



Assessing the Temporariness of the *Chavez-Vilchez* Right of Residence

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1. Introduction

This expert opinion was written on the request of lawyer Ellen Gelok in the context of Case C-624/20, which was referred to the Court of Justice (henceforth: CJEU) by the District Court of the Hague in November 2020.¹ The core question, which will be addressed in this expert opinion is whether the right to residence of a third-country national parent of a European Union (henceforth: EU) citizen child is of a temporary nature. This question is important because a third-country national (henceforth also TCN) cannot be granted a residence right on the basis of the Long-Term Residence Directive (henceforth: LTRD)², if they reside in a Member State 'solely on temporary grounds'.³

1.1 Facts of the Case

The third-country national involved in the case before the CJEU is a Ghanaian woman, who moved to the Netherlands to reside with her partner, a Dutch national. In February 2002, they had a child together, who is a Dutch citizen. The relationship between the Ghanaian woman and her Dutch partner ended around two years later and the mother gained sole custody of her son. In 2013, the mother was granted a derived right of residence on the basis of Article 20 of the Treaty of the Functioning of the European Union (henceforth: TFEU).⁴ She was granted the right because otherwise her 11-year-old son would have to leave the territory of the EU, depriving him of the enjoyment of his substantive rights as an EU citizen under EU law. Since 2013, the mother has been residing in the Netherlands and taking care of her son by virtue of this derived right of residence. In February 2019, the mother applied for a residence permit under the LTRD, which provides for the possibility of acquiring long-term residence status after legally and continuously residing in the Member State (MS) for five years. Despite meeting the duration, income and integration requirements, she was denied long-term residence status. According to the Dutch Immigration and Naturalisation Service (IND), the derived right of residence of parents on the basis of Article 20 TFEU is temporary because the relationship of dependency between the parent and child will cease to exist when the minor reaches the age of majority. Therefore, this right of residence falls outside the scope of the LTRD.

1.2 The Right of Residence on the Basis of Article 20 TFEU

In the 2011 seminal case of *Ruiz Zambrano*,⁵ the Court of Justice of the European Union (CJEU) ruled that Article 20 TFEU could, in certain circumstances, be interpreted as to confer a right of residence to TCN parents of EU citizen children. The rationale was that, where a relationship of dependency exists between the EU citizen child and their TCN parent, a refusal to grant a right of residence to the parent would create a situation where the child would be forced to leave the territory of the EU. This would make the EU citizen child unable to exercise the substance of their rights, primarily the right to

¹ District Court the Hague, 24 November 2020, ECLI:NL:RBDHA:2020:11785.

² Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents [2003] OJ L16/44.

³ Art 3(2)(e) LTRD.

⁴ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) (2012) OJ C326/47 Art 20, Article 20 TFEU establishes citizenship of the European Union.

⁵ CJEU Case C-34/09 *Ruiz Zambrano* [2011].

reside freely in the territory of the EU, conferred on them by virtue of their status as EU citizen.⁶ In 2017 the CJEU elaborated on the notion of dependency between TCN parents and their children in the *Chavez-Vilchez*⁷ case. Dutch law was amended in order to implement this ruling. This increased the eligibility for TCN parents to receive the derived right of residence under Article 20 TFEU. Since 2017, the Netherlands has referred to this right of residence as the '*Chavez-Vilchez* right of residence'.⁸ This term will therefore also be used in this expert opinion.

1.3 The Nature of the Right to Residence under Dutch Law

The IND grants residence permits on the basis of a *Chavez-Vilchez* right of residence for a five-year period, which cannot be extended. As a result, parents need to make an entirely new application for further residence, every five years.⁹ The IND argues that since the *Chavez-Vilchez* right of residence is based on the relationship of dependency between parent and child and this dependency ceases to exist when the child turns 18, the derived right is temporary by its nature.¹⁰ Consequently, the parent is not eligible for a long-term residence permit under the LTRD. However, the temporariness of the right also limits the parent's entitlements to a permanent residence permit on the basis of Dutch national law and the possibility to naturalise. Therefore, the question of temporariness that is central in the referred case, has implications beyond the scope of the LTRD.

As a result of the Dutch law, a TCN parent has to leave the Netherlands as soon as their EU citizen child reaches the age of 18. Consequently, the age of the child is decisive for the length of the lawful residence of the parent. This implies that there is a wide variety of duration of temporary residence within the scope of the so-called *Chavez-Vilchez* permits. Furthermore, the Netherlands makes a distinction between the temporariness of *Chavez-Vilchez* residence rights and various other derived residence rights, such as rights following from the Citizenship Directive (henceforth: CD)¹¹ or the Family Reunification Directive (henceforth: FRD)¹². This affects the equal treatment of third country nationals in the Union.

Moreover, it makes it possible for a TCN parent to reside legally in the Netherlands for 18 years, after which prolonged residence would no longer be permissible on the ground that their residency has been temporary all the time. The time spent in the Netherlands can be even longer than 18 years if the TCN parent has multiple EU citizen children. The TCN parent could thus find themselves at risk of removal, even after a considerable amount of time has passed. This disregards the parent's intention to settle in EU territory and their level of integration within the Member State. In addition, it is assumed that the family life between the parent and child is of a temporary nature.

⁶ Ibid para 44.

⁷ CJEU Case C-133/15 *Chavez-Vilchez* [2017].

⁸ District Court the Hague, 24 November 2020, ECLI:NL:RBDHA:2020:11785, para 3.

⁹ Aliens Circular (*Vreemdelingencirculaire*), Section B10/2.2.

¹⁰ Case 624/20 *E.K. v Staatssecretaris van Justitie en Veiligheid* [2020], Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice paras 7 and 14.

¹¹ Directive 2004/38/EC of the European Parliament and 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, [2004] OJ L158/77.

¹² Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, [2003], OJ L 251/12.

1.4 The Preliminary Questions Referred

Before the District Court of The Hague, the applicant argued that it is not for the Member State to determine the nature of the *Chavez-Vilchez* right of residence and that such a right must be uniformly interpreted within the EU. Furthermore, she contended that her right of residence under Article 20 TFEU is not temporary in the meaning of Article 3(2) LTRD. Article 3(2)(e) LTRD clearly excludes rights of residence defined in advance as temporary, such as students or au pairs, from its scope. In her view, it does not follow from the LTRD that only autonomous, independent residence permits can lead to a residence permit on the basis of the LTRD. Additionally, she argued that her intention was to settle permanently and she claimed that the finite nature of the dependency relationship with her child does not make her right of residence temporary.¹³

The District Court of The Hague had doubts as to whether the *Chavez-Vilchez* right of residence is of a temporary nature. Therefore, it could not rule about the lawfulness of the rejection of the long-term residence permit. Furthermore, the court questioned whether it is justified to make a distinction between various derived rights of residence under EU Directives and Article 20 TFEU. It is in light of these considerations that the District Court has referred the following preliminary questions to the CJEU:

1. Is it within the competence of the Member States to determine whether the right of residence on the basis of Article 20 TFEU is in itself of a temporary or a non-temporary nature, or should it be interpreted in conformity with Union law?
2. If interpretation must be in conformity with Union law, does a distinction [then] exist, when applying Directive 2003/109/EC, between the various dependents' residence rights to which third-country nationals are entitled on the basis of Union law, including the dependent's right of residence granted to a family member of a Union citizen on the basis of the Residence Directive and the right of residence on the basis of Article 20 TFEU?
3. Is the right of residence on the basis of Article 20 TFEU, which by its nature depends on the existence [of] a relationship of dependency between the third-country national and the Union citizen and is therefore finite, of a temporary nature?
4. If the right of residence on the basis of Article 20 TFEU is of a temporary nature, must Article 3(2)(e) of the Directive [then] be interpreted as precluding national legislation which only excludes residence permits issued under national law from acquiring long-term residence status within the meaning of the Directive?¹⁴

1.5 Outline of the Expert Opinion

Chapter 2 of this expert opinion addresses the first preliminary question of whether or not it should be within the competence of the EU to define what constitutes 'temporary grounds' under the LTRD. We argue that this question should be answered in the affirmative.

The main focus of this expert opinion is the question whether the right of residence based on Article 20 TFEU is of a temporary nature, purely because the EU citizen child will at some point become an adult and the relationship of dependency is presumed to end at this point. More specifically it

¹³ District Court the Hague, 24 November 2020, ECLI:NL:RBDHA:2020:11785, paras 9-12.

¹⁴ CJEU Case C-624/20.

examines whether this right of residence is ‘temporary’ in the light of Article 3(2)(e) LTRD. In the expert opinion we call the opposite of such ‘temporary’ residence, ‘non-temporary residence’. This is not a term explicitly mentioned in the LTRD, CD or FRD, but we use it to refer to the type of residence that is not exempted from the scope of the Directive on the basis of temporariness. ‘Permanent’ or ‘long-term residence’ then refers to the long-term resident status, which is granted on the basis of Article 4 LTRD, Article 16 CD and Article 15 FRD.

Chapter 3 will first assess whether the *Chavez-Vilchez* right of residence should be considered as temporary or non-temporary from the outset, at the moment this right is first granted to the TCN parent. In this context we will look at the purpose of the LTRD. Moreover, we will compare the *Chavez-Vilchez* right of residence with rights of residence, which are clearly considered of a temporary nature under the LTRD (au pairs, seasonal workers and service providers). We will also look at the nature of other rights of residence, which are dependent on family ties (the right of residence of family members of EU citizens under the CD and the right to family reunification under the FRD). Chapter 3 concludes that the *Chavez-Vilchez* residence right cannot be considered temporary *at the moment* they are granted.

Chapter 4 argues that *de facto* long-term residence, is decisive for the legal qualification a right of residence as non-temporary. It is demonstrated in this chapter that it is an important element of EU law that *de facto* long-term residence cannot indefinitely be qualified as temporary. *De facto* long-term residence generally also leads to more protection. It is argued that the duration of the residence and the integration of the TCN parent should make it possible to obtain a permanent residence permit under EU law. This is based on the rootedness of the individual and the objective of EU Law to genuinely integrate (TCN family members of) EU citizens and TCN sponsors in the society of the hosting Member State.

2. The Scope of EU Law

This chapter contends that Member States do not have the competence to determine whether the derived residence right based on Article 20 TFEU is of a temporary or non-temporary nature for the purpose of Article 3(2)(e) LTRD. If the Member States would have this competence, they could individually determine the scope of the LTRD through establishing the (non) temporary nature of a residence right on the basis of their own interpretation of Article 3(2)(e) of the LTRD. The chapter identifies two main arguments against such competence, which are closely related to the goals of the LTRD. First, it would endanger the uniform application of rights granted by EU law in the Member States and as a result mutual confidence between the Member States. Secondly, it would undermine the Directive's purposes and its *effet utile*, if Member States could exclude certain types residence rights from the scope of the Directive.

2.1 Uniform Interpretation

The goal of the LTRD is to harmonise 'the terms for acquisition of long-term resident status'. According to the Preamble of the LTRD.¹⁵ The LTRD also aims to grant a 'set of uniform rights' to TCNs who have resided legally in a Member State for a specific period of time and hold a long-term residence permit.¹⁶ If Member States were competent to determine whether the *Chavez-Vilchez* right of residence is 'temporary' in the meaning of Article 3(2)(e) LTRD, this would lead to very different standards as to how *Chavez-Vilchez* cases are treated within different Member States. Such an interpretation would in fact mean that Member States can unilaterally determine the personal scope of the LTRD. As a consequence, TCNs may be excluded from the scope of the LTRD in some Member States, whereas they are potentially eligible in another Member State. This would seriously hamper the objective of the LTRD to harmonise long term residency. Moreover, it should be noted that long-term residents (under certain conditions) acquire the right to reside in the territory of Member States other than the one which granted them the long-term residence status, for a period exceeding three months.¹⁷ The fact that a Member State thus grants or rejects long-term residence status to a TCN has consequences for other Member States. Harmonisation of the conditions for acquiring this status therefore promotes mutual confidence between Member States.¹⁸

The CJEU stressed in its judgment in *Singh*, which directly concerned Article 3(2)(e) LTRD, that the need for a uniform interpretation of EU law arises specifically when determining its scope.¹⁹ Moreover, according to the CJEU's settled case law a provision of EU law, which makes no express reference to the law of the Member States, which is the case in the LTRD, must normally be given an autonomous and uniform interpretation throughout the European Union.²⁰ When the relevant term is not sufficiently defined within the legislation, it does not automatically follow that it is for the Member States to determine its meaning.²¹

¹⁵ Art 1(a) and Recitals 17 and 24 Preamble LTRD.

¹⁶ Recital 2 Preamble LTRD.

¹⁷ Art 14 LTRD.

¹⁸ Recital 17 Preamble LTRD.

¹⁹ CJEU Case C-502/10 *Singh* [2012] para 42.

²⁰ CJEU Case C-163/17 *Jawo* [2019] para 55, CJEU Case C-395/16 *DOCERAM GmbH* [2018] para 20, CJEU Case C-247/16 *Heike Schottelius* [2017] para 31.

²¹ CJEU Case C-550/16 *A and S* [2018] para 40.

2.2 Effectiveness of EU Law

The question of temporariness should also be understood in the light of the principle objective of the LTRD, which is the integration of third-country nationals who are settled within the territory of the EU for a long-term period.²² The LTRD, by granting the status of long-term resident, seeks to approximate the status of TCNs to that of Member State's nationals.²³ It is the duration of legal and continuous residence of five years that shows that the person has put down roots in the country and the long-term residence of that person.²⁴ The Court has explicated that the grounds of Article 3(2)(e) LTRD for excluding a TCN from the right to long-term residence should be understood in the light of these objectives.

If it is within the competence of the Member States to qualify the derived right of residence as 'temporary' or 'non-temporary' in the light of Article 3(2)(e) LTRD, this would then provide them with wide discretion to exclude TCNs from the scope of the LTRD. This could lead to a situation where TCNs who have resided for a considerable amount of time within a Member States are refused long term residence, even though duration of residence is a primary factor for acquiring the status of long-term resident.²⁵

This is illustrated by the case referred to the CJEU by the District Court of The Hague, in which the applicant has resided in the Netherlands for at least 19 years, of which 7 years on the basis of Article 20 TFEU. Nevertheless, the Dutch Government argues that this residence should be considered 'temporary'. The 'principal objective' of the 'integration of third-country nationals who are settled on a long-term basis in the Member States'²⁶ is hampered if the Member States have the competence to apply such an interpretation and liable to seriously call into question the *effet utile* of the LTRD.

It should be concluded on the basis of the forgoing that the first preliminary question should be answered in the negative. As a consequence, the second and third preliminary questions referred to the CJEU by the District Court of The Hague fall within the scope of EU law and will be dealt with in the following chapters.

²² CJEU Case C-502/10 *Singh* [2012] para 45 and Recitals 4, 6 and 12 Preamble LTRD.

²³ Recital 2 Preamble LTRD.

²⁴ Recital 6 Preamble LTRD

²⁵ Ibid.

²⁶ CJEU Case C-502/10 *Singh* [2012] para 45.

3. The Non-temporary Nature of the *Chavez-Vilchez* Right of Residence

In this chapter, it is argued that the *Chavez-Vilchez* right of residence cannot be considered to be temporary from the moment it is granted. Thereto, first the meaning of temporariness in the LTRD is examined. It follows from this examination that the different elements that define whether a residence right is ‘temporary’ within Article 3(2)(e) LTRD do not apply to the *Chavez-Vilchez* right of residence. Secondly, the Citizenship Directive and the Family Reunification Directive are examined. This analysis will show that derived residence rights for family members are never qualified as temporary. It is argued that the situation of TCN parents who have been given a right of residence on the basis of Article 20 TFEU is in this regard analogous to that of those granted non-temporary residence permits under the Citizenship Directive and the Family Reunification Directive. Therefore, this right can neither be interpreted as being temporary.

3.1 Temporariness in the Long-term Residence Directive

In order to examine whether the *Chavez-Vilchez* right of residence can be qualified as ‘temporary’ on the moment that it is granted, the following section first explores the meaning of temporariness within Article 3(2)(e) LTRD in the context of the legislative framework. Article 3(2)(e) excludes from its scope residence, which is based on ‘solely temporary grounds’. It does not provide for an exhaustive list of temporary grounds and therefore leaves a margin of interpretation to national authorities towards what constitutes temporary residence. This can be derived from the fact that the original Commission’s proposal for the LTRD included an exhaustive list of temporary grounds.²⁷ However, the Directive currently in force ended up including the phrase ‘reside solely on temporary grounds such as’ before proceeding to provide examples (*au pairs*, seasonal workers, (workers posted by) cross-border providers of services and cases where the residence permit has been formally limited).²⁸ Although non-exhaustive, this list of grounds, which are considered to be of a temporary nature may indicate which elements constitute such temporariness.²⁹ Thus, this section aims to elucidate the elements constituting temporariness within Article 3(2)(e) LTRD in the light of the directive’s object and purpose.

3.1.1 *Au Pairs*

Residence of *au pairs* within the EU is limited to a maximum period of one year (based on an agreement with the host family) or, exceptionally, one year and six months.³⁰ Such residence cannot be extended after the maximum period on the basis of the *au pair* status. The authorisation is based upon the pursuance of the defined activities within a host family and a respective agreement between both parties.³¹ Hence, the situation of *au pairs* with regard to temporariness can be characterised as

²⁷ Art 3(2)(e) of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents COM(2001) 27 final, OJ C240E/79.

²⁸ Art 3(2)(e) LTRD.

²⁹ CJEU Case C-502/10 *Singh* [2012] paras 48 and 50.

³⁰ Art 18(5) Directive 2016/801/EU of 11 May 2016 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and *au pairing* [2016] OJ L132/21.

³¹ Arts 16(1) and 3(8) and (15) Directive 2016/801/EU.

follows: their duration of stay is relatively short, clearly defined and for a limited purpose. Consequently, from the moment the status of an *au pair* is granted, the ground of residence does not reflect an intention of the TCN to settle and integrate on a long-term basis within the Member State. On the contrary, the TCN is expected to leave the territory of the Member State after the prescribed time period. As a result, this ground of residence is defined as temporary by its very nature and falls within the ambit of Article 3(2)(e) LTRD.³²

3.1.2 Seasonal Workers

The temporary nature of the stay of seasonal workers is due to the inherently ‘temporary’ (i.e. seasonal) activity on which it is based. Their activity is ‘tied to a certain time of the year’³³ and when it is done, the seasonal worker will leave the territory of the Member State. The EU legislature has prescribed a maximum time limit of stay which is no more than nine months within the timeframe of a twelve-month period.³⁴ Moreover, seasonal workers do not change their principal place of residence to the Member State they work in, and therefore they stay temporarily.³⁵ When their right to residence is granted, it is not perceived as entailing an intention to integrate within the Member State. Therefore, seasonal workers stay on temporary grounds and are excluded from the scope of the LTRD.

3.1.3 Service Providers

Service providers reside in the Member State simply for the purpose of a temporary and non-continuous activity.³⁶ The residence is discontinued when no services are being provided.³⁷ The service provider may build up some infrastructure in the Member State where the services are provided, but only with regard to provision of the services. As AG Léger pointed out, the service provider stays established in another Member State where he is also integrated.³⁸ Service providers are not perceived to hold an intention to integrate and reside on a long-term basis within the Member States where the services are provided. For these reasons the residence of service providers is considered to be of a temporary nature.

Residence for the purpose of providing services may be contrasted with other free-movement rights which are not listed as ‘temporary’ in the LTRD, such as the EU right of establishment. In the case of *Gebhard*, the CJEU distinguished the right to provide services from the right to establishment on the basis of ‘the duration of the service’ and ‘its regularity, periodicity and continuity’.³⁹ If service providers do direct their principal activity to the Member State,⁴⁰ establishing themselves there on a regular and continuous basis,⁴¹ this economic activity may fall under the freedom of establishment.

³² CJEU Case C-502/10 *Singh* [2012] para 50.

³³ Art 3(c) Directive 2014/36/EU of 26 February 2014 of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.

³⁴ Recital 31 Preamble and Art 14(1) Directive 2014/36/EU.

³⁵ Art 3(b) Directive 2014/36/EU.

³⁶ CJEU Case 55/94 *Gebhard* [1995] paras 26-27.

³⁷ *Ibid.* para 27.

³⁸ CJEU Case C-55/94 *Gebhard* [1995] Opinion of AG Léger of 20 June 1995, para 20.

³⁹ CJEU Case C-55/94 *Gebhard* [1995] para 27.

⁴⁰ CJEU Case 205/84 *Commission of the European Communities v Federal Republic of Germany* [1986] para 22.

⁴¹ CJEU Case C-55/94 *Gebhard* [1995] para 25.

3.1.4 Formally Limited Residence Permits

Article 3(2)(e) LTRD excludes from long-term residence cases where the residence permit of a TCN 'has been formally limited'. In many Member States residence permits are granted to TCNs for a fixed period of time (for example five years). The CJEU held in the case of *Singh* that a fixed-period residence permit does not necessarily fall within the scope of the concept of a residence permit, which 'has been formally limited' mentioned in Article 3(2)(e) LTRD. It considered that 'the fact that a residence permit contains a formal restriction does not in itself give any indication as to whether that third-country national might settle on a long-term basis in the Member State, notwithstanding the existence of such a restriction'.⁴² Crucial in this regard is the possibility to extend the validity of the residence permit. '[T]he fact that the residence permit can be extended for successive periods, including beyond a five-year period, and, in certain cases, indefinitely, may be a strong indication from which it can be concluded that the formal limitation attached to that permit does not prevent the long-term residence of the third-country national in the Member State concerned'.⁴³ If the formal limitation attached to the residence permit does not prevent the long-term residence of the TCN, the residence permit in question will not fall within Article 3(2)(e) LTRD and residence on the basis of such a permit will have to be regarded as legal residence for the purpose of acquisition of long-term residency. Otherwise, 'the achievement of the objectives pursued by the directive would be jeopardised and, therefore, it would be deprived of its effectiveness'.⁴⁴

3.1.5 Application of the Elements of Temporariness to the *Chavez-Vilchez* Right of Residence

From the preceding paragraphs, five elements can be inferred, which make these grounds of residence temporary by their very nature⁴⁵:

1. the short and regulated duration of the residence right;
2. the factual impossibility to prolong such residence right for successive periods, including beyond a five-year period;
3. the non-continuous nature of the residence;⁴⁶
4. the retention of a principal residence elsewhere; and
5. the limited purpose of the residence, based on a certain activity that is limited in time.

If a residence permit contains (most of) these elements, it will be qualified as temporary residence under Article 3(2)(e) LTRD.

The *Chavez-Vilchez* right of residence does not contain the mentioned elements of temporariness. First, right of residence is not of a clearly defined short and regulated duration at the moment it is granted, neither is it limited to a maximum period of time that has been settled beforehand. The *Chavez-Vilchez* right of residence is based on a relationship of dependency between an EU citizen child and their TCN parent, which can, and oftentimes will, last for a lengthy period of

⁴² CJEU Case C-502/10 *Singh* [2012] para 50.

⁴³ *Ibid*, para 54.

⁴⁴ *Ibid*, para 51.

⁴⁵ *Ibid*, para 48.

⁴⁶ See also CJEU Case C-469/13 *Tahir* [2014] para 34.

time. Second, residence based on *Chavez-Vilchez* entails continuity of residence with a potentially long-lasting *de facto* duration. The case at issue in the preliminary reference discussed in this expert opinion illustrates this. Third, the right of residence is continuous. Fourth, a person who resides on the basis of *Chavez-Vilchez* does not retain a principal place of residence elsewhere. In fact, in *Chavez-Vilchez* cases, derived rights of residence are granted to parents precisely because a refusal of this right would force the EU citizen child to leave the Member State of its nationality and the territory of the EU. Finally, a *Chavez-Vilchez* right is not related to a certain activity with a specific purpose. It is a right that is based on a care relationship between parents and children, and therefore necessarily also concerns family life.

The above shows that *Chavez-Vilchez* rights are distinct from the categories of temporary residence as explicitly mentioned in Article 3(2)(e) LTRD. Yet, it remains to be explored whether there is something intrinsic to the *Chavez-Vilchez* right of residence that would make it temporary on other grounds than those already existing in Article 3(2)(e) LTRD. The *Chavez-Vilchez* right is characterised by two elements: family life and a relationship of dependency. In order to find out whether the nature of both family life and such a relationship of dependency qualify the right as ‘temporary’, the following section examines the right to family reunification within the framework of the EU and applicable international law.

3.2 Family Reunification and Relations of Dependency

The Dutch government holds that the *Chavez-Vilchez* rights are to be qualified as temporary because they are based on the relationship of dependency between parent and child and this dependency ceases to exist when the child turns 18. This raises two interrelated questions. First, is family life with children ever qualified as temporary? Second, what is the relationship between temporariness and dependency? The following section analyses these two questions within the Citizenship Directive and the Family Reunification Directive. The Citizen Directive is discussed first in section 3.2.1 as it regulates derived residence rights for family members of EU citizens. It thus has a great resemblance to the derived *Chavez-Vilchez* right of residence. Section 3.2.2 will focus on the Family Reunification Directive. This Directive concerns family reunification between TCNs.

3.2.1 The Citizenship Directive

The preamble of the Citizenship Directive states that the enjoyment of permanent residence by EU citizens who have chosen to settle long-term in the host Member State strengthens ‘the feeling’ of EU citizenship and is a key element in promoting social cohesion for Union citizens and their family members.⁴⁷ Genuine integration of the EU citizen is not only in the interest of the individual, ‘but also in that of the European Union in general’.⁴⁸ Integration of family members is seen as a prerequisite for the EU citizen to be able to fully exercise their rights.⁴⁹ Family members have a right to obtain a permanent residence permit and this right of permanent residence, once obtained, should not be subject to any further conditions, in order to be a ‘genuine vehicle for integration into the society of the host Member State’.⁵⁰

⁴⁷ Recital 17 Preamble CD.

⁴⁸ CJEU Case C-145/09 *Tsakouridis* [2010] para 50.

⁴⁹ CJEU Case C-413/99 *Baumbast* [2002] para 50.

⁵⁰ Recitals 17 and 18 Preamble CD.

The mentioned aims of the Citizenship Directive have been strengthened by the interpretation of the provisions of the Directive in the CJEU's case law.⁵¹ Where it concerns the notion of dependency in the Citizenship Directive, it is foremost important that the rights that are given to family members on the basis of the Directive are not considered to be autonomous rights. The CJEU has oftentimes explicated that the Directive aims to facilitate and strengthen the exercise of the primary and individual right that is conferred on EU citizens by Article 21(1) TFEU to move and reside freely within the EU.⁵² Any rights conferred on TCNs by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by an EU citizen.⁵³ These rights are thus based on the interdependent relationship between family members, which is considered of such a fundamental nature that without those family members the aims of Article 21(1) TFEU and the Citizenship Directive cannot be achieved. The Court holds in this regard that not granting those rights would deter EU citizens from making use of their free movement rights.⁵⁴

Even though the right to residence of family members of EU citizens is a dependent right, Article 16 CD explicitly grants the right to permanent residence to those family members when they have legally resided in the host Member State with the Union citizen for a continuous period of five years. In addition, Article 28 CD provides that these family members are protected against expulsion. Before taking a decision to expel someone, the host Member State will have to take into account, *inter alia*, the duration of the residence of the family member in the host state and their social and cultural integration. The better integrated, the better protected they are against expulsion.⁵⁵

The right of residence granted to parents of EU citizen children on the basis of the Citizenship Directive is thus considered a non-temporary right, even though it is based on a relationship of dependency between parent and child at the moment the right is granted. The reason for this is that the integration of both the EU-citizen and their family member(s) is one of the primary aims of the Citizenship Directive. It is worthwhile to mention in this regard that the CJEU has established under the Citizenship Directive that dependency does not per se end, once the child has reached the age of 18. Where for example the child still pursues education, the relationship of dependency continues to exist.⁵⁶ At the same time, family members of EU citizens may continue to benefit from the right to residence under the Citizenship Directive, even though there is no longer a relation of dependency between them and the EU citizen. In its judgment in *Gaal* the CJEU held that a TCN children of an EU citizen should be able to successfully complete their studies and thus rely on the financial assistance

⁵¹ The CJEU held that the CD 'introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding the directive and culminates in the right of permanent residence'. CJEU Joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] para 38.

⁵² CJEU Case C-40/11 *Iida* [2012] para 66 and Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] para 34.

⁵³ CJEU Case C-40/11 *Iida* [2012] para 67; Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] para 35 and CJEU Case C-86/12 *Alokpa and others* [2013] para 22.

⁵⁴ CJEU Case C-60/00 *Carpenter* [2002] para 39; CJEU Case C-200/02 *Zhu and Chen* [2004] para 45 and CJEU Case C-457/12 *S. & G.* [2014] para 41. The same follows from case law where the right of EU citizens to return to the Member State of their own nationality is at stake and wherein the CD is applied by analogy such as Case C-370/90 *Surinder Singh* [1992] paras 19-20; CJEU Case C-291/05 *Eind* [2007] paras 35-37 and CJEU Case C-456/12 *O. & B.* [2014] paras 45-49.

⁵⁵ Recital 24 Preamble CD and CJEU Joined Cases C-316/16 and C-424/16 *Vomero* [2018].

⁵⁶ CJEU Case C-413/99 *Baumbast* [2002] paras 68-75; CJEU Case C-480/08 *Teixeira* [2010] and CJEU Case C-310/08 *Ibrahim* [2010].

available in the host Member State, even after they have reached 21 years of age and are no longer dependant on their parents.⁵⁷

3.2.2 The Family Reunification Directive

The main objective of the Family Reunification Directive is to promote family reunification in conformity with the obligation to respect family life in compliance with fundamental rights.⁵⁸ According to the Directive, the integration policy of the EU should aim at granting TCNs a fair treatment comparable to those of Union citizens.⁵⁹ It is assumed that family reunification helps to create socio-cultural stability, which facilitates the integration of TCNs in the Member State.⁶⁰ This in turn serves to promote economic and social cohesion, a fundamental EU objective stated in the Treaty.⁶¹ Considering the importance the EU legislator attached to the integration of family members, once the conditions of the Family Reunification Directive are fulfilled, family reunification is the rule.⁶² Limitations are to be interpreted in a strict manner and Member States may never use their discretion in such a way as to undermine the aim of the Directive, namely the promotion of family reunification, and its effectiveness.⁶³ Since the integration of family members should be promoted, it is considered important that they are granted a status independent of the sponsor.⁶⁴ Hence, the presence and integration of third country family members is considered to contribute to the functioning of the EU.

Article 2 FRD defines family reunification as the 'entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to *preserve the family unit*, whether the family relationship arose before or after the resident's entry'.⁶⁵ Article 13(2) FRD provides that the permit given to family members is renewable. Article 13(3) FRD here adds that the residence permit of the family member in principle does not exceed the date of expiry of the residence permit of the sponsor. From this, it can be deduced that the residence permit as provided to the family member, is initially made dependent on the residence right of the sponsor. Their right of residence is a right derived from that of the sponsor concerned and is intended to assist the latter's integration.⁶⁶

Nonetheless, on the basis of Article 15 FRD an autonomous residence permit is granted to the family member of the sponsor after five years of legal residence in the host state. Also here, the CJEU stressed that the grant of an autonomous permit at the end of the period referred to in Article 15(1) FRD is a general rule and therefore the margin that is left to the Member States cannot be used in a way that would undermine the objective and effectiveness of that Article, which is to allow family members to be granted a status independent of that of the sponsor.⁶⁷ Thus, similar to the Citizenship

⁵⁷ CJEU Case C-7/94 *Gaal* [1995].

⁵⁸ Recital 2 Preamble CD. See also S. Sanchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration Law*, p 144.

⁵⁹ Recital 3 Preamble FRD.

⁶⁰ Recital 4 Preamble FRD.

⁶¹ *Ibid.*

⁶² CJEU Case C-578/08 *Chakroun* [2010] para 43.

⁶³ CJEU Case C-635/17 *E. v Staatssecretaris van Veiligheid en Justitie* [2019] paras 46-47; CJEU Joined Cases C-133/19, C-136/19 and C-137/19 *B.M.M. and others* [2020].

⁶⁴ Recital 15 Preamble FRD.

⁶⁵ Art 2 FRD.

⁶⁶ CJEU Case C-557/17 *Y.Z., Z.Z. and Y.Y.* [2019] paras 47-48.

⁶⁷ Case C-153/14 *K. and A.* [2015] para 59 and Case C-257/17 *C. & A.* [2018] para 51.

Directive, the residence right that is granted under the Family Reunification Directive to family members, is based on an existing relationship of dependency but is nevertheless considered a non-temporary right.

3.2.3 Temporariness of *Chavez-Vilchez* Rights

It is considered of utmost importance that the interpretation of provisions of EU law should comply with the need for a uniform application of EU law and the principle of equality.⁶⁸ The rationale of granting a *Chavez-Vilchez* right of residence to TCN parents of EU citizen children is analogous to the rationale for granting a right to residence to TCN family members of EU citizens on the basis of the Citizenship Directive and to TCN family members of TCN sponsors on the basis of the Family Reunification Directive. The *Chavez-Vilchez* right of residence is granted in order to ensure that minor EU citizens can make effective use of the rights that are attached to their fundamental status as EU citizens.⁶⁹ The presence of their TCN parent(s) therefore directly contributes to the goals of EU law, as does the presence of the family members of EU citizens and TCN sponsors in the context of respectively the Citizenship Directive and Family Reunification Directive.

The discussion of the Citizenship Directive and the Family Reunification Directive has shown that derived family rights under those directives are considered to be of a non-temporary nature. In both Directives it is stressed that it is important to make sure that those family members can fully integrate into the Member State. Consequently, in both situations it is possible as a family member to obtain permanent or autonomous residence rights.⁷⁰ The right of TCN parents to reside with their EU citizen children on the basis of Article 20 TFEU is established in the CJEU's case law. They can only obtain an autonomous and permanent right of residence on the basis of the LTRD. To exclude the *Chavez-Vilchez* right holder from the scope of Article 3(2)(e) LTRD by interpreting the nature of such right as 'temporary' would be contrary to the aims that this Directive strives to achieve: the integration of third-country nationals who are settled within the territory of the EU for a long-term period⁷¹ and to approximate the status of TCNs to that of Member State's nationals. There is no valid reason to make a distinction between on the one hand TCNs with a *Chavez-Vilchez* right of residence and on the other hand TCN family members of EU citizens and TCN sponsors, who have a right to permanent residence on the basis of the Citizenship Directive respectively the Family Reunification Directive.

Moreover, the CJEU should take into account EU fundamental rights when assessing whether family members of EU citizen children with a *Chavez-Vilchez* right of residence have the right to permanent residence on the basis of the LTRD.⁷² In this light, the right to family life as laid down in Article 7 of the Charter of Fundamental Rights (henceforth: the Charter), and the obligation to take into account the best interests of the child as laid down in Article 24 of the Charter should be considered relevant. In this regard, attention should also be paid to the interpretation of fundamental rights in international law. Here the right to respect for family life as laid down in Article 8 of the

⁶⁸ CJEU Case C-225/16, *Ouhrami* [2017] para 38, CJEU Joined Cases 133/19, C-136/19 and 137/19 *B.M.M. and others* [2020].

⁶⁹ CJEU Case C-34/09 *Ruiz Zambrano* [2011] paras 42-44.

⁷⁰ Where for example residence has been granted on fraudulent grounds, Member States can in principle withdraw the residence permits of those family members. See CJEU Case C-557/17 *Y.Z., Z.Z. and Y.Y.* [2019] paras 47-48.

⁷¹ CJEU Case C-502/10 *Singh* [2012] para 45 and Recitals 4, 6 and 12 Preamble LTRD.

⁷² CJEU Case C-403/09 PPU *Detiček* [2009] para 34 and CJEU Joined cases C-356/11 and C-357/11 *O. and S.* [2012] para 78 and CJEU Case C-557/17 *Y.Z., Z.Z. and Y.Y.* [2019] paras 53-54.

European Convention of Human Rights (henceforth: ECHR) is particularly relevant.⁷³ In case law of the European Court of Human Rights (henceforth: ECtHR) the right of parents and children to live together⁷⁴ and to mutually enjoy each other's company and develop normal family relationships⁷⁵ are considered fundamental elements of the right to family life. An interpretation whereby *Chavez-Vilchez* rights are considered to be temporary would imply that TCN parents of EU citizen children can be expelled and thus separated from their children as soon as the child reaches majority. At that moment, the TCN parent may have resided in the Member State for a period of up to 18 years (or longer in case the parent has multiple EU citizen children). Such a reading would appear to violate the fundamental right to family life and is harmful to the best interests of the child as laid down in both EU and international law.

It should thus be concluded that no distinction must be made between the *Chavez-Vilchez* right of residence and the dependent right of residence granted to a family member of a Union citizen on the basis of the Citizenship Directive or that of a family member of a TCN sponsor on the basis of the Family Reunification Directive as regards their non-temporary nature. The *Chavez-Vilchez* right of residence can thus not be considered 'temporary' in the meaning of Article 3(2)(e) LTRD. In the next Chapter we will demonstrate that the *Chavez-Vilchez* right of residence also leads to a *de facto* long-term residence, which further supports its non-temporary nature.

⁷³ Recital 2 Preamble FRD.

⁷⁴ The ECtHR has held that the possibility of continuing to live together is a fundamental consideration. Thereby, the state is, in principle, obliged to enable the ties between parents and their children to be preserved. Lastly, the right to live together also means that states have an obligation, in the event of a separation, to reunite parents and children as soon as possible, see ECtHR 10 February 2015, Appl No 77818/12 *Penchevi v. Bulgaria*, para 59, ECtHR 21 September 2006, Appl No 12643/02 *Moser v Austria*, para 64 and ECtHR 26 June 2003, Appl No 48206/99 *Maire v Portugal*, para 70.

⁷⁵ ECtHR 22 June 1989 Appl No 11373/85 *Eriksson v. Sweden*, para 58 and ECtHR 26 May 1994, Appl No 16969/90 *Keegan v. Ireland*, para 50.

4. *De Facto* Long-term Residence

In this chapter, it is argued that next to the non-temporary nature of the *Chavez-Vilchez* right the *de facto* long-term residence that is the result of this right is decisive for the qualification of non-temporariness. We recall that on the basis of the *Chavez-Vilchez* right of residence, lawful residence up to 18 years (or more if the TCN parent has multiple EU citizen children) is possible. It is well established in EU and international law that *de facto* long-term residence is the basis for legal qualification as long-term or permanent residence. *De facto* long-term residence is the proxy for a stronger status. This is based on the assumption that longer residence leads to stronger roots, integration and ties with the host society. The LTRD is the perfect example of this, as it establishes statutory guarantees for long-term residing TCNs, making their rights akin to those of EU citizens. This principle can also be found in the Citizenship Directive, the Family Reunification Directive and Article 8 ECHR. The importance of *de facto* residence is further exemplified in situations in which the LTRD takes into account periods of residence that were initially qualified as temporary for the duration of the long-term resident status.

4.1 The Value of *de facto* Residence

In the previous chapter, we already emphasised the value of family life for integration and discussed the possibilities under the Citizenship Directive and the Family Reunification Directive to gain a permanent or autonomous residence status after lapse of time. Building on that discussion this chapter further explicates the value of *de facto* residence within a Member State. The provisions of EU law and the jurisprudence of the ECtHR clearly exemplify the value European law attaches to *de facto* residence within a territory. The provisions recognise that over time, individuals become more integrated or rooted into society, and therefore deserve greater protection, akin to nationals.

According to the LTRD, the long-term residence of a person is based on the legal and continuous residence of five years, which shows that the person has put down roots in the country.⁷⁶ The idea is that TCNs who have lived in the host country for a considerable number of years should be given all the tools to be fully integrated, in both economic and social terms.⁷⁷ The Directive allows Member States to require TCNs to comply with integration conditions, such as language and cultural awareness tests, before acquiring long-term residence status.⁷⁸ A majority of Member States require applicants to comply with integration conditions.⁷⁹ In its judgment in *P. and S.*, the CJEU even found that the conditions could apply after a permanent status has been granted, as long as failure to comply would not result in withdrawal of the status.⁸⁰ Long-term residing, well-integrated third country nationals thus have a strong residence status under the LTRD.

The Citizenship Directive has a similar system of strong protection in which *de facto* residence is key. EU citizens are given permanent residence after five years of continuous residence in another

⁷⁶ Recital 6 Preamble and Art 4 LTRD. See also CJEU Case C-469/13 *Tahir* [2014] para 29.

⁷⁷ Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States [1996] OJ C80/2.

⁷⁸ Art 5(2) LTRD.

⁷⁹ European Commission, Report on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, 29 March 2019, COM(2019) p 3.

⁸⁰ CJEU Case C-579/13 *P and S* [2015] para 38.

Member State, with ‘long-term’ being set at a continuous period of five years.⁸¹ Recital 18 of the Directive notes that the right to permanent residence should not be subject to any conditions, in order to be a genuine vehicle for integration. This has been underlined by the CJEU in the cases of *Ziolkowski and Szeja*,⁸² *Vomero*⁸³ and in the recent case of *AT*.⁸⁴ Similarly, for TCNs, the Family Reunification Directive allows for family members to gain an autonomous residence permit after five years of residing with their family member, who already has a residence permit with a reasonable prospect of obtaining permanent residence, in an EU member state.⁸⁵

Further, these Directives imply that the longer a person remains in a country the stronger their right to not be removed becomes. Under the Citizenship Directive, ‘serious grounds’ are needed to justify the expulsion of permanent residents. For those who have lived for a period of more than ten years in the Member State, ‘imperative grounds’ are needed to justify removal.⁸⁶ Moreover, the scope of removal measures should be limited to what is proportionate, taking into account the degree of integration of the persons concerned, their length of residence and their individual circumstances.⁸⁷ In the case of *Tsakouridis*, the CJEU emphasised that greater integration of individuals leads to greater protection.⁸⁸ It also noted in this case that it is in the interest of the individual and the EU in general to socially rehabilitate offenders in the state in which they have become ‘genuinely integrated’ rather than expelling them to a state where they have no connection.⁸⁹ In the case of *Vomero* the Court stated that it flows from the wording and structure of the Citizenship Directive ‘that the protection against expulsion gradually increases in proportion to the degree of integration [...] in the host Member State’.⁹⁰

The starting point that longer residence leads to stronger rights is also at the basis of the ECtHR’s case law on Article 8 ECHR. The ECtHR has emphasised that the duration of a person’s stay is one of the elements to be taken into account into the assessment whether the expulsion of a migrant breaches the family or private life protected by Article 8 ECHR. The rationale behind his starting point, lies in the ‘assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be.’⁹¹

In *Üner*, the ECtHR referred to Recommendation 1504 of the Council of Europe, on the non-expulsion of settled immigrants.⁹² In this Recommendation, the Parliamentary Assembly of the Council of Europe (PACE) recommends the Committee of Ministers to invite states to ‘take the necessary steps to ensure that in the case of long-term migrants the sanction of expulsion is applied only to particularly serious offences affecting state security of which they have been found guilty’ and to ‘guarantee that migrants who were born or raised in the host country, and their under-aged children, *cannot be*

⁸¹ Recital 17 and Art 16 CD.

⁸² CJEU Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] para 41.

⁸³ CJEU Joined Cases C-316/16 and C-424/16 *Vomero* [2018] para 54.

⁸⁴ CJEU Case 32/19 *AT* [2020] para 36.

⁸⁵ Art 3(1) and Art 15 FRD. See also CJEU Case C-484/17 *K.* [2018]; CJEU Case C-257/17 *C. & A.* [2018].

⁸⁶ Art 28 CD.

⁸⁷ Recital 23 Preamble CD.

⁸⁸ Case 145/09 *Tsakouridis* [2010] para 25.

⁸⁹ *Ibid* para 50.

⁹⁰ CJEU Joined Cases C-316/16 and C-424/16 *Vomero* [2018] para 48.

⁹¹ ECtHR 18 October 2006, Appl No 46410/99 *Üner v the Netherlands*, para 58.

⁹² *Ibid*.

expelled under any circumstances'.⁹³ Even though the protection of 'settled migrants' under Article 8 ECHR is not absolute, it is rather strong. In *Maslov*, the ECtHR considered that as the applicant had spent all or most of his life in the country, and been educated there, 'serious reasons' were needed to justify expulsion, especially where the offences were minor and committed as a juvenile.⁹⁴

4.2 Principal and Genuine Residence

Continuity of residence is an important element to qualify residence as long-term. The LTDR has established rules regulating the periods of absence from the territory of the Member States in Article 4(3). It stipulates that periods shorter than six consecutive months, which do not exceed an overall period of ten months will not interrupt the continuity of the five years of residence necessary to obtain long-term residence. In cases of specific or exceptional reasons of a temporary nature, Member States may accept that longer periods of absence will not interrupt the said period.⁹⁵ As was explained in section 3.1 of this expert opinion, non-continuous nature of the residence, which is to be understood together with the element of principal residence, is an important characteristic of temporariness within Article 3(2)(e) LTRD. The protection of long-term residence only applies to cases in which third-country nationals created their principal residence in the Member State and the continuity of residence must prove this. It is because TCNs have moved their principal residence, which follows from the *de facto* continuous residence within the territory of the Member State, that they qualify for the stronger protection of the long-term residence status.

A similar reasoning can be found in the case law regarding Article 21 TFEU. Here, the CJEU has ruled that, where EU citizens have resided in a Member State other than the one of which they are a national, their family members have a derived right to reside in the Member State of the EU citizen's nationality after their return to this Member State.⁹⁶ However, the derived right of family reunification is applicable 'only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State'.⁹⁷ The EU citizen who resides in another Member State on the basis of Article 6 CD (right of residence up to three months) does not intend to settle, whereas residence on the basis of Article 7 CD is 'in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State'.⁹⁸ Accordingly both 'continuous' and 'sufficiently genuine' residence are relevant characteristics of residence that is non-temporary in order to establish whether the *de facto* residence leads to the conclusion that the migrants have settled, which goes hand in hand with creating and strengthening family life in the Member State.

⁹³ PACE, Recommendation 1504 (2001), text adopted by the Standing Committee on behalf of the Assembly on 14 March 2001.

⁹⁴ ECtHR 23 June 2008, App No 1638/03 *Maslov v. Austria*, para 75.

⁹⁵ Art 4(3) LTRD.

⁹⁶ CJEU Case C-370/90 *Surinder Singh* [1992]; CJEU Case C-291/05 *Eind* [2007].

⁹⁷ CJEU Case C-456-12 *O & B* [2014] para 51.

⁹⁸ *Ibid.*, para 53.

4.3 Changing situations

The value of *de facto* long-term presence is further exemplified by those cases in which residence is initially qualified as temporary but eventually turns out to be *de facto* long-term. EU law recognises that certain situations may change and therefore the residence status should be able to change too, in order to ensure that the purpose and objectives of EU law instruments, particularly to integration, are still fulfilled. In this context we will discuss the residence of students and beneficiaries of international protection.

4.3.1 Students

As discussed in the previous chapter, one of the important characteristics of temporary residence in the context of Article 3(2)(e) LTRD is the *prima facie* intention not to settle long term in the host Member State. Yet, as already stated, the formulation *prima facie* underlines that this intention can change in the future. Residence that was initially intended to be short-term can end up being *de facto* long-term. The changing nature of intention has been recognised in the LTRD itself, regarding the situation of students. A student is allocated temporary residence on the basis of their studies, which will end in the near future, and is therefore outside the scope of Art 3(2)(a) LTRD. However, if a student later acquires a form of residence that is not excluded from the scope of the LTRD, such as through a work permit, the duration of their initial temporary residence as student can still count towards the duration required for the acquisition of a long-term residence permit.⁹⁹ However, only half of the residence for student purposes counts in the context of long-term residence.¹⁰⁰ The rules of the LTRD have therefore been adjusted to ensure the desired policy objectives of integration and parity of rights for those who have put down roots in the country, are complied with. Such a rule reaffirms the value of *de facto* residence.

4.3.2 Beneficiaries of international protection

Another illuminating case of temporary residence relates to refugee protection. Article 1C of the 1951 Refugee Convention outlines that refugee status may be withdrawn if the circumstances in the country of origin change.¹⁰¹ This indicates that refugee status is considered to be temporary under international law and is dependent on the situation in the refugee's country of origin. In 2001, the European Commission published its proposal for a Long Term Residents Directive, which included refugees under its scope.¹⁰² In addition, the original proposal for the Qualification Directive envisaged that the LTRD would apply to beneficiaries of subsidiary protection.¹⁰³ However, when the LTRD was adopted in 2003, it did not apply to beneficiaries of international protection (refugees or beneficiaries

⁹⁹ Art 4(2) LTRD.

¹⁰⁰ Ibid.

¹⁰¹ UN General Assembly, 1951 Convention Relating to the Status of Refugees, vol. 189 UNTS 137.

¹⁰² Art 3 Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents COM(2001) 27 final, OJ C240E/79.

¹⁰³ Art 22 Proposal for a Council Directive of minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection COM(2001) 510 final.

of subsidiary protection under EU law), because their status was excluded on the basis of temporariness.

In 2011, the scope of the LTRD was extended to include beneficiaries of international protection.¹⁰⁴ According to the new text of the Directive, beneficiaries of international protection qualify for long-term residence after five years of legal residence in the Member State, even though their status can still be qualified as temporary under international law; their asylum permit can be withdrawn if the situation in the country of origin improves significantly. Moreover, even the time within the asylum procedure can be taken into account for the purpose of the duration of the LTRD, in case the asylum application is successful. Half of the time spent waiting for a decision on their application for international protection counts towards this five-year period. If an applicant for international protection waited more than 18 months for a decision to grant a residence permit, the entire time period they spent in the asylum system will be counted.¹⁰⁵ This amendment indicates that the EU institutions envisaged the application of the LTRD to TCNs whose stay in the EU could initially be regarded as temporary. Therefore, if a TCN is recognised as a refugee, their prior *de facto* residence during the procedure in the territory is retrospectively non-temporary. Moreover, *de facto* presence of the recognised refugee within the territory is taken into account for establishing long-term residence under the LTRD, even though that status may be considered temporary. This endorses the contention that *de facto* long-term presence on the territory matters for the enhanced protection of long-term residence.

4.4 *De facto* Long-term residency of Chavez-Vilchez residence holders

As was mentioned before, the Dutch Government considers the *Chavez-Vilchez* right of residence to be ‘temporary’ in the meaning of Article 3(2)(3) LTRD because it is based on the dependency between the TCN parent and EU citizen child, which will end when the child reaches majority. However, as is evidenced by the case in which the preliminary questions at issue in this expert opinion were referred, TCN parents may stay in a Member State on the basis of *Chavez-Vilchez* for prolonged periods of time, leading to their integration in the Member State’s society. They most likely establish social and cultural ties with the Member State, the most important tie being their relationship with their EU citizen child. On the basis of the principles following from EU law and international law set out in this chapter, this would warrant an independent and permanent right of residence and greater protection against expulsion. This is true, even if the CJEU would hold that the *Chavez-Vilchez* right of residence is of a temporary nature at the moment it is granted.

¹⁰⁴ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132.

¹⁰⁵ Art 4(1)(a) LTRD.

5. Conclusion

This expert opinion concerned the assessment of the temporariness of the *Chavez-Vilchez* right of residence. It concluded, first of all, that questions concerning the (non)-temporary nature of a residence right falls within the scope of EU law. Therefore, Member States do not have the competence to qualify the nature of the *Chavez-Vilchez* right as temporary or non-temporary. First, such interpretation ensures the uniform interpretation of EU law and the principle of equality. National interpretation of the scope of the Long-Term Residence Directive would lead to very different standards throughout the EU. This would be contrary to the Directive's purpose of laying down uniform conditions for the acquisition and loss of, as well as the rights attached to long-term residence status. Second, such interpretation is necessary to guarantee the *effet utile* of the Long-Term Residence Directive. The *Chavez-Vilchez* right of residence can lead to *de facto* long-lasting legal residence of the parents within the particular Member State. To then leave the possibility to exclude such residence from the Long-Term Residence Directive to the Member States would hamper the Directive's principal objective, namely, to foster the integration of TCN'S who have resided for a long period of time within the territory of a Member State. It would in fact allow Member States to create a situation of long-term, precarious residence, merely by means of qualifying it as temporary residence.

Chapter 3 has provided arguments, which support the interpretation that the *Chavez-Vilchez* right of residence is not temporary at the moment it is granted. By analysing the different temporary grounds in Article 3(2)(e) of the Long-Term Residence Directive, five factors have been deducted which indicate temporariness. These are: (1) A short and regulated duration of residency, (2) the factual impossibility to prolong such residence right for successive periods, including beyond a five-year period; 3) its non-continuous nature, (4) the retention of a principal place of residence elsewhere and (5) the limited purpose of stay based on a certain activity.

The *Chavez-Vilchez* right of residence does not contain the mentioned elements of temporariness. Firstly, the duration of the right is not short-term, nor is there a factual impossibility to prolong the said right (factor 1 and 2). To the contrary, the *Chavez-Vilchez* right of residence is based on a relationship of dependency which can, and oftentimes will, last for a lengthy period of time (up to 18 years or more if there are multiple children involved). Moreover, the right entails continuous residence with a possible long-lasting *de facto* duration (factor 2 and 3) and the TCN residing on the basis of the *Chavez-Vilchez* right does not retain a principal place of residence elsewhere (factor 4). After all, the whole point of providing the said right is that if the family would principally reside elsewhere, the EU citizen would be forced to leave the territory of the EU. Finally, the right is not based on a certain activity with a specific purpose that is limited in time, most importantly because it also concerns family life (factor 5).

This latter conclusion is substantiated by the analysis of the Citizenship Directive and the Family Reunification Directive in section 3.2 of this expert opinion. It is argued that the rationale for granting a *Chavez-Vilchez* right of residence is the same as for the derived rights of residence in these two directives. The right of residence of family members needs to be protected in order to achieve their genuine integration in the Member State. Both the Citizenship Directive and the Family Reunification Directive grant family members a permanent residence permit after five years of continuous residency in a Member State. Hence, the derived rights of residence in these EU instruments are considered non-temporary rights. TCN parents with a *Chavez-Vilchez* right of

residence, who apply to the Long-Term Residence Directive have likewise resided legally and continuously within the Member State for a period of five years. A justification for distinguishing between rights based on Article 20 TFEU and on the Citizenship Directive and the Family Reunification Directive is missing. Moreover, a reading of the *Chavez-Vilchez* right of residence as being temporary would appear to violate the right to respect for family life and to contravene the best interest of the child as laid down in Articles 7 and 24 of the Charter. Thus, from the structure and rationale of the Long-Term Residence Directive as well as the Citizenship Directive and the Family Reunification Directive, it cannot be concluded that *prima facie* there is no intention to settle long-term for the *Chavez-Vilchez* family members, while the said right of residence does not imply residence that is *de facto* not long-term.

Chapter 4 of this expert opinion argued that next to the non-temporary nature of the *Chavez-Vilchez* right, the said *de facto* long-term residence that is the result of this right, is decisive for the qualification of its non-temporariness. First, it is emphasised that it is well established in EU and international law that *de facto* continuous long-term residence is the basis for the qualification of long-term or permanent residence. This is based on the assumption that longer residence leads to roots, integration and ties with the host society. This not only follows from the rationale behind the long-term residence status in the Long-Term Residence Directive and the permanent status in the Citizenship Directive, but similarly from the system of protection against expulsion for long-term residents in these Directives and the case law of Article 8 ECHR. Finally, the value of *de facto* long-term presence is further exemplified by the fact that some types of residence which are initially qualified as temporary eventually turn out to be *de facto* long-term. This expert opinion mentioned the examples of residence as a student or a beneficiary of international protection.

5.1 Answers to the preliminary questions

On the basis of the foregoing findings, we would recommend the following answers to the preliminary questions asked by the District Court.

1. In light of the need for a uniform application of EU law and the principle of equality and *effet utile* of Union law, it is not within the competence of the Member States to determine whether the right of residence on the basis of Article 20 TFEU is in itself of a temporary or a non-temporary nature.
2. The underlying rationale of Directive 2003/109/EC, which is the genuine integration of long-term residing third country nationals in the Member State, does not allow Member States to make a distinction between the various dependent residence rights to which third-country nationals are entitled on the basis of EU law, including the right of residence granted to a family member of a Union citizen on the basis of Directive 2004/38/EC and the right of residence on the basis of Article 20 TFEU.
3. Considering that residence rights granted in accordance with Directive 2004/38/EC and Directive 2003/86/EC to third-country national family members on the basis of a relationship of dependency are not considered temporary, the right of residence of third-country nationals on the basis of Article 20 TFEU, which by its nature very similar to the mentioned residence rights should also be considered of a non-temporary nature.

4. In the light of all the foregoing considerations, the answer to the first, second and third questions is that the right of residence on the basis of Article 20 TFEU is of a non-temporary nature. Therefore, the fourth question does not need to be answered.