



Right of residence under Article 20 TFEU of the primary carer of a minor Union Citizen

Expert opinion on issues arising from the case of *Chavez-Vilchez and Others* (C- 133/15)

Executive Summary

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Because of the official language of the case this expert opinion was written in Dutch.

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Executive Summary

This expert opinion provides a thorough legal analysis of the issues raised by the preliminary questions referred in the cases of *Chavez-Vilchez and Others* (C-133/15). It was written in support of the written observations by the lawyers of the mothers and children involved. Since the rules of the Court of Justice of the European Union (Court) do not allow the submission of amicus briefs it is circulated and made public in the hope of raising awareness of the cases and the relevant legal issues they contain.¹

The cases of H.C. Chavez-Vilchez and Others (Case C-133/15)

The cases of *Chavez-Vilchez* and seven other third country national mothers and their Dutch minor children are currently pending before the Court of Justice of the European Union.² In these cases the Dutch Centrale Raad van Beroep has referred the following questions:

- '1. Must Article 20 of the TFEU be interpreted as precluding a Member State from depriving a third-country national who is responsible for the day to day and primary care of his/her minor child, who is a national of that Member State, of the right of residence in that Member State?
2. In answering that question, is it relevant that the legal, financial and/or emotional burden does not rest entirely with that parent and, furthermore, that it cannot be excluded that the other parent, who is a national of the Member State, might in fact be able to care for the child? In that case, should the parent/third-country national have to make a plausible case that the other parent is not able to assume responsibility for the care of the child, so that the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?'

Importantly, all cases involve a situation where the third country national mother is the *primary and actual carer* of a minor Union citizen. Moreover, each mother has (*sole*) *parental authority and custody* over the child. The fathers in these cases, from whom the minor Union citizens derive their Dutch nationality, is either not involved at all, or only to a very minor extent and has either no or shared parental authority. Moreover, the fathers are *unwilling and/or unable* to care for the child. Nonetheless, the mother is faced with denial of residence rights by the Dutch authorities and shall therefore be under a legal obligation to leave the Netherlands and the European Union as a whole.

A simple *Ruiz Zambrano* type situation, one might think, in which the mother derives an EU law-based residence right from her child. However, the Dutch immigration authorities have taken the stance that since the fathers are not deceased or incarcerated they should – despite the fact that they are unwilling to do so – take over the care of the child and therefore the departure of the mothers from the territory of the European Union does not force the child to follow. *Ruiz Zambrano*, they therefore argue, is not applicable.

Findings of the expert opinion

This expert opinion concludes that the third country national mothers indeed have a derived right of residence from Article 20 TFEU. The decision to refuse a right of residence and sufficient means would in the cases at hand deprive the minor children who are European Union citizen of their *genuine and effective enjoyment* of the substance of the rights attaching to the status of European Union citizen. This is drawn from the assumption that the decision to refuse the third country national mothers with a right of residence will have the following result:

¹ With the consent of the lawyers of the mothers and children involved.

² Case C-133/15: Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands) lodged on 18 March 2015 — H.C. Chavez-Vilchez and Others, other parties: Raad van bestuur van de Sociale verzekeringsbank (Svb) and Others.

- **The minor Union citizens will have to leave the territory of the European Union**

In the cases at hand the minor Union citizens are all *legally* and *emotionally* dependent of their third country national mothers.³ The mothers have (*sole*) *parental authority* and *custody* rights over the minor Union citizens and are the *primary, daily and actual carer*. Importantly, the *parental authority and custody rights* give the mothers the right to determine the child's place of residence.⁴

The circumstance that some of the minor Union citizens in the referred cases are also, but to a lesser extend legally, emotionally and/or financially dependent on their Dutch father does not make this any different. Crucial is that the primary and actual care of the children does not lie with the father and the father is unwilling and in some cases also unable to take over the care from the mother. Under Dutch family law the father cannot be provided with parental authority and custody rights against his will.⁵ Moreover, even in the cases where the parental authority lies in part with the father, it must be assumed that the mother will be able to leave with her Union citizen child if she is forced to do so. As the child's primary carer she is able to be appointed with sole parental authority and custody so that she does not need the father's permission to take the minor Union citizen with her outside the European Union.⁶ Furthermore, it follows from the Court's case law on Article 20 and Article 20 TFEU that the role of the *actual and primary carer* is decisive in this regard.⁷ The circumstance that another parent or governmental institution could hypothetically assume and take over care for the child is irrelevant.

It must therefore be concluded that the minor Union citizens in these cases are dependent of their third country national mothers to such an extent that they will accompany their third country national mother and leave the territory of the European Union if she is denied a right of residence. According to the Court of Justice's standing case law, Article 20 TFEU precludes this since it would deprive the minor Union citizens of the *genuine and effective enjoyment* of the substance of the rights attaching to the status of European Union citizen.⁸

- **The minor Union citizens will be forcibly separated from their mothers**

It follows from the case law of the European Court of Human Rights (ECtHR) in migration, custody and child protection cases that a forced separation, and expropriation of parental authority and custody rights to enable this, amounts to a *clear violation of the child's right to family life* as protected under Article 8 of the European Convention on Human Rights and Article 7 of the Charter on Fundamental Rights.

Though not every expulsion of a third country national parent amounts to a violation of the right to family life, this is largely due to the fact that the ECtHR assumes in these cases that there is no forced separation of the child and parent because the child can follow the parent to the country of origin. In these cases the ECtHR stresses that 'Article 8 does not guarantee a right to choose the most suitable place to develop family life'.⁹ Crucial in finding a violation of Article 8 is therefore the

³ CJEU 6 December 2012, C-356/11 en C-357/11 (*O.S. and L.*), para 56.

⁴ See Art 2(9) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (*OJEU* 2003, L 338/1).

⁵ This is laid down in Titel 14 of Book 1 of the Dutch Civil Code.

⁶ G. Gardol, 'Ruiz Zambrano vanuit familie en jeugdrechtelijk perspectief' (Ruiz Zambrano from a family and youth law perspective) *Asiel & Migrantenrecht* 2013, no. 8, p. 379.

⁷ CJEU 10 October 2013, C-86/12 (*Alokpa*), CJEU 19 October 2004, C-200/02 (*Zhu en Chen*) en CJEU 17 September 2002, C-413/99 (*Baumbast en R.*).

⁸ CJEU 8 March 2011, C-34/09 (*Ruiz Zambrano*), paras 43-45 and HvJ EU 15 November 2011, C-256/11 (*Dereci*), para 66.

⁹ ECtRM 30 July 2013, 948/12 (*Berisha*) para 61 and ECtHR 3 November 2011, 28770/05 (*Avelo Aponte*), para 54 and ECtHR 14 February 2012, 26940/10 (*Antwi*).

question whether the family may remain intact, despite expulsion of the parent.¹⁰ This also explains why in cases where the child's parents are separated, the ECtHR often finds that expulsion of the third country national parent amounts to a violation of the right to family life.¹¹

That forced separation of the child and its parent is only allowed under exceptional circumstances, is best illustrated by the case law of the ECtHR in family law matters.¹² In the case of *Moser* for example, the ECtHR decided that lack of financial means and residence rights cannot justify separation of parent and child.¹³ This is even the case where there are clear signs of neglect. Before separating parent and child, the state must provide assistance in the child's care.¹⁴ According to the ECtHR, separating parent and child is a clear infringement of the right to family life and should therefore be based on the best interest of the child and with the purpose of protecting the child against immediate danger.¹⁵

It must be concluded from the above that forced separation of the minor Union citizen and its third country national mother with the sole purpose of ensuring that the child remains in the European Union and to prevent the third country national parent from obtaining a derived right of residence, amounts to a clear violation of the child's right to family life. It therefore cannot be upheld that under these circumstances the minor Union citizen can genuinely and effectively enjoy its right to remain in the European Union. Accordingly, separation of the minor Union citizens from their third country national mother who is the primary and able carer shall deprive the minor Union citizens of the *genuine and effective enjoyment* of the substance of the rights attaching to the status of European Union citizen.

¹⁰ See for example: ECtHR 9 April 2015, 72780/12 (*Muraldeli*), para 76, ECtHR 3 October 2014, 12738/10 (*Jeunesse*), para 117, ECtHR 30 July 2013, 948/12 (*Berisha*), para 60, ECtHR 3 November 2011, 28770/05 (*Avelo Aponte/Nederland*), para 60.

¹¹ See for example: ECtHR 28 June 2011, 55597/09 (*Nunez*), ECtHR 31 January 2006, 50435/99 (*Rodrigues da Silva en Hoogkamer*), EHRM 3 October 2014, 12738/10 (*Jeunesse/ Nederland*).

¹² See for example ECtHR 18 December 2008, 39948/06 (*Saviny*), para 50.

¹³ ECtHR 21 September 2006, 12643/02 (*Moser*), para 68-73.

¹⁴ ECtHR 26 October 2006, 23848/04 (*Wallová en Walla*) and ECtHR 18 December 2008, 39948/06 (*Saviny*).

¹⁵ ECtHR 10 April 2012, 19554/09 (*Pontes*), para 77 and ECtHR 27 January 2015, 25358/12 (*Paradiso and Campanelli*).