen. In her application, Miss Bajratary presented as source of family resources her husband's income, coming form an unlawful employment. Like in the *X case*, in *Bajratari* the Court was requested to assess whether national authorities could consider the origin of applicants' resources as a criterion for the

[20] In *P and S*, the Court had to assess whether the requirement under Dutch law for applicants to pass a compulsory and costly civic integration exam was in compliance with Art. 5, para. 2, of the Long-Term Residence Directive.

[21] *X*, cit., para. 31.

[22] The most important ones are, beside the Long-Term Residents Directive, the already quoted Union Citizens and Family Reunification Directives.

[23] Court of Justice, judgment of 2 October 2019, case C-93/18, *Bajratari*. For an insight of the case, see: F. STAIANO, *Lawful Employment' as a Precondition for the Recognition of Residence Rights: Bajratari*, in *European Papers – European Forum*, *Insight* of 13 December 2019, p. 1 *et seq.*, www.europeanpapers.eu.

assessment over residence permits' applications. Where in the *X* case the ownership of the resources was at stake, in *Bajratari* the Court faced the admissibility of sources acquired via illegal means (the income of an unlawful employment). In the latter case, the Court considered the automatic refusal by UK authorities to grant a residence permit due to the fact that the family resources derived by illegal work to be "manifestly beyond what is necessary in order to protect the public finances of that Member State". According to the Court, conditioning the access to residence rights from the legality of the applicant's resources "would run contrary to the objective pursued by Directive 2004/38, namely,[...] to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States".[24]

This brief summary of the key elements of the *Barjtari* case shows that the reasoning followed by the First Chamber is very similar to the one adopted by the Third Chamber in the *X case*, considering irrelevant for the applicants' individual assessments whether they own or have obtained legally their resources, focusing instead on the resources' continuity and stability. Interestingly, the two rulings have been delivered by two different chambers of the Court almost on the same day, showing that the Court is moving towards the adoption of a common voice over intra-EU mobility and residence rights, overcoming the discrepancies and contradictions arisen among the different chambers in the past.[25] Presumably, a new chapter of regained and needed coherent case law of the Court of Justice on intra-EU mobility and residence rights is being opened.

[24] *Bajratari*, cit., paras 46-47.

[25] D. Sarmiento, *EU Citizenship, Sufficient Resources and the New Stability in Citizenship case law*, in *EU Law Live*, 9 October 2019, eulawlive.com.