Field:	BVerwGE: Yes
Immigration Law	Professional press: Yes

Sources in law:

Treaty on the Functioning of the European Union	Articles 20, 21
Residence Act	Section 36 (2), Section 5 (1) nos. 1 and 2, (2) sentence 1 no. 1, sentence 2
European Convention on Human Rights	Article 8
Basic Law	Article 6 (1) and (2)

Headwords:

Child; citizenship of the Union; German nationality; right of permanent residence; emotional dependency; patchwork family; residence permit; extraordinary hardship; de facto compulsion; particular hardship; economic dependence; biological father; family unit; custody; maintenance, citizenship of the Union; visa procedure; duration; subsequent immigration to join family.

Headnotes:

1. Stricter requirements are to be set for the existence of an extraordinary hardship within the meaning of Section 36 (2) sentence 1 of the Residence Act than for the existence of a particular hardship within the meaning of Section 30 (2), Section 31 (2) and Section 32 (4) of the Residence Act.

2. The denial of a residence permit to a member of a ‘patchwork’ family desirous of subsequent immigration can in rare, exceptional cases constitute a violation of Article 20 of the Treaty on the Functioning of the European Union (following guidance of the ECJ, judgment of 6 December 2012 – Case C-356/11, O. and S.).

Judgment of the First Division of 30 July 2013 – BVerwG 1 C 15.12

I. Neustadt a.d. Weinstrasse Administrative Court of 8 December 2011 – Case: VG 2 K 711/11.NW -
II. Koblenz Higher Administrative Court of 18 April 2012 – Case: OVG 7 A 10112/12 –

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 15.12
OVG 7 A 10112/12

Released
on 30 July 2013
Ms Werner
as Clerk of the Court

In the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 30 July 2013 – BVerwG 1 C 15.12 – para. …

the First Division of the Federal Administrative Court
upon the hearing of 30 July 2013
by Presiding Federal Administrative Court Justice Eckertz-Höfer
and Federal Administrative Court Justices Prof. Dr Dörig, Fricke, Dr Maidowski
and Dr Fleuss

decides:

On appeal by the Respondent, the judgment of the Rhineland-Palatinate Higher Administrative Court of 18 April 2012 is set aside.

The matter is remitted to the Higher Administrative Court for further hearing and a decision.

The disposition as to costs is reserved for the final decision.

Reasons:

I

1 The Complainant, born in 1973, is a Ghanaian national. He first entered Germany in 2007, without a visa. With his Ghanaian partner, born in 1987, he has two daughters, born in 2008 and 2010, who are likewise Ghanaian nationals. He and his partner provide parental care for both children. His partner has an additional daughter (R.), who holds both Ghanaian and German nationality, and for whom she alone is the primary carer; this daughter likewise lives in the same household with the Complainant and his partner. The partner is employed part-time. She holds a residence permit under Section 28 (1) sentence 1 no. 3 of the

Residence Act, and the couple's two daughters have residence permits under Section 33 of the Residence Act.

2 In May and July of 2008 and in July 2010 the Complainant applied for a residence permit to establish a family union of cohabiting partners with his partner and their two daughters. In response to his voluntarily coming forward to report that he had entered the country multiple times without a visa, a penal order was issued, imposing a fine. By a decision dated 24 January 2011 the Respondent rejected the Complainant's applications for a residence permit (Item 1), ordered him to leave the country (Item 2), and warned him that he would be deported to Ghana if he did not leave the country voluntarily (Item 3).

3 The Administrative Court found against the Complainant in his action to obtain a residence permit under Section 36 (2) of the Residence Act, or alternatively under Section 25 (5) of the Residence Act. The Higher Administrative Court upheld his appeal in a judgment of 18 April 2012 and ordered the Respondent to grant the Complainant a residence permit under Section 36 (2) of the Residence Act. This was necessary, the court held, in order to avoid an extraordinary hardship (*aussergewöhnliche Härte*). It held that a care and upbringing relationship protected by Article 6 of the Basic Law existed between the Complainant and his daughters. It found that the Complainant did indeed provide primary care and tended the children by himself while their mother was away. This family community, the court held, could be continued only within the Federal territory. Further, other, equally protected communities existed not only between the Complainant's daughters and their mother, but also between the mother and her daughter R. Terminating the Complainant's residence would necessarily disrupt the family community with his daughters if they did not accompany him to Ghana. But this would result in the disruption of the family unit between the two daughters and their mother, if the mother wished to remain in the Federal territory with her daughter R. If, on the other hand, the mother were to return to Ghana with the Complainant and their daughters, she would either have to abandon the family unit with R., or else take R. with her. But as a German national, R. has a right to reside in the Federal Republic of Germany. Even if one were correct in assuming that the termination of the Complainant's resi-

dence did not violate Article 6 (1) and (2) of the Basic Law, in any case Article 20 of the Treaty on the Functioning of the European Union and the case law concerning that provision from the European Court of Justice (ECJ) would stand against terminating his residence. Nor did the Complainant's claim fail, the court held, for absence of the general requirements for approval of residence. With reference to Section 5 (1) no. 1 of the Residence Act (secure livelihood), an exception existed because of the aforementioned reasons, and excluded applying this requirement – which applied only as a general rule – for granting a residence title. Although it was true that the Complainant had met a requirement for expulsion by entering the country multiple times without a visa, a waiver of Section 5 (1) no. 2 of the Residence Act was necessary in the present case: after all, the Complainant could not reasonably be expected to pursue a visa procedure after the fact, because in view of the Respondent's adverse stance, such a procedure would presumably take a very long time (Section 5 (2) sentence 1 no. 1 and sentence 2 of the Residence Act).

4 As grounds for its appeal to this Court, which was lodged in a timely manner, the Respondent argues that the Complainant is not entitled to be granted a residence permit. There is no extraordinary hardship. The family assistance that the Complainant owes his two minor children need not be provided in the Federal territory, because the Complainant could also continue to live as a family in Ghana with his common-law wife and her daughter R. It is true that the latter daughter has a right, in virtue of her German nationality, to reside in the Federal Republic. But because of her second nationality, she can also immigrate into Ghana, where the family unit enjoys constitutional protection comparable to that in the Federal Republic of Germany. When founding its decision on the case law of the ECJ concerning Article 20 of the Treaty on the Functioning of the European Union, the court below failed to recognise that the present matter was not comparable to the cases decided by the ECJ.

5 The Complainant defends the challenged judgment. The representative of the Federal interests before the Federal Administrative Court has joined in the proceedings and emphasises that this is no hardship case within the meaning of

Section 36 (2) of the Residence Act; he argues that the legislature expressly decided against a general right of subsequent immigration.

II

6 The Respondent's appeal meets with success. The grounds adopted by the court below for assuming the necessity for granting a residence title in order to avoid extraordinary hardship contravene law that is subject to review by this Court by adopting an incorrect standard for decision-making (Section 137 (1) no. 1 of the Code of Administrative Court Procedure). As there are not sufficient findings of fact concerning the circumstances relevant for the presumption of an extraordinary hardship, this Court cannot decide the matter finally. The matter must therefore be remitted to the court below for further examination and a new decision, pursuant to Section 144 (3) sentence 1 no. 2 of the Code of Administrative Court Procedure. For that reason, there is no need at present to decide on the Complainant's alternative request, also submitted in these proceedings, to be granted a residence title under Section 25 (5) of the Residence Act.

7 The assessment of the situation of fact and law in an action to compel the administration to grant a residence title is fundamentally governed by the date of the last hearing or decision by the finder of fact (established case law, judgment of 7 April 2009 – BVerwG 1 C 17.08 – BVerwGE 133, 329 = Buchholz 402.242 Section 32 Residence Act no. 4, each at 10). Changes in law that occur in the course of appeals to this Court must, however, be given consideration if the court below, were it deciding in place of the Federal Administrative Court, would have to take them into account (established case law, judgment of 10 July 2012 – BVerwG 1 C 19.11 – BVerwGE 143, 277 = Buchholz 402.242 Section 11 Residence Act no. 9, each at 12, with further authorities). Therefore this decision must be founded on the terms of the Residence Act in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), as last amended by Article 1 of the Act Amending Federal Laws Consequent upon the Accession of the Republic of Croatia to the European Union of 17 June 2013 (Federal Law Gazette I p. 1555). That Act did not, however, alter the situation of law in respect of the provisions relevant to a decision in the present case.

8 1. It cannot be decided on the basis of the findings of fact whether the necessary requirements for an entitlement to the grant of a residence permit under Section 36 (2) of the Residence Act are satisfied.

9 1.1 The Residence Act is applicable. It is not superseded by the Act on the General Free Movement of Citizens of the Union (see Section 1 (2) no. 1 of the Residence Act), because that Act does not apply to the Complainant. Under Section 1 of the Act on the General Free Movement of Union Citizens, the Act governs only the entry and residence of nationals of other Member States of the European Union, as well as, subject to the conditions of Sections 3 and 4 of the Act (see Section 2 (2) no. 6 of the Act on the General Free Movement of Union Citizens), of their family members. But the Complainant is not a family member of a citizen of the Union, as he is not related to his partner's eldest daughter; furthermore, she does not provide maintenance for him.

10 1.2 Under Section 36 (2) sentence 1 of the Residence Act, other family members of a foreigner may be granted a residence permit for the purpose of subsequent immigration to join the foreigner, if such a grant is necessary in order to avoid extraordinary hardship. Usually also the general requirements for the grant of a permit (Section 5 of the Residence Act) must be met.

11 In the sixth part of its second chapter, the Residence Act addresses the residence of foreigners in Germany for family reasons. Sections 28 through 30, 32, 33 and 36 (1) of the Residence Act govern the requirements for family reunification among spouses, parents and children, and in addition distinguish as to whether the family member living in Germany does or does not hold German nationality. By contrast, in order to protect marriage and the family as provided under Article 6 of the Basic Law (see Section 27 (1) of the Residence Act), Section 36 (2) of the Residence Act also extends the possibility of family reunification to other family members who are not covered by the aforementioned provisions; this provision is to be applied *mutatis mutandis* to other family members of Germans (see Section 28 Abs. 4 of the Residence Act). However, subsequent immigration of other family members is limited to cases of extraordinary

hardship (*aussergewöhnliche Härte*), meaning rare exceptional cases in which a refusal of the right of residence and therefore of preservation of the family unit would contradict fundamental concepts of justice in the light of Article 6 (1) and (2) of the Basic Law and Article 8 of the European Convention on Human Rights, and would therefore be simply indefensible.

12 An extraordinary hardship in this sense fundamentally presupposes that the family member in need of protection is unable to survive independently, but must necessarily rely on the family's assistance, and that such assistance can reasonably be provided only in Germany (judgment of 10 March 2011 – BVerwG 1 C 7.10 – Buchholz 402.242 Section 7 Residence Act no. 5, at 10; so held as well concerning the predecessor provision under Section 22 of the Foreigners Act: order of 25 June 1997 – BVerwG 1 B 236.96 – Buchholz 402.240 Section 22 Foreigners Act 1990 no. 4). Whether this is the case can be answered only taking account of all relevant, specific factors relating to the need to establish or maintain the family unit (see judgment of 18 April 2013 – BVerwG 10 C 9.12 – InfAuslR 2013, 331, at 23).

13 The specific need to rely on family assistance in Germany, as a prerequisite for subsequent immigration of other family members, establishes a higher barrier than the requirements established in Sections 28 through 30, 32, 33 and 36 (1) of the Residence Act for subsequent immigration of children, parents or spouses, because it demands a separate reason why it would not be reasonable to expect a family unit to be established outside the Federal Republic of Germany (see judgment of 18 April 2013 – BVerwG 10 C 10.12 – juris, at 37 – 39). This also proceeds, moreover, from the fact that in the case of subsequent immigration of spouses and children (Section 30 (2) and Section 31 (2) or Section 32 (4) of the Residence Act), granting a residence permit already comes under consideration in cases in which the required characterising factors for the respective provision of law are not met, merely in order to avoid <u>particular</u> hardship (*besondere Härte*), i.e., if there is a threat of significant impairment of interests deserving of protection (see Section 31 (2) sentence 2 of the Residence Act). The court below fell short of the standard of review under Section 36 (2) of the Residence Act by assuming an extraordinary hardship even though the circum-

stances of the individual case merely establish only an urgency comparable to the subsequent immigration of parents, children or spouses in the sense of a particular hardship.

14 1.3 The Complainant is another family member within the meaning of Section 36 (2) sentence 1 of the Residence Act of his biological daughters A. B. and T., because as their father, unmarried to the children's mother, he cannot be categorised under any of the characterising factors that would otherwise come under consideration. However, this Court cannot finally decide whether it is required to grant a residence title according to the aforementioned decisive criterion of avoiding extraordinary hardship, because necessary findings as to the relevant circumstances of the specific case are lacking. It is true that the children A. B. and T., because of their respective ages of two and four years, are unable to lead an independent life; rather, as small children, they are in need of continuous caregiving, and therefore of inclusion in a family unit. However, whether this family assistance can reasonably be provided for A. B. and T. only in Germany would depend significantly on how a continuation of the family unit outside Germany would presumably affect the child R. This proceeds from the following considerations:

15 Article 6 (1) and (2) of the Basic Law confers no direct entitlement to residence, but it does oblige the immigration authorities, when deciding on a residence application, to take full account of the foreigner's existing family ties to persons who are legitimately residing in the Federal territory. The State's obligation to protect the family does not supersede concerns of immigration policy unless the family unit can live together only in the Federal Republic of Germany, for example because special circumstances would make it unreasonable for the member of that unit with whom the foreigner has an exceptionally close relationship to leave the Federal territory. If this member of the family unit is a child, the child's perspective must be determinative (Federal Constitutional Court, orders of 18 April 1989 – 2 BvR 1169/84 – BVerfGE 80, 81 <93>, of 12 May 1987 – 2 BvR 1226/83, 101, 313/84 – BVerfGE 76, 1 <46 et seqq.>, of 5 June 2013 – 2 BvR 586/13 – AuAS 2013, 160, of 10 May 2008 – 2 BvR 588/08 – InfAuslR 2008, 347 and of 23 January 2006 – 2 BvR 1935/05 – InfAuslR 2006, 320). The spe-

cial situations that result from a family arrangement known as a ‘patchwork’ family must be carefully examined and given due consideration in view of their importance. The minor family members’ biological parents who are not included in the ‘patchwork’ family must also be included in the considerations.

16 According to this standard, in an isolated consideration that did not take the child R. into account, it would be reasonable to expect the Complainant and his biological daughters A. B. and T., as well as their mother, the Complainant’s partner, to maintain their family community also outside Germany. They hold only Ghanaian nationality; according to the findings of the court below, special circumstances that would indicate particularly strong ties to Germany (Article 8 European Convention on Human Rights) have neither been adduced in the proceedings below nor are they otherwise evident. In view of the children’s ages of only two and four years, the court below also had no cause to investigate further in this regard at the time of its decision. We may leave aside the question of whether this will still apply at the time of the new hearing and decision after remittal.

17 However, according to the findings of the Higher Administrative Court, R., born in 2006, the eldest daughter of the Complainant’s partner, is included in the protection of the existing family unit to which the Complainant belongs, as guaranteed under Article 6 (1) and (2) of the Basic Law and Article 8 European Convention on Human Rights. For that reason, the effects on R. of an emigration by the Complainant, his biological daughters and his partner must be taken into account. It is true, as the court below correctly held, that as a German national R. is protected from acts of the authorities that would terminate her residence. However, it does not per se follow from her German nationality that, in the absence of special circumstances, it will always be unreasonable to expect her to continue living with her family unit in another country. The same also applies to the protection afforded under Article 8 of the European Convention on Human Rights (see judgment of 13 June 2013 – BVerwG 10 C 16.12 – juris, at 22 et seq., with references to the case law of the European Court of Human Rights). Rather, whether leaving the country would indeed be unreasonable will depend on the consequences it would have upon her if she was to continue to live in a

family unit with her mother, her half-sisters and the Complainant in another country – a situation that might last until she came of age, but in would any case be temporary –, whether any alternatives might be conceivable for her, and if so, what they may be (established case law, Federal Constitutional Court, orders of 10 May 2008, op. cit., and of 1 December 2008 – 2 BvR 1830/08 – BVerfGK 14, 458, at 27), and how such residence outside Germany might affect her – legally warranted – ability to return later and be reintegrated in Germany (judgment of 13 June 2013, op. cit., at 27).

18 If such circumstances – which have not been sufficiently clarified to date – indicate that R. cannot reasonably be expected to continue living with her family unit outside Germany, the preponderance of evidence would argue that to avoid extraordinary hardship, the Complainant could claim a residence title. This is because, although the Complainant is not related to R. and has no other legal relationship with her, the relationship between R. and her biological mother – the Complainant's partner, who furthermore has sole custody of R. – would likewise come under the legal protection of Article 6 (1) and (2) of the Basic Law, just like the relationship of the Complainant's partner with their joint children A. B. and T. An officially ordered termination of the Complainant's residence could mean either that R. would leave the Federal Republic of Germany together with her family unit, or that constitutionally protected family ties among the members of the 'patchwork' family would be compromised or destroyed, depending on what decision the Complainant and his partner make concerning the whereabouts of the other members of the 'patchwork' family. The resulting specific consequences for the child R. have not been adequately investigated in the proceedings to date from the viewpoint of either Article 6 (1) and (2) of the Basic Law or Article 8 of the European Convention on Human Rights, therefore the question as to whether refusing the Complainant a residence title would leave open an option for action in which R. could reasonably be expected to continue living with her family unit in another country, cannot be answered as yet.

19 1.4 The court below will therefore have to clarify whether there are special circumstances that make the child R.'s remaining in Germany appear to be the

only alternative that can be reasonably expected of her. Such circumstances might, for example, result from R.'s relationship with her biological father, especially if contacts they have or wish to have, would be rendered impossible by maintaining the family unit in another country. Even though no such circumstances have come to light in the proceedings so far, a further investigation imposes itself in view of a child's right to associate with both parents. It must also be clarified whether living conditions in Germany might cause R. to be unable to cope with a termination of her residence without suffering harm. Whether this can be the case may also depend on what her living conditions would presumably be if the family unit were to relocate to Ghana. Furthermore, a prognosis must be made as to whether a relocation of the family to Ghana would compromise or indeed even render worthless the possibility of return to which she is entitled by her nationality, for example by making reintegration more difficult for linguistic reasons, or as a consequence of socialisation in Ghana. Finally, it must be examined whether there are alternatives to having all members of the 'patchwork' family continue living together as a family unit outside Germany. In this connection, a decision might depend on how to assess the relationship of the child R. to the Complainant, to her biological father, to her half-sisters, and to her mother. A significant point of reference for this review will be the date of the new decision by the court below.

20 1.5 Nor can the question of whether the general conditions for granting a residence title have been met or not be answered without further clarification of the facts.

21 According to the findings of the court below, it must be assumed that the Complainant's livelihood is not secure without drawing upon public benefits (Section 5 (1) no. 1 of the Residence Act); furthermore the ground for expulsion of multiple illegal entries (Section 5 (1) no. 2, Section 95 (1) no. 3, Section 14 (1) no. 2 of the Residence Act) applies; after all, the Complainant entered the country without a visa (Section 5 (2) sentence 1 no. 1 of the Residence Act).

22 1.5.1 Under Section 5 (1) no. 1 of the Residence Act, granting a residence title presupposes, as a rule, that the foreigner's livelihood is secure; but this does not apply in atypical, exceptional cases. The court below held, with no contravention of law, that such an exceptional case must be assumed if it were to be determined that refusing a residence title represented an extraordinary hardship within the meaning of Section 36 (2) of the Residence Act, because it would be unreasonable to expect the family unit to be maintained in another country, and therefore a breach of Article 6 of the Basic Law and Article 8 European Convention on Human Rights should be presumed. However, as already explained, it cannot be determined whether this is the case until the aforementioned significant circumstances have been clarified.

23 1.5.2 The court below also held, likewise without contravening law subject to review by this Court, that in the present case the requirement under Section 5 (1) no. 2 of the Residence Act does not oppose granting a residence permit. According to that provision no grounds for expulsion may apply in general. Although it is true that the Complainant's multiple entries into the country without a residence title violate Section 14 (1) no. 2 of the Residence Act, and at the same time constitute a criminal offence (Section 95 (1) no. 3 of the Residence Act) and are therefore a ground for expulsion (Section 55 (1) no. 2 of the Residence Act), the preponderance of evidence nevertheless argues in the present case that this requirement for granting a residence permit must be waived pursuant to Section 27 (3) sentence 2 of the Residence Act. In the light of the purpose of his entering the country, his subsequent voluntarily coming forward and the official toleration of the situation in the meantime, any damage to public safety and order is of minor importance (see Federal Constitutional Court, order of 10 May 2008 – 2 BvR 588/08 – InfAuslR 2008, 347 at end). There is no need for further clarification of the facts in this regard.

24 1.5.3 Finally, it cannot be decided without a further clarification of the facts whether the Complainant's claim to be granted a residence title is negated by the fact that he entered the country without the required visa. According to Section 5 (2) sentence 1 no. 1 of the Residence Act, the grant of a residence permit presupposes that the foreigner has entered the country with the required visa.

This requirement may be waived, for example, if special circumstances relating to the individual case render a subsequent visa application procedure unreasonable.

25 The court below accepted the existence of such a case in the absence of a sufficiently broad foundation of fact, on the grounds that a subsequent visa procedure could be expected to be lengthy because the Complainant would presumably have to seek a remedy through the courts against a decision that would initially be in the negative. By adopting these grounds, the court below improperly proceeds on the presumption that despite a court decision that fundamentally affirms a claim to a residence title under Section 36 (2) of the Residence Act, the responsible authority would act unlawfully and refuse the visa; it furthermore neglected to allow in its prognosis for the possibility of effective legal recourse through a temporary injunction under Section 123 of the Code of Administrative Court Procedure (see judgment of 18 April 2013 – BVerwG 10 C 9.12 – InfAuslR 2013, 331, at 22).

26 Rather, for the prognosis to be reached under Section 5 (2) sentence 2 of the Residence Act, one must determine how long the family unit of the Complainant, his partner, and the three children could reasonably be expected to tolerate the Complainant's absence. In this regard, the presumable duration of the visa procedure is especially relevant, supposing that the matter were handled correctly, if applicable with the aid of a temporary injunction, and what effects the Complainant's temporary departure from the country would have on the family, particularly whether even a procedurally induced absence of the Complainant of no more than a few months would impose an unreasonable emotional burden on his very small children. The relevant findings of fact for this purpose have not been made to date.

27 2. If, on the basis of the outstanding findings of fact, the court below decides in the negative on the Complainant's claim to be granted a residence permit under Section 36 (2) sentence 1 of the Residence Act, that decision will have to be measured against European Union law.

28 2.1 Directive 2004/38/EC of the European Parliament and of the Council (the ‘Citizenship Directive’) does not apply to the Complainant. It governs the conditions under which citizens of the European Union and their family members may exercise their right of free movement within the territories of the Member States, the rights of those persons to permanent residence, and the limitation of those rights on grounds of public policy, public security and public health; it applies for every citizen of the Union who has exercised the right of free movement, as well as the citizen’s family members. But the Complainant is not a family member within the meaning of the Directive, because he is not related to the child R., who is of German nationality; furthermore, she has not exercised her right of free movement, and does not provide maintenance to the Complainant.

29 Nor does Council Directive 2003/86/EC (the ‘Family Reunification Directive’) apply. It is true that the Complainant’s partner and his biological children are third-country nationals, so that they might in principle qualify as family members with whom a person might be reunified. But the Complainant is not among those entitled to subsequent immigration because he is not the legal spouse of his partner (see Article 4 (1) (a) of the Directive); the options for subsequent immigration of unmarried partners and first-degree relatives in the direct ascending line who are dependent on the family members with whom they might be reunified (see Article 4 (2) (a) and (3) of the Directive) have not been incorporated into German residence law.

30 2.2 Rather, the only standards to be considered under Union law for the present case are Articles 20 and 21 of the Treaty on the Functioning of the European Union (the TFEU).

31 Article 20 (1) of the Treaty on the Functioning of the European Union confers the status of a citizen of the Union on every person holding the nationality of a Member State. According to Article 20 (2) sentence 2 (a) and Article 21 of the TFEU, that status includes the right to reside and move freely within the territory of the Member States. According to the case law of the ECJ, this fundamental status of Union citizens precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the

rights conferred by virtue of their status as citizens of the Union. This also applies for minors who are citizens of the Union. As long as their situation is defined by a legal, financial or emotional dependence on third country nationals, no measures may be taken against those third party nationals, particularly under residence laws, which would compel the minor who is a citizen of the Union de jure or de facto to leave the territory of the Union. Here it is fundamentally immaterial whether the measure is directed against one or both parents of the Union citizen, or against other parental figures. It is also irrelevant whether the citizen of the Union has already exercised his or her freedom of movement. However, the mere wish to maintain the family unit with all family members within the territory of the Union is not sufficient. The purpose is to prevent a situation in which the citizen of the Union sees no alternative but to follow a third party national, on whom he or she is legally, financially, or emotionally entirely dependent, in emigrating or in joining that person abroad, and therefore to leave the territory of the Union. If, on the other hand, the citizen of the Union lives with a third party national who has custody of him or her and has a permanent right of residence and a work permit, this argues against the possibility that a measure taken under residence laws against another third party national could result in a compulsion to emigrate that is contrary to Union law (see ECJ, judgments of 19 October 2004 – Case C-200/02, Zhu and Chen – Col. 2004, I-9925, at 25 et seqq.; of 8 March 2011 – Case C-34/09, Zambrano – Col. 2011, I-1177, at 41 et seqq.; of 5 May 2011 – Case C-434/09, McCarthy – Col. 2011, I-3375, at 44 et seqq.; of 15 November 2011 – Case C-256/11, Dereci – NVwZ 2012, 97, at 59 – 69; of 8 November 2012 – Case C-40/11, Iida – NVwZ 2013, 357, at 66 et seqq.; of 6 December 2012 – Case C-356/11, O. and S. – NVwZ 2013, 419, at 52 et seqq., with a reference to para. 44 of the opinion of the Advocate General in this matter, and of 8 May 2013 – Case C-87/12, Ymeraga – InfAuslR 2013, 259, at 34 et seqq.).

32 According to these principles, any national measure taken by a Member State against third party nationals who are parental figures to a citizen of the Union who is a minor must be measured against the prohibition on imposing a de jure or de facto compulsion to leave the territory of the Union, thereby depriving citizenship of the Union of its practical effect. However, an invocation of Articles 20

and 21 of the TFEU is limited to exceptional circumstances (ECJ, judgment of 8 November 2012, op. cit., at 71). In any case, all circumstances of the specific case must be examined (ECJ, judgment of 6 December 2012, op. cit., at 53). The court of the Member State must decide whether a national measure compromises the substance of citizenship of the Union in this sense.

33 If the citizen of the Union who is a minor and in need of protection lives in a ‘patchwork’ family, the circumstances resulting from the special characteristics of this family unit must be taken into consideration. Here, however, it is irrelevant whether there is a biological relationship between the third country national for whom a right of residence is being applied for, and the Union citizen who is a minor; rather, the determinative factor is whether the citizen of the Union is financially, legally or emotionally dependent on the third country national in the aforementioned sense. It is also material whether a de facto compulsion to emigrate would prevent the Union citizen who is a minor from maintaining an existing contact with a biological father or mother who lives outside the ‘patchwork’ family. Finally, it must be considered who has and exercises custody of the Union citizen who is a minor (ECJ, judgment of 6 December 2012, op. cit., at 51, 55).

34 2.3 These principles are applicable to the present case. However, it cannot be decided whether refusing the Complainant a residence permit under Section 36 (2) sentence 1 of the Residence Act would meet requirements of Union law without a further clarification of the facts, which becomes necessary in the event of such a decision under Section 36 (2) of the Residence Act.

35 The court below argued that irrespectively of the assumption of an extraordinary hardship within the meaning of Section 36 (2) sentence 1 of the Residence Act, the Complainant is in any case entitled to a residence title under Article 20 of the Treaty on the Functioning of the European Union, because refusing a residence title would compel both his partner and her eldest daughter R. to leave Germany. This assumption is based on a decision-making standard that does not comport with the case law of the ECJ cited above. The court below does not take into account that R.’s mother – the Complainant’s partner – has a right of

residence that is equivalent to a permanent right of residence as it is tied to R.'s status as a minor, and that this circumstance alone already opposes the presumption of a de facto compulsion to leave the territory of the Union in contravention of Union law. Another argument against such a compulsion is that the Complainant's partner has sole custody of R., so that in any case R. is not legally dependent on the Complainant. Finally, the court below found that the Complainant's partner – but not the Complainant himself – contributes to the economic maintenance of the family unit through gainful employment, so that there is also nothing to argue that R. is economically dependent on the Complainant; he has no maintenance obligation to her.

36 However, without further clarification of the facts it cannot be decided whether the other governing criteria according to the ECJ case law cited above are present or not. In particular, there are no meaningful findings as to whether there is a relationship of emotional dependence between R. and the Complainant, the intensity of which might argue that there would be a compulsion to leave the territory of the Union in violation of Union law, despite the established circumstances – particularly R.'s economic, legal and very probably emotional dependence on her mother. There are also no adequate findings as to the further question of whether an emotional relationship between R. and her biological father can be determined, such as might mitigate a possible emotional dependence of R. on the Complainant. Only after sufficient clarification of these aspects a decision on whether refusing a right of residence to the Complainant is compatible with Article 20 of the Treaty on the Functioning of the European Union and the associated case law of the ECJ may become possible.

3. The disposition as to costs is reserved for the final decision.

Eckertz-Höfer Prof. Dr Dörig Fricke

Dr Maidowski Dr Fleuss