



**The withdrawal of the residence permits of family members on the basis of fraud committed by the sponsor**

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# 1. Introduction

This expert opinion is written on the request of lawyer Martijn Strooij. It concerns a case in which preliminary questions were referred to the Court of Justice (henceforth: CJEU) by the Dutch Administrative Jurisdiction Division of the Council of State (henceforth: Council of State) concerning the Family Reunification Directive (Directive 2003/86/EC, henceforth: FRD) and the Long-Term Residence Directive (Directive 2003/109/EC, henceforth: LTRD).<sup>1</sup> The questions relate to the withdrawal of residence permits based on these directives, on the ground that they were fraudulently acquired.

## 1.1 Facts of the case

The case in which the questions were referred concern a family consisting of a father (the sponsor), a mother and a son (the family members). On 29 March 2001, the father obtained a temporary residence permit because of his work as manager for a private company in the Netherlands. On 28 April 2006, the father was provided with a permanent residence permit. Both permits were based on Dutch domestic law. On 31 January 2002, the mother and son were issued temporary residence permits on account of Article 2 Family Reunification Directive (FRD). Since 18 October 2006, the applicants had been in the possession of long-term residence permits, based on Articles 7 and 8 Long-Term Residence Directive (LTRD).<sup>2</sup>

According to mr. Strooij, the lawyer in this case, the father worked in a company in the Netherlands owned by a Chinese parent company. He received his salary from the parent company and booked the results of the Dutch company to the parent company. However, the activities of the Dutch company changed over time as the results were too small. Furthermore, it was discovered by the Dutch Social Affairs inspection in 2010 that a huge fake construction of Chinese enterprises was built by a group of perpetrators with the purpose to enable Chinese entrepreneurs to reside legally in the Netherlands. This construction was used as of 2001. The name of the father and his company were found in the administration of the group of perpetrators. The Court in first instance found that the residence permit of the father was obtained by deliberate fraud. The father's residence permits had thus been fraudulently acquired.<sup>3</sup> On 29 January 2014, his permits were withdrawn with retroactive effect.

Subsequently, the Dutch government withdrew the mother's and son's permits, also with retroactive effect, within the framework of both the FRD and the LTRD. The Dutch State Secretary contended that their permits under the FRD had been fraudulently acquired, since they were provided on the basis of the father's employment. Consequently, the mother's and son's long-term residence permits were also withdrawn, since they had been based on the assumption that they legally resided in the Netherlands. The State Secretary further argued that the mother and son acquired their long-term residence permits by submitting the father's fraudulent job statements. They thus provided misleading information themselves.<sup>4</sup>

It is not disputed in this case that the mother and son were unaware of the fraudulent character of the information they presented to acquire long-term resident status.<sup>5</sup> Further, there is no evidence that the family ever applied for social assistance during their stay in the Netherlands.

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<sup>1</sup> CJEU Case C-557/17.

<sup>2</sup> AJD 20 September 2017, ECLI:NL:RVS:2017:2492, para 2.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid, para 3.

<sup>5</sup> Ibid, para 1.

## 1.2 The preliminary questions

The Council of State posed two preliminary questions:

1. Must Article 16(2)(a) FRD be interpreted as precluding the withdrawal of a residence permit granted for the purpose of family reunification in the case where the acquisition of that residence permit was based on fraudulent information but the family member was unaware of the fraudulent nature of that information?
2. Must Article 9(1)(a) LTRD be interpreted as precluding the withdrawal of long-term resident status in the case where the acquisition of that status was based on fraudulent information but the long-term resident was unaware of the fraudulent nature of that information?<sup>6</sup>

## 1.3 Outline of the expert opinion

This expert opinion seeks to answer these questions by exploring the broader context from which the questions arise. The Council of State asks whether withdrawal clauses relating to fraud require an element of awareness of the migrant. It therefore in essence wants to know which considerations are relevant in assessing withdrawal of resident status on the basis of fraud.

This expert opinion will discuss the two relevant directives separately and take into account the similarities and differences between them. Prior to answering the preliminary questions, the following questions will be investigated:

- With respect to Article 16 Directive 2003/86/EC, which considerations are relevant in assessing withdrawal of resident status on the basis of fraud?
- With respect to Article 9 Directive 2003/109/EC, which considerations are relevant in assessing withdrawal of resident status on the basis of fraud?

This approach was taken because certain interrelating aspects must be entangled first, before the bare question of the relevance of awareness of the fraudulent character of the provided information can be assessed. For instance, it is relevant to know the meaning of the term 'fraud' and the answer to the question whether the mother and the son (the family members) are in a different position than the father (the sponsor). Moreover, it should be examined whether the position of the family member with regard to the fraud committed by the sponsor changes when they have obtained a residence permit which makes them independent of the sponsor. Further, the question has to be answered of how the income requirements included in the two Directives relate to the element of fraud. Supposed that the family had sufficient income to live without applying for social assistance in the host member state, what is then the relevance of the sponsor misrepresenting the source of that income? Finally, there is the important issue of whether withdrawal may have retroactive effect, and if so under what conditions.

Chapter 2 of this expert opinion will first pay attention to the phenomenon that both the Family Reunification Directive and the Long-Term Residence Directive grant a stronger position to immigrants after five years of legal stay. Chapter 3 will analyse the meaning of fraud and the meaning of withdrawal in both Directives. In Chapter 4 containing a summary and conclusions will assess which considerations are relevant for withdrawal on the basis of fraud in both directives. Finally, the preliminary questions will be answered.

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<sup>6</sup> Ibid, para 32.

## **2. The acquirement of a stronger position after lapse of time under the FRD and LTRD**

In this section, the meaning of the FRD and the LTRD for the specific situation at hand will be investigated, focussing on the question of dependency of the status of the family members on the status of the sponsor. It will deal with the following questions:

- How has the relationship between the sponsor and the family members been shaped in the FRD in terms of dependency?
- How does the autonomous residence permit granted by the FRD to family members after five years of legal stay, relate to the long-term resident status granted by the LTRD to third country nationals after five years of legal stay?

These questions are of importance for the central questions in this case, because of the relation between the fraud of the father and the residence rights of the mother and the son. After all, the initial residence permits of the mother and the son were dependent on the residence permit of the father. If the mother and the son's residence permit remain dependent of the fathers' permit all the time, this means that the withdrawal and consecutive loss of the father's residence permit would have similar consequences for the family members. However, if the mother and son have lawfully acquired an autonomous permit, the fraud of the father may have no consequences for the mother and the son.

### **2.1 Relationship sponsor – family members in the FRD**

Article 1 FRD defines the purpose of this Directive as determining the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. The Directive applies where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence. The members of his or her family should be third country nationals of whatever status. If the sponsor loses his residence right, the position of the family members maybe at stake as well. According to Article 13(3) FRD, the duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor. Thus, the residence rights of the family members under the FRD are, in principle, dependent on the residence right of the sponsor.

At the same time however, the residence permits of family members do not remain dependent on that of the sponsor forever. According to recital 15 FRD, the integration of family members in the host country should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships. Moreover, they should have access to education, employment and vocational training on the same terms as the person with whom they are reunited under the relevant conditions.

This principle of integration by means of independency from the sponsor is to found explicitly in Article 15(1) FRD. This provision grants an entitlement to an autonomous residence permit, independent of that of the sponsor, not later than after five years of residence for the spouse or unmarried partner and a child who has reached majority. This entitlement comes into being directly by the passing of five years by virtue of the Directive. It is up to national law of the member state whether the autonomous residence permit shall be issued upon application or not.

According to Article 15(1) FRD this entitlement is not applicable when the family member has been granted a residence permit for reasons other than family reunification. Apparently, independence from the sponsor was deemed sufficiently secured by the drafters of the FRD, if a residence right for another reason has been obtained.

The integration of the family members is a gradual process, which already starts long before the five years have passed. This follows already from recital 4 of the Preamble to the Family

Reunification Directive, which stresses that family reunification as such helps to create 'sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty'. This implies that the family members all integrate better in society when they live together with their family members.

Accordingly, their dependency from the sponsor may be conceived as gradually diminishing. Once the permit has been issued, the position of the family members is already stronger than at the stage of the application. This follows from the fact that the permit can no longer be withdrawn for reasons of illness or disability, suffered after the issue of the residence permit.<sup>7</sup> Article 15(1) FRD grants an 'entitlement' to an autonomous residence permit 'not later' than five years. According to Article 17 FRD, the duration of the residence of the family member in the Member State is one of the aspects to be taken into account in decisions to withdraw or refuse to renew a residence permit or to order the removal of the *sponsor or members of his family*. The wordings '*sponsor or members of his family*' clearly suggest the possibility that the sponsor may be expelled while his family members remain.

The system of a gradual acquirement of an independent, autonomous status by family members can also be seen in Article 7 Decision 1/80 of the Association Council EEC-Turkey. According to steady case law of the CJEU, the right of access to employment in the host Member State by members of a Turkish worker's family after a certain period, is specifically intended to consolidate their position in that State by offering them the chance to become independent.<sup>8</sup>

It should be concluded that from the outset the residence status of family members under the FRD is one of dependency. Yet, this dependency changes over time because the family members gradually integrate into the host country, and subsequently acquire an autonomous residence status after five years of residence.

## 2.2 Independency after lapse of time in the FRD and LTRD

The system of gradual acquirement of an autonomous status under the FRD raises the question how this relates to the long-term resident status of the LTRD. Both Directives have in common that they provide for an autonomous residence right after five years of legal residence. In these Directives this right is consistently based on the objective of integration of third country nationals in general or family members specifically.<sup>9</sup>

The principal purpose of the LTRD is the integration of third-country nationals, who are settled on a long-term basis in the Member States.<sup>10</sup> According to recital 2 of the Preamble to the LTRD the legal status of third-country nationals should be approximated to that of Member States' nationals. A person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union in that Member State. The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of a Member State.<sup>11</sup> Residence should be both legal and continuous in order to show that the person has rooted in the country. The long-term resident status must be granted to third country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application.<sup>12</sup>

It seems beyond doubt that a long-term resident status can be equated with an autonomous

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<sup>7</sup> Art 6(3) FRD.

<sup>8</sup> CJEU Case C-351/95 *Kadiman* [1997], para 36, CJEU Case C-373/03 *Aydinli* [2005], para 23.

<sup>9</sup> Recital 15 Preamble FRD, recital 2 Preamble LTRD.

<sup>10</sup> CJEU Case C-508/10 *Commission v the Netherlands* [2012], para 66, CJEU Case C-309/14 *CGIL and INCA* [2015], para 21, CJEU Case C-636/1 *López Pastuzano* [2017], para 23.

<sup>11</sup> Recital 6 Preamble LTRD.

<sup>12</sup> Art 4(1) LTRD.

residence permit or a ‘residence permit for reasons other than family reunification’ as mentioned under Article 15(1) FRD. A long-term resident status secures independence from the sponsor. Even though the residence right of Article 15 FRD is autonomous, it is not necessarily granted for an unlimited period. However, the legislative history shows a certain connection between the autonomous status of Article 15 FRD and the long-term resident status. The European Commission remarked, in its explanatory memorandum with the second proposal for what is now Article 15 FRD, that the legislation in most Member States does not distinguish between a permanent residence permit and an autonomous residence permit, but merges them in a single status: the holder of a permanent right of residence holds a residence permit that is autonomous of the sponsor. For this reason, the Commission harmonised the maximum period of time after which an autonomous status must be granted under Article 15 FRD with the period of residence needed to acquire long-term resident status: five years in both cases.<sup>13</sup> Thus, the European Commission had the express aim of facilitating the granting of a long-term resident status under the same conditions as the autonomous residence permit.

It should thus be concluded that the status of long-term resident can be equated with an autonomous residence permit or a residence permit for other reasons than family reunification.

### **2.3 Sub conclusions**

If the sponsor loses his residence right as a consequence of fraudulent acts this will also affect the residence status of the family members, as long as their status is dependent of the status of the sponsor. Withdrawal of the sponsor's status in principle implies loss of the dependent status for the family members. However, the dependency of family members from the sponsor under the FRD lessens gradually as they further integrate over time in the host member state. This dependency ends no later than after five years of legal residence. After a maximum of five years the family members are entitled to an autonomous residence permit on the basis of Article 15 FRD. Independence can also be gained by obtaining a residence permit for other reasons than family reunification. The long-term resident status can be considered such ‘residence permit for other reasons’. This status is not only autonomous but also granted for an unlimited period.

Yet there could be other reasons why the fraud could have consequences for the autonomous status of the family members. After all, their autonomous permit or long-term resident status could be withdrawn when it was acquired on the basis of fraud itself. For that reason, the next question to investigate is what the term ‘fraud’ means. Moreover, it should be examined whether it makes a difference in cases of family reunification who was the actor of the fraud. Finally, it should be assessed when and under what conditions (with retroactive effect or not) fraud may lead to termination of legal residence under the FRD and the LTRD.

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<sup>13</sup> European Commission, Amended proposal for a Council Directive on the right to family reunification, Explanatory Memorandum, COM(2002)225.

### 3. The meaning of the terms ‘fraud’ and ‘withdrawal’

In the case in which the preliminary questions were referred the permit of the family members were ‘withdrawn’ on the basis of Article 16(2)(a) FRD and 9(1)(a) LTRD. Under Article 16(2)(a) FRD, Member States may reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that ‘false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means’ were used. Under Article 9(1)(a) LTRD, long-term residents shall no longer be entitled to maintain long-term resident status in case of detection of ‘fraudulent acquisition’ of long-term resident status.

This chapter will examine the meaning of two important concepts mentioned in these provisions: the concept of ‘fraud’ and the concept of ‘withdrawal’. The following questions will be raised:

- What is the meaning of fraud?
- What is the meaning of withdrawal on the basis of fraud in the FRD?
- What is the meaning of withdrawal in the LTRD?

In order to investigate whether the fraud could have consequences for the autonomous residence status of the family member it should first be analysed whether fraud is a European Union concept and what the meaning of such a concept could be. An important aspect of this question is whether fraud requires intention. Subsequently it must be assessed what the system of withdrawal is in both directives and what the particular legal consequences could be of the withdrawal on the basis of fraud.

#### 3.1. The meaning of fraud

As ‘fraud’ is a key concept in the relevant provisions of the Family Reunification Directive and the Long-Term Residence Directive, it must be examined whether this is a Union law concept, like the concept of ‘worker’<sup>14</sup> or the concept of ‘risk to public policy’<sup>15</sup>. The fact that ‘fraud’ is a ground to derogate from the rights granted in the FRD and the LTRD implies that it is a Union law concept. It seems apt to paraphrase paragraph 48 of the *Zh. and O.* judgment. It states that Member States essentially retain the freedom to determine the requirements of [fraud] in accordance with their national needs, which can vary from one Member State to another and from one era to another. However, the fact still remains that, in the European Union context and particularly when relied upon as a justification for derogating from [a principle], those requirements must be interpreted strictly. It follows that the scope of these requirements cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.<sup>16</sup> In the *Brosnan* judgment<sup>17</sup>, the CJEU stated that the principle that abusive practices are prohibited displays the general, comprehensive character which is naturally inherent in general principles of EU law.

According to common understanding of the word ‘fraud’ as can be derived from a list of circumscriptions in Black’s Law Dictionary<sup>18</sup>, there must be an ‘intentional perversion of the truth with the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right’ (Latin: *fraus, dolus or dolus malus*). ‘As distinguished from negligence, it is always positive, intentional’.

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<sup>14</sup> CJEEC Case C-53/81 *Levin* [1983], paras 11 and 12.

<sup>15</sup> CJEEC Case 30/7727 *Bouchereau* [1977], para 27, CJEU Case C-5654/13 *Zh. and O* [2015], para 48.

<sup>16</sup> CJEU Case C-5654/13 *Zh. and O* [2015], para 48.

<sup>17</sup> CJEU Case C-251/16, *Brosnan* [2017], para 31.

<sup>18</sup> Black’s Law Dictionary, sixth edition, 1990, pp 660-663.

Similarly, the Communication from the Commission to the European Parliament and the Council on guidance for the application of the Citizenship Directive (Directive 2004/38/EC<sup>19</sup>) states that, for the purposes of the Directive, fraud may be defined as ‘deliberate deception or contrivance made to obtain the right of [...] residence under the Directive’. In the context of that Directive, fraud is likely to be limited to forgery of documents or false representation ‘of a material fact concerning the conditions’ attached to the right of residence.<sup>20</sup> According to the Commission’s Guidance on the Citizenship Directive, it must be a ‘deliberate deception or contrivance made to obtain the right’. The Commission’s Guidance on Directive 2004/38/EC also requires a criminal conviction, which normally presumes intent or culpability: ‘Persons who have been issued with a residence document only as a result of fraudulent conduct in respect of which they have been convicted, may have their rights under the Directive refused, terminated or withdrawn’.<sup>21</sup> In the *Halifax* judgment,<sup>22</sup> abusive practices were defined as ‘transactions carried out not in the context of normal commercial operations, but *solely for the purpose* of wrongfully obtaining advantages provided for by Community law’. In the *Brosnan* judgment, the Court specified that obtaining such advantage does not have to be the only purpose, and that it is sufficient that ‘the accrual of a tax advantage constitutes the *essential aim* of the transactions at issue’.

In the same vein, Article 1(1)(a) of the Council Regulation of 1995 on the protection of the European Communities financial interests<sup>23</sup> states that ‘[f]or the purposes of this Convention, fraud affecting European Communities’ financial interests shall consist of: in respect of expenditure, any ‘intentional act or omission’. Article 16(2) (a) FRD mentions that fraud can take the form of using ‘false or misleading information’ and ‘false or falsified documents’. Further, it is essential, that the *misrepresentation or omission of facts, including the use of false documents*, must have been *decisive for the granting* of the status or the residence right, as it is formulated in Articles 14(3)(b) and 19(3)(b) Qualification Directive<sup>24</sup> (Directive 2011/95/EU, henceforth: QD). Taking these definitions into account it is difficult to imagine a useful concept of fully unintentional ‘fraud’, lacking the purpose to manipulate the granting of an undeserved right.

### 3.1.1 Benefitting from fraud committed by another person

Still, it should be investigated what meaning should be given in this regard to concepts like culpability and reprehensible negligence. This may particularly be relevant for cases in which a person benefits from fraud committed by another person. The case at hand concerns family members of a sponsor who, according to the national court of first instance, had intentionally misrepresented or omitted

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<sup>19</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

<sup>20</sup> European Commission, ‘Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ COM (2009) 313 final, para 412.

<sup>21</sup> European Commission, Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2009) 313 final.

<sup>22</sup> CJEU Case C-255/02, *Halifax* [2006], para 69.

<sup>23</sup> Council Regulation (EC) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests [1995] OJ L 312/1, Art 1.

<sup>24</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

facts. The position of the family members was different from that of the sponsor, because they were, according to the Council of State, not conscious of the fraudulent behaviour of the sponsor. However, they still benefited from the fraud.

The Council of State referred, in its explanation of the preliminary questions, to CJEU judgments which indeed have regard to situations in which the question arose whether a party using information provided by others was aware of a fraud committed by these others. Especially relevant is the *Euro-Tyre* case. In this case the CJEU stated that, if the taxable person concerned knew or should have known that the transaction which it had carried out was part of a fraud committed by the purchaser and *that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed*, that person would have to be refused a VAT exemption.<sup>25</sup> In other words, the purchaser may not be culpable of using fraud but he has a positive obligation to prevent fraud from happening. It seems adequate to limit this obligation to measures that are within his power and can reasonably be asked from him.

According to the Council of State a different finding could be derived from the *Eurofit* judgment.<sup>26</sup> However, this case was about a very specific question on the interpretation of Regulation No 3665/87 concerning export refunds on agricultural products.<sup>27</sup> In that case it was relevant whether the fact that the authorities did not inform an operator could be considered *force majeure*. It is not clear in what sense the *Eurofit* judgment might be relevant here. However, the additional value of the *Euro-Tyre* judgment to the observations above about the intentional character of fraud seems to be, that persons unconsciously making use of fraud committed by others, do not commit fraud themselves, but still can be required to have taken all reasonable steps to prevent fraud from being committed.

In an attempt to merge these indications into one definition, the term 'fraud' could be described as deliberate misrepresentation or omission of facts, the use of false or misleading information, including the use of false or falsified documents, which was decisive for the granting of the right applied for. Obtaining an undeserved advantage must be the essential aim.

These observations are relevant for the preliminary questions of the Council of State. If the term 'fraud' in the Union law sense of the word can only exist, if the actions concerned were carried out deliberately, then it would be clear that non-reprehensible unawareness of the fraudulent character of the information provided would exclude that there was fraud in the Union law sense of the word.

Persons unconsciously making use of fraud committed by others, do not commit fraud themselves, but still can be required to have taken all reasonable steps to prevent fraud from being committed. In case of family members who benefitted from the fraud committed by the sponsor, it can be adequate to take into account in assessing their responsibility to prevent fraud whether they are in a vulnerable situation, for instance because of their age or gender.

### 3.1.2 Sub conclusion on the term 'fraud'

This leads to the following conclusions regarding the meaning of fraud. From the common meaning of fraud and the analogous findings from Union Law sources it was concluded that 'fraud' must be intentional. Fraud means: deliberate misrepresentation or omission of fact, the use of false or misleading information, including the use of false or falsified documents, which was decisive for the granting of the right applied for. Obtaining an undeserved advantage must be the essential aim.

A person who is unconsciously benefitting from fraud conducted by another person does not commit fraud himself. However, but he may be held responsible for culpably using the false information, if he did not take every step which could reasonably be asked from him to prevent fraud.

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<sup>25</sup> CJEU Case C-21/16 *Euro Tyre* [2017], para 40. See also CJEU Case C-273/11 *Meczek-Gabona* [2012], para 55.

<sup>26</sup> CJEU Case C-99/12 *Eurofit* [2013].

<sup>27</sup> Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products [1989] OJ L351/1.

### 3.2. Withdrawal

In the preliminary questions posed by the Council of State, the word 'withdraw' (*intrekken*) is used both with regard to Article 16(2)(a) FRD as to Article 9(1)(a) LTRD. This raises the question what the term 'withdrawal' means. In EU law, withdrawal is merely one of the terms used for ending a residence permit. Other terms are annulment or revocation. In the Visa Code (Regulation 810/2009<sup>28</sup>) a distinction is made between annulment and revocation. On the one hand, '[a] visa shall be *annulled*<sup>29</sup> where it becomes evident that the conditions for issuing it were not met at the time when it was issued, in particular if there are serious grounds for believing that the visa was fraudulently obtained'.<sup>30</sup> On the other hand, '[a] visa shall be *revoked*<sup>31</sup> where it becomes evident that the conditions for issuing it are no longer met'.<sup>32</sup> Characteristic for annulment is, that the visa is considered never to have existed. In contrast, revocation leaves the visa intact for the past and only has consequences for the future.

In Article 16 FRD the term 'withdraw' is used.<sup>33</sup> It seems therefore necessary to investigate whether this word is meant in the sense of 'annulment' or in the sense of 'revocation'. It should be noted that in Article 9(1) LTRD no comparable verb is used. It states that the person shall 'no longer be entitled to maintain long-term resident status'. In that respect, the second question asked by the Council of State, speaking of 'the withdrawal of the status of long-term resident'<sup>34</sup> is not fully in line with the wording of Article 9(1) LTRD. At the same time, the word 'withdrawal' is frequently used elsewhere in the LTRD.<sup>35</sup> Apparently, a reasoned withdrawal decision by the national authorities is needed to terminate the validity of the long-term resident status, also in the case of Article 9(1) LTRD. In the following sections it is investigated how the termination of a residence permit/status is shaped in the FRD and the LTRD. The focus will be on the question whether withdrawal with retroactive effect is allowed and, if so, under what circumstances.

#### 3.2.1 Withdrawal in the FRD

Article 16(2)(a) FRD is placed in Chapter VII under the heading 'penalty and redress'. Withdrawal is an optional measure ('Member States may ...'). The measure is possible 'when the conditions laid down in this Directive are not or no longer satisfied'<sup>36</sup>. These conditions are, according to Article 4(1) FRD, laid down in Chapter IV as well as in Article 16 FRD itself. One of the important conditions is not to constitute a danger for public policy, public security or public health. Article 6(2) FRD provides the possibility of withdrawing family members' residence permit on grounds of 'public policy, public security or public health'. Under Article 16, withdrawal is further possible 'where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship'<sup>37</sup>; 'where it is found that the sponsor or the unmarried partner is married or is in a long-term relationship with another person'<sup>38</sup>; 'where it is shown that (b) the marriage, partnership or adoption was contracted

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<sup>28</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas [2009] OJ L 243/1.

<sup>29</sup> Dutch version: 'nietig verklaard', German version: 'annuliert', French version: 'annulation'.

<sup>30</sup> Art 34(1) Visa Code, emphasis added.

<sup>31</sup> Dutch version: 'ingetrokken', German version: 'aufgehoben', French version: 'abrogé'.

<sup>32</sup> Art 34(2) Visa Code, emphasis added.

<sup>33</sup> Dutch version: 'intrekken', German version: 'entziehen', French version: 'rétirer'.

<sup>34</sup> Dutch version: 'de intrekking van de status van langdurig ingezetene'.

<sup>35</sup> See for instance recitals 22, 24, Articles 1, 9(2)(3a)(6)(7), 10, 20.

<sup>36</sup> Art 16(1)(a) FRD.

<sup>37</sup> Art 16(1)(b) FRD.

<sup>38</sup> Art 16(1)(c) FRD.

for the sole purpose of enabling the person concerned to enter or reside in a Member State<sup>39</sup> or 'where the sponsor's residence comes to an end and the family member does not enjoy an autonomous right of residence under Article 15'.<sup>40</sup>

It can be inferred from the provisions cited that withdrawal is not a form of termination, which by definition takes effect retroactively as if the residence permit had never existed – like in the case of annulment. Articles 6(2) and 16 FRD mention many situations, in which it is clear that termination should not have retroactive effect, especially when the conditions are 'no longer' satisfied as mentioned in Article 16(1)(a). The same applies when the sponsor and the family members do 'no longer' live in a real marital or family relationship, as mentioned in Article 16(1)(b) FRD. As it is not consistent to interpret a term as having varying definitions according to the situation to which it is applied, it should be concluded that 'withdrawal' can never mean 'annulment'. Still there may be situations in which a Member State could reasonably argue that there was a '*vitium in originis*', a defect which – in principle - prevented the right to come into being. In fraud cases this could be an adequate approach.<sup>41</sup> In such cases there might be discretionary power for the Member States to attach retroactive effect to the withdrawal decision.

However, it should be noted that Member States should conduct a proportionality test, also if they withdraw with retroactive effect. This follows from the fact that the Court of Justice has indeed applied the proportionality principle in a case where a right (nationality) was annulled under national law because of fraud. In the *Rottmann* judgment, the CJEU recognised the legitimate public policy needs of the state to fight fraud.<sup>42</sup> It held nonetheless that a decision to withdraw citizenship must be in line with 'the principle of proportionality', having regard to all the relevant circumstances.<sup>43</sup>

Also in the *Metock* judgment the Court stated that Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Citizenship Directive in the case of abuse of rights or fraud, such as marriages of convenience. It added that any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive.<sup>44</sup>

Similarly, Article 17 FRD demands for all cases of withdrawal – including cases of fraud - a proportionate decision, taking due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin. Further, in case of suspicions of fraud, Article 16(4) FRD allows for specific checks and inspections. Thus, the Member States are enabled to assess the level of seriousness of the misrepresentation and the deliberateness of the fraud and to balance their findings against the interests involved.

Moreover, the general EU principle of proportionality requires that measures adopted should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question. Where there is a choice between several appropriate measures, recourse must be had to the least onerous. The disadvantages caused must not be disproportionate to the aims pursued.<sup>45</sup> Scholars note that the principle of proportionality can be conceived of as three different elements; suitability, necessity and proportionality *stricto sensu*.<sup>46</sup> Under suitability, it can be asked whether the means employed are 'suitable, namely reasonably likely, to achieve its objective.'<sup>47</sup> Necessity considers the 'adverse consequences that the measure

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<sup>39</sup> Art 16(2)(b) FRD.

<sup>40</sup> Art 16(3) FRD.

<sup>41</sup> See CJEU Case C-251/16, *Brosman*, [2017], para 43 and CJEU Case C-258/95, *Kol*, [1997], para 26.

<sup>42</sup> CJEU Case C-135/08 *Rottman* [2010], para 51.

<sup>43</sup> *Ibid*, para 56.

<sup>44</sup> CJEU Case C-127/08 *Metock* [2008], para 75.

<sup>45</sup> CJEU Case C-180/00 *The Netherlands v Commission* [2005], para 103.

<sup>46</sup> D.A. Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Leiden/Boston, Brill, 2011), p 219.

<sup>47</sup> T. Tridimas 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999), p 88.

has on an interest worth of legal protection' and whether 'those consequences are justified in view of the importance of the objective pursued.'<sup>48</sup> Thus, 'the more severely a measure affects private interests, the more difficult it is to establish its necessity.'<sup>49</sup> Finally, the proportionality *stricto sensu* test requires 'the measure does not have an excessive effect on the applicants interests'.<sup>50</sup>

In sum, 'withdrawal' in the FRD cannot have the meaning of annulment, meaning that the residence permit has never existed. Yet, it is conceivable that withdrawal has retroactive effect, but this should be proportionate. This implies a proportionality assessment that follows from the CJEU's case law, the text of the FRD and the general principles of EU law.

Such a proportionality assessment should take into account all the relevant aspects of the case and weigh this against the legitimate aims pursued. Given the particularities of the referred case it seems necessary to highlight two specific important aspects in such an assessment here: the time that has lapsed since the fraud in the light of the principle of legal certainty and the specific role of a proportionality assessment in case of income fraud.

#### *Lapsed time and legal certainty*

Legal certainty is a general principle of EU law. According Maxeiner, this means that '(1) laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.'<sup>51</sup> In particular, the fifth aspect plays a crucial role in the case at hand.

The 'principle [of legitimate expectations], which is part of the Community legal order [...], is the corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable.'<sup>52</sup> In *Mavridis v European Parliament* the CJEU pointed out that 'any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations'<sup>53</sup> can rely on the principle of legitimate expectation. According to Wiesbrock there are three conditions that must be fulfilled to invoke the named principle:

Firstly, there must be an action undertaken by the authority concerned in the form of adopting an administrative measure (be it a lawful or an unlawful one) that has justifiably created legitimate expectations on the part of an individual. [...]

Secondly, the person concerned must be entitled to have that expectation. He may not have acted in any way so as to preclude reliance on the expectation. [...]

Thirdly, even if the principle of legitimate expectations is applicable, the interests of the individual must override the public interest.<sup>54</sup>

These elements seem to coincide with the previous discussion of the meaning of fraud. The sponsor who has committed fraud will never fulfil the second condition. After all, we concluded that fraud can only be intentional. The committing of fraud therefore does not bring about any legitimate expectations. Still, the third condition, an overriding interest of the individual, may lead to maintaining an unlawfully acquired status. In the *Rottmann* judgment the CJEU accordingly invoked the principle of proportionality so far as concerns the consequences it entails for the situation of the

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<sup>48</sup> Ibid, p 68.

<sup>49</sup> Ibid, p 76.

<sup>50</sup> Ibid, p 68.

<sup>51</sup> Maxeiner, J. R., 'Some realism about legal certainty in the globalization of the rule of law' 31 *Houston Journal of International Law* (2008), p 32.

<sup>52</sup> CJEU Case C-63/93 *Duff and Others* [1996], para 20.

<sup>53</sup> CJEU Case 289/81 *Mavridis v European Parliament* [1983], para 1744.

<sup>54</sup> A Wiesbrock, *Legal migration to the European Union* (Brill, 2010), p 191 ff.

person concerned.<sup>55</sup>

A different situation arises for the family members who have not committed the fraud themselves, but have unconsciously benefitted from the fraud. Since they were not aware of the fraud, they were entitled to expect that the expectations based on the grant of the residence status were legitimate. In addition, they may also have an overriding interest not to lose their residence status.

This is in line with the *Altun* judgment, which concerned a case of a Turkish worker's right of residence. The case has many similarities to the case which led to the preliminary questions addressed in this expert opinion. In *Altun* the CJEU considered that an autonomous right of access to the employment market of the host Member State and, as a corollary, a right of residence there, may no longer be called into question on account of irregularities which, in the past, affected the right of residence. Any other solution would be contrary to the principle of legal certainty which, according to settled case-law, requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals.<sup>56</sup>

#### *Income fraud and proportionality*

Even if it would be established that a residence permit for family reunification was acquired on the basis of deliberate or culpably used misleading information with regard to the income requirement, there may be reasons to waive the possibility of withdrawal. This applies especially, if it would be established in hindsight that the person concerned did never apply for social assistance in the host Member State. This may be an indication that the income requirements were nevertheless complied with. In such case it could be necessary to investigate in more detail how the person concerned managed to live without asking for social benefits. The findings of such investigation may be relevant for assessing the seriousness of the fraud committed. According to the *Halifax* judgment, it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. The prohibition of abuse is not relevant where the activity carried out may have some explanation other than the mere attainment of advantages.<sup>57</sup>

Here a distinction must be made between the assessment made at the moment of the application and the assessment in hindsight. At the moment of an application for family reunification, the Member States may refuse an application for family reunification on the basis of a prospective assessment<sup>58</sup> of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources as further defined in the *Chakroun* judgment.<sup>59</sup> A prospective assessment may, amongst other things, rely on documentation provided by the applicant. If this documentation is misleading, the effect may be that the prospective assessment is also seriously misguided.

However, when it is retroactively investigated whether the family has complied with the income requirement in the context of a possible withdrawal of the residence permit, it is no longer relevant whether it could be expected that the income requirement would be fulfilled at the moment that the residence permit was granted.<sup>60</sup> In such situation only the general approach of the *Chakroun* judgment should fully apply. In this judgment the Court of Justice stated, that the Member States may indicate a certain sum as a reference amount. However, they may not impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant. The extent of needs can vary greatly depending on the individuals. Member States may not use the margin for manoeuvre which is granted to them in a manner which would undermine the objective of the Directive, which is to promote family

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<sup>55</sup> CJEU Case C-135/08 *Rottman* [2010], para 55.

<sup>56</sup> CJEU Case C-337/07 *Altun* [2008], paras 59-60.

<sup>57</sup> CJEU Case C-255/02 *Halifax*, [2006], paras 75, 81.

<sup>58</sup> CJEU Case C-558/14 *Khachab* [2016].

<sup>59</sup> CJEU Case C-578/08 *Chakroun* [2010], paras 48 and 43.

<sup>60</sup> See also Case C-558/14 *Khachab* [2016], para 45.

reunification, and the effectiveness thereof.<sup>61</sup>

### 3.2.2 Termination of status in the LTRD

In Article 9(1)(a) LTRD the term ‘withdraw’ is not used, as was already noted above. In contrast to Article 16 FRD, Article 9(1)(a) LTRD provides no discretion to refrain from terminating the long-term resident status, if the condition mentioned under (a) is fulfilled. It states: ‘Long-term residents shall no longer be entitled to maintain long-term resident status in the following cases: (a) detection of fraudulent acquisition of long-term resident status’.

The text of the Directive makes clear that the long-term resident status must terminate as from the withdrawal decision made by the authorities of the Member State. The status cannot be annulled. The wording ‘no longer be entitled’ implies that applicants *were* entitled to maintain long-term resident status *until* fraudulent acquisition of that status was detected. Furthermore, the relationship with the term ‘acquisition’ suggests that applicants were entitled to maintain long-term resident status until detection, *even* if that status was fraudulently *acquired* from the start. Hence, retroactive effect is excluded from the scope of Article 9(1)(a) LTRD.<sup>62</sup> Hailbronner and Thym conclude that ‘withdrawal takes effect *ex nunc*, i.e. periods of residence before withdrawal based on a permit acquired fraudulently remain legal’.<sup>63</sup>

The legal certainty principle is applied here in the advantage of the long-term resident in light of his overriding interests. Even if the long-term resident might not have had legitimate expectations because of the fraud committed, the LTRD protects the legal residence enjoyed in the past.

In determining whether the condition mentioned in Article 9(1)(a) is fulfilled, it is important whether the fraud committed was serious enough to warrant termination of the status. For instance, if the person had stable and sufficient resources all the time, even if the information provided about the income was misleading, the question may be asked whether there is sufficient ground for terminating the status.

### 3.2.3. Sub conclusions on the term ‘withdrawal’

It should be concluded that withdrawal on the basis of the FRD does not normally have retroactive effect. In all cases of withdrawal a proportionality assessment must be made. In cases where income fraud has been duly assessed, it still must be investigated whether the family effectively made use of social benefits of the host Member State.

Article 16(3) FRD, read in the light of the principle of legal certainty, prohibits withdrawal of that residence permit or status of family members on the basis of fraud committed by the sponsor, once the family members have lawfully obtained an autonomous residence permit as mentioned in Article 15 FRD or another independent residence permit. A long-term resident status should be considered such ‘independent residence permit’.

Under the LTRD, a status must be terminated once it has been duly assessed that the status was fraudulently acquired and that the fraud was sufficiently serious. Withdrawal under the LTRD does not have retroactive effect. In cases where income fraud has been established, it still must be investigated whether the long-term resident effectively made use of the system of social benefits in the host Member State.

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<sup>61</sup> CJEU Case C-578/08 *Chakroun* [2010].

<sup>62</sup> Furthermore, withdrawal *with* retroactive effect seems to be a superfluous notion, bearing in mind the policy makers’ possibility to employ the perfectly suited notion of ‘annulment’ instead.

<sup>63</sup> K. Hailbronner and D. Thym, *EU Immigration and Asylum Law* (München, C.H. Beck/Hart/Nomos, 2016), p 474.

## 4. Summary and conclusions

The case in which the questions were referred by the Dutch Council of State concerns a family consisting of a father (the sponsor), a mother and a son (the family members). On 29 March 2001, the father obtained a temporary residence permit because of his work as manager for a private company in the Netherlands. On 28 April 2006, the father was provided with a permanent residence permit. Both permits were based on Dutch domestic law. On 31 January 2002, the mother and son were issued temporary residence permits on account of Article 2 Family Reunification Directive (FRD). Since 18 October 2006, the applicants had been in the possession of long-term residence permits, based on Articles 7 and 8 Long-Term Residence Directive (LTRD).

On 29 January 2014, the sponsor's permits were withdrawn with retro-active effect. Subsequently, the Dutch government withdrew the mother's and son's permits, also with retro-active effect, within the framework of both the FRD and the LTRD. The Dutch State Secretary contended that their permits under the FRD had been fraudulently acquired, since they were provided on the basis of the father's employment. Consequently, the mother's and son's long-term residence status was also withdrawn, since it had been based on the assumption that that legally resided in the Netherlands. The State Secretary further argued that the mother and son acquired their long-term residence status by submitting the father's fraudulent job statements. They thus provided misleading information themselves.<sup>64</sup>

It is not disputed in this case that the mother and son were unaware of the fraudulent character of the information they presented to acquire long-term resident status.<sup>65</sup> Further, there is no evidence that the family ever applied for social assistance during their stay in the Netherlands.

The preliminary questions asked by the Council of State focus on one single aspect, namely the relevance of whether the mother and the son were *aware* of the fraudulent character of the information provided with regard to their income position. This expert opinion sought to answer the preliminary questions by exploring the broader context from which they arise. It was investigated which considerations are relevant in assessing withdrawal of resident status on the basis of fraud in both the FRD and the LTRD.

This approach was taken because, in the opinion of the Migration Law Clinic, certain interrelating aspects must generally be entangled first before it is possible to assess the bare question of the relevance of awareness of the fraudulent character of the provided information. Of course, it is important to know what is meant by 'fraud' in these two directives. But it is also relevant whether the mother and the son (the family members) are in a different position than the father (the sponsor). Furthermore, the position of the family member with regard to the fraud committed by the sponsor changes when they have obtained a residence permit which makes them independent of the sponsor. Moreover, the question had to be answered of how the income requirements of the two Directives relate to the element of fraud. Finally, there was the important issue of whether withdrawal may have retroactive effect, and if so under what conditions.

### *Meaning of 'fraud'*

This expert opinion contended that the concept of 'fraud' has a uniform Union law meaning, which should thus be the same for both Directives. Fraud means: deliberate misrepresentation or omission of fact, the use of false or misleading information, including the use of false or falsified documents, which was decisive for the granting of the right applied for. Obtaining an undeserved advantage must be the essential aim.

The position of persons who unconsciously benefitted from fraud, for instance family members, should be discerned from the position of the person who committed the fraud. According

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<sup>64</sup> Ibid, para 3.

<sup>65</sup> Ibid, para 1.

to the findings in this opinion, persons who unconsciously benefitted from this fraud may not be reprehended for doing so. However, such persons must have taken all reasonable steps within his power that can be asked from him to prevent fraud. In case of family members benefitting from fraud committed by the sponsor, it seems adequate also to take into account whether they are in a vulnerable situation, for instance because of their age or gender.

#### *Autonomous residence status*

If the sponsor loses his residence rights as a consequence of fraudulent acts this will also affect the residence status of the family members, as long as their residence rights are dependent of status on the sponsor's status. Withdrawal of the sponsor's status in principle implies loss of the dependent status for the family members. However, the dependency of family members from the sponsor under the FRD lessens gradually as they further integrate over time in the host member state. This dependency ends no later than after five years of legal residence. After a maximum of five years the family members are entitled to an autonomous residence permit on the basis of Article 15 FRD. Independence can also be gained by obtaining a residence permit for other reasons than family reunification. The long-term resident status can be considered such residence permit for other reasons. This status is not only autonomous but also granted for an unlimited period.

Once the family member has lawfully obtained an autonomous residence permit meant in Article 15 FRD or another independent residence permit, including a long-term resident status, Article 16(3) FRD prohibits withdrawal of that residence permit or status on the basis of fraud committed by the sponsor. This also follows from the principle of legitimate expectations.

#### *Withdrawal*

In the national proceedings leading to the preliminary questions it was presumed that withdrawal may, under both Directives, always be performed with retroactive effect. However, in this expert opinion it was found that these presumptions should be reconsidered.

This expert opinion has contended that withdrawal in the FRD does not normally have retroactive effect. Furthermore, in all cases of withdrawal under the FRD a proportionality assessment must be made in compliance with Article 17 FRD, taking into account all the relevant circumstances of the case. This may include the lapse of time, age, vulnerability, integration, the seriousness of the fraud and the consequences for the persons concerned.

The seriousness of the fraud may be influenced by its effects on the host society. Supposed, that the family had sufficient income to live without applying for social assistance in the host Member State, what is then the relevance of the sponsor misrepresenting the source of that income? According to this expert opinion, it should always be investigated whether or not the family asked the host Member State for social benefits, in order to assess the seriousness of income fraud.

Under Article 9(1)(a) of the LTRD, withdrawal never has retro-active effect. According to that provision, a long-term resident status must be terminated once it has been duly assessed that the status was fraudulently acquired and that the fraud was sufficiently serious.

### **4.1 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 Dutch Council of State

- 1.a. If a family member was granted a residence title which was acquired on the basis of false or misleading information intentionally or culpably provided by the sponsor, this residence permit may not be withdrawn under Article 16(2)(a) of the Family Reunification Directive (2003/86), if the family member was unaware of the fraudulent character of the information, provided that the family member took every step which could reasonably be asked to prevent fraud.

- 1.b. If the family member culpably used the fraudulent character of the information, and if the family member did not yet obtain an autonomous residence permit independent of the sponsor, the host member state may terminate the residence permit only after a proportionate assessment of all the relevant circumstances.
- 1.c. Withdrawal under the Family Reunification Directive normally does not have retroactive effect, unless this is justified by a proportionate assessment of all the relevant circumstances.
- 2.a. If the status of long-term resident was acquired by a third country national on the basis of false or misleading information intentionally provided by someone else, while the applicant was not aware of the fraudulent character of the information, Article 9(1)(a), of the Long-Term Residence Directive (2003/109) does not lead to termination of the long-term resident status, provided that the applicant took every step which could reasonably be asked to prevent fraud.
- 2.b. Withdrawal of a long-term resident status under Article 9(1)(a) of the Long-Term Residence Directive (2003/109) has no retroactive effect.