Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 September 2016[1]

Case C-133/15

H.C. Chavez-Vilchez,
P. Pinas,
U. Nikolic,
X.V. García Perez,
J. Uwituze,
I.O. Enowassam,
A.E. Guerrero Chavez,
Y.R.L. Wip
(Request for a preliminary ruling

from the Centrale Raad van Beroep (Higher Social Security Court, Netherlands))

(Reference for a preliminary ruling — Citizenship of the Union — Article 20 TFEU — Refusal, in a Member State, to grant a right of residence to a third-country national who is the primary carer of his/her young child, a national of that Member State — Presence of the other parent, a national of that State, in the territory of the same State — Obligation on the third-country national to demonstrate the other parent's inability to care for the child, inability which obliges the child to leave the territory of the State of which he is a national if the third-country national parent is refused the right of residence))

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I – Introduction

1. The questions referred by the Centrale Raad van Beroep (Higher Social Security Court, Netherlands) concern, in essence, whether Article 20 TFEU precludes a Member State from depriving one of the parents, a third-country national, of a young child who is a national of that Member State and has always resided there, of the right of residence even though that parent is the primary carer of that child, where it has not been established that the other parent, who is a national of that Member State, is able to assume the primary care of the child.

2. The referring court states that it is apparent from Netherlands administrative practice that the case-law resulting from the judgment in *Ruiz Zambrano*[2] is being interpreted restrictively, as meaning that, under that case-law, the third-country national parent's departure from the territory of the European Union does not deny the child who is a Union citizen the genuine enjoyment of the substance of the rights he derives from his status as a citizen of the Union. According to the competent Netherlands authorities, that case-law is applicable only where the father is unable to care for the child because he is deceased, in prison, detained in a psychiatric institution, incapable or cannot be traced, or if his request to obtain custody of the child who is a Union citizen has been rejected by a court.

3. In that judgment, in which the Court held that EU law precludes national measures which have the effect of denying citizens of the Union the genuine enjoyment of the substance of the rights which those citizens derive from their status as citizens of the Union, the principle of the best interests of the child was undoubtedly taken into account. The present reference for a preliminary ruling will lead the Court to approach this principle in a way that, to my mind, is more straightforward.

II – Legal framework

A – *EU law*

1. The Treaty on the Functioning of the European Union

4. Article 20(1) TFEU establishes Union citizenship and provides that 'every person holding the nationality of a Member State' is a citizen of the Union. Under Article 20(2)(a) TFEU, citizens of the Union have 'the right to move and reside freely within the territory of the Member States'.

5. Article 21(1) TFEU adds that that right is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

2. The Charter of Fundamental Rights of the European Union

6. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Respect for private and family life', provides that 'everyone has the right to respect for his or her private and family life, home and communications'.

2 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

3. Directive 2004/38/EC [3]

7. Article 5(1) and (4) of Directive 2004/38/EC provides as follows:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

…

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.’

B – *Netherlands law*

8. Article 1 of the Vreemdelingenwet 2000 (Law on Foreign Nationals 2000, ‘Law on Foreign Nationals’) provides as follows:

‘Within the meaning of the present Law and of the provisions adopted on the basis thereof:

…

(e) Community nationals shall mean:

1. nationals of the Member States of the European Union who, under the Treaty establishing the European Community, have the right to enter and reside on the territory of another Member State;

2. members of the families of the persons referred to in subparagraph 1 who are nationals of a third country and who, on the basis of a decision taken in implementation of the Treaty establishing the European Community, have the right to enter and reside on the territory of a Member State;

…’

9. Article 8 of that law provides:

‘A foreign national is legally resident in the Netherlands only:

…

(e) by virtue of his status as a Community national, so long as the person resides in the Netherlands on the basis of arrangements established under the Treaty establishing the European Community or the Agreement on the European Economic Area;

3 — Directive 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 (OJ 2004 L 158, p. 77).

(f) if, pending the decision on an application for a residence permit …, the present law, a provision adopted on the basis of the latter or a court order provides that the deportation of the foreign national should be deferred until a decision has been taken on the application;

(g) if, pending the decision on an application for a residence permit …, or on the extension of the period of validity of the residence permit …, or an amendment thereof, the present law, a provision adopted on the basis of the latter or a court order provides that the deportation of the applicant should be deferred until a decision has been taken on the application;

(h) if, pending the decision on an objection or appeal, the present law, a provision adopted on the basis of the latter or a court order provides that the deportation of the applicant should be deferred until a decision has been taken on the objection or the appeal.'

10. Article 10 of that law reads:

'1. A foreign national who is not lawfully resident may not claim entitlement to benefits and allowances awarded by decision of an administrative authority. The previous sentence shall apply *mutatis mutandis* to exemptions or licences issued pursuant to a law or a general administrative measure.

2. Paragraph 1 may be derogated from if the claim relates to education, the provision of emergency medical care, the prevention of situations that would jeopardise public health, or the provision of legal assistance to the foreign national.

3. The granting of a claim does not confer a right to lawful residence.'

11. The referring court states that implementation of the Law on Foreign Nationals is the responsibility of the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, 'State Secretary'). The Immigratie-en Naturalisatiedienst (Immigration and Naturalisation Service, 'IND') is responsible, among other tasks, for implementing the Law on Foreign Nationals in so far as it assesses all applications for residence and takes decisions on them on behalf of the State Secretary. [4]

12. The Vreemdelingencirculaire 2000 (Circular on Foreign Nationals 2000, 'Circular on Foreign Nationals') consists of a number of policy rules issued by the State Secretary. That circular is accessible to all and anyone may rely on the policy rules. In assessing applications for residence, in respect of which it is appointed to be the competent national authority, the IND is required to comply with those policy rules. It may depart from them only if it provides reasons for so doing and in exceptional cases that were not considered when the rules were drawn up.

13. Section (B), 2.2 of the Circular on Foreign Nationals, in the version in force at the date of the disputes in the main proceedings, contains the following rules:

'A foreign national is lawfully resident under the [Law on Foreign Nationals] if all the following conditions are met:

— the foreign national has a minor child who has Netherlands nationality;

— that child is the responsibility of the foreign national and lives with that foreign national; and

4 — According to the order for reference, in matters relating to immigration law the Chamber for Contentious Administrative Proceedings of the Raad van State (Council of State, Netherlands) is the highest authority. In matters relating to the Wet Werk en Bijstand (Law on Work and Social Assistance, 'Law on Social Assistance') the referring court is the highest authority. In matters relating to the Algemene Kinderbijslagwet (General Law on Child Benefit, 'Law on Child Benefit') there is the right to bring an appeal before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against decisions of the referring court with regard to the interpretation of the term 'insured person', including international law aspects of that term.

— that child would, if the right of residence were withheld from the foreign national, be required to follow the foreign national and leave the territory of the European Union.

The IND shall in any event not assume that the child [whose father or mother is a foreign national] must follow [the foreign national parent] and leave the territory of the European Union if there is another parent who is lawfully resident under … the [Law on Foreign Nationals] or who has Netherlands nationality, and that parent is in fact able to care for the child.

The IND shall in any event assume that the other parent is in fact able to care for the child if:

— the other parent has custody of the child, or is still able to get custody of the child; and

— the other parent can make use of help and support services related to care and education offered by public authorities or by social organisations. The IND understands that to include the provision of a benefit from public funds to which Netherlands nationals in the Netherlands are in principle entitled.

The IND shall in any event assume that the other parent is not in fact able to care for the child if that parent:

— is in detention; or

— shows that custody of the child cannot be awarded to him/her.'

14. Under Netherlands law, parents who are third-country nationals must have been granted a right of residence in order to be entitled to claim the benefits provided for under the Law on Social Assistance or under the Law on Child Benefit.

15. 1 July 1998 saw the entry into force of the Law of 26 March 1998 amending the Law on Foreign Nationals and certain other laws, which links claims by foreign nationals against administrative authorities in respect of benefits, allowances, exemptions and permits to the lawful residence of the foreign national in the Netherlands. That law is also known as the 'linkage legislation'. For foreign nationals other than citizens of the Union, that law introduced into social assistance legislation the requirement to obtain a residence permit issued by the competent body in order to receive the same treatment as Netherlands nationals, and introduced into the Law on Child Benefit an equivalent requirement in order to be regarded as an insured person.

16. Applications for a residence permit must be made to the IND. That service takes decisions on residence on behalf of the State Secretary.

17. Applications for child benefit under the Law on Child Benefit are made to the Sociale verzekeringsbank (Social Insurance Fund, 'SvB', Netherlands).

18. Applications for assistance under the Law on Social Assistance must be submitted to the College of Aldermen of the municipality where the person concerned lives.

19. Article 11 of the Law on Social Assistance provides as follows:

'1. Every Netherlands national residing in the Netherlands whose circumstances there are or threaten to become such that he/she does not have the resources to meet essential subsistence costs, is entitled to assistance from the authorities.

2. A foreign national living in the Netherlands because he/she is lawfully resident here pursuant to the introductory sentence to Article 8 and Article 8(a) to (e) and (l) of the [Law on Foreign Nationals], shall be treated in the same way as a Netherlands national referred to in Article 11(1), with the exception of the cases referred to in Article 24(2) of Directive 2004/38/EC.

…'

20. Article 16 of that law provides as follows:

'1. Notwithstanding this section, the College [of Aldermen] may, having regard to all the circumstances, provide assistance to a person who is not entitled to assistance if very urgent reasons so require.

2. The first paragraph does not apply to any foreign nationals other than those referred to in Article 11(2) and (3).'

21. Article 6 of the Law on Child Benefit provides:

'1. Insured persons for the purpose of the present provisions are:

(a) residents and,

(b) non-residents subject to income tax in respect of salaried occupational activities carried out in the Netherlands.

2. Foreign nationals who are not lawfully resident in the Netherlands for the purposes of the introductory sentence to Article 8 and Article 8(a) to (e) and (1) of the [Law on Foreign Nationals] are not to be regarded as insured persons.'

III – The facts giving rise to the disputes in the main proceedings, the questions referred and the procedure before the Court

22. The eight disputes in the main proceedings concern applications, made by the applicants, for social assistance benefit (bijstandsuitkering) under the Law on Social Assistance and/or applications for child benefit (kinderbijslag) under the Law on Child Benefit.

23. Ms H.C. Chavez-Vilchez, a Venezuelan national, came to the Netherlands in 2007-2008 on a tourist visa to visit Mr Koopman, a Netherlands national. On 30 March 2009, the couple had a daughter, Angelina, who was acknowledged by Mr Koopman, thereby acquiring Netherlands nationality. All three of them lived in Germany until 2011. In June 2011, Mr Koopman turned Ms Chavez-Vilchez and their daughter out of their home. Ms Chavez-Vilchez and her daughter left Germany and reported to the emergency centre of the Municipality of Arnhem (Netherlands), where they remained for a time. Since then Ms Chavez-Vilchez has been responsible for the care of her daughter, and has stated that Mr Koopman does not contribute to the latter's maintenance or upbringing.

24. Ms Pinas, a Surinamese national, had had a residence permit since 2004, which was withdrawn in 2006. She lives in Almere (Netherlands) and is the mother of four children. Shine, one of her children, was born on 23 December 2009 from her relationship with Mr Mawny, a Netherlands national. She was acknowledged by her father, thereby acquiring Netherlands nationality. Ms Pinas and Mr Mawny were both granted custody of Shine but they live apart and the latter does not contribute to the maintenance of his daughter. There is contact between them but no agreed access arrangement.

25. Ms Nikolic came to the Netherlands in 2003 from one of the countries of the former Yugoslavia. Because she has no identity papers her nationality is unclear. According to the referring court, she may be Croatian. Her application for a residence permit was rejected in 2009. A daughter, Esther, was born from her relationship with Mr van de Pluijm, a Netherlands national, on 26 January 2010. The child was acknowledged by Mr van de Pluijm, thereby acquiring Netherlands nationality. Ms Nikolic is resident in Amsterdam (Netherlands) and has custody of her daughter. They both live in a reception centre provided by their municipality. Ms Nikolic has stated that she and her daughter's father cannot live together because the father is in a supported living scheme.

26. Ms García Pérez, a Nicaraguan national, came to the Netherlands in 2001-2002 from Costa Rica with Mr Schwencke, a Netherlands national. A daughter, Angely, was born from that relationship on 9 April 2008. She was acknowledged by Mr Schwencke, thereby acquiring Netherlands nationality. Ms García Pérez lives in Haarlem (Netherlands) and has custody of her daughter. Mr Schwencke does not contribute to Angely's maintenance and his current place of residence is unknown. According to the personal records database, he left for Costa Rica on 8 July 2009. Ms García Pérez has a second child but Mr Schwencke is not the father. The family lives in a reception centre provided by the municipality.

27. Ms Uwituze, a Rwandan national, gave birth on 12 December 2011 to a daughter, Habibatou. Mr Fofana, a Netherlands national, acknowledged the child, who thereby acquired the same nationality as her father. Mr Fofana does not contribute towards his daughter's maintenance or her upbringing. He has stated that he cannot and does not want to care for her. Ms Uwituze is resident in Bois-le-Duc (Netherlands) and lives with her daughter in a reception centre provided by their municipality.

28. Ms Wip, a Surinamese national, is the mother of two children, Shalomie, born on 25 November 2009, and Joe, born on 23 November 2012. Mr Panka and the children have Netherlands nationality. Despite the fact that the couple's relationship has ended, Mr Panka has contact with his children several times a week. He receives social assistance benefit as well as child benefit. He gives the child benefit to Ms Wip but makes no further contribution towards the children's maintenance. Ms Wip lives in Amsterdam.

29. Ms Enowassam, a Cameroonian national, came to the Netherlands in 1999. A daughter, Philomena, was born on 2 May 2008 from her relationship with Mr Arrey, a Netherlands national. Mr Arrey acknowledged Philomena, who thereby acquired Netherlands nationality. Ms Enowassam and Mr Arrey have joint custody of their daughter but live apart. Philomena is registered at Mr Arrey's address but in fact lives with her mother, who is resident in The Hague (Netherlands). Emergency reception facilities were made available to them by the municipality of The Hague. There is an access arrangement between Mr Arrey and his daughter. Philomena stays with her father for three weekends each month and sometimes spends the holidays with him. Mr Arrey pays EUR 200 every month in child maintenance. He also receives child benefit, which he passes on to Ms Enowassam. Mr Arrey has a full-time job, as a result of which he has stated he is not able to look after his daughter.

30. Ms Guerrero Chavez, a Venezuelan national, arrived in the Netherlands on 24 October 2007 and then returned to Venezuela on 2 November 2009. She came back to the Netherlands in January 2011 and is currently resident in Schiedam (Netherlands). Salomo was born from her relationship with Mr Maas, a Netherlands national, on 31 March 2011. Mr Maas acknowledged the child, who thereby acquired Netherlands nationality. Mr Maas and Ms Guerrero Chavez are separated and no longer live together, but Ms Guerrero Chavez and her son live with Mr Maas's stepfather and brother. Mr Maas has almost daily contact with the child but is not prepared to take care of him and makes a limited contribution towards expenses. Ms Guerrero Chavez takes day-to-day care of her son and has custody of him.

31. The applicants' applications for social assistance benefit and/or child benefit were all rejected by the contested decisions of the Netherlands administrative authorities concerned because, under the Netherlands legislation, the applicants were not entitled to those benefits owing to their residence status. Under that legislation, a parent without some form of lawful residence status is neither an 'entitled person' (rechthebbende) nor an 'insured person' (verzekerde) and is therefore not entitled to benefits.

32. During the periods in the course of which the abovementioned benefit applications were rejected [5] the applicants had their applications for a residence permit, within the meaning of the Law on Foreign Nationals, refused. Some of the parties concerned were lawfully resident at the time since it was, essentially, the period during which they were waiting for a decision on their applications for a residence permit. The other parties concerned were not lawfully resident in the Netherlands during (part of) the time in question and should have left the Netherlands of their own accord. No measures were taken to deport them. The applicants were not entitled to work.

33. The applicants lodged appeals with the Centrale Raad van Beroep (Higher Social Security Court) against the decisions refusing their entitlement to the benefits sought.

34. The referring court raises the question whether the applicants, who are all third-country nationals, each being the mother of a child who is a Union citizen, may, in the circumstances described above, derive a right of residence under Article 20 TFEU. It considers that if that were the case the applicants would potentially, by virtue of the Law on Social Assistance and the Law on Child Benefit, be entitled to benefits under those laws.

35. In that regard, the referring court infers from the judgments in *Ruiz Zambrano* [6] and *Dereci and Others* [7] that the applicants have a direct right of residence based on Article 20 TFEU, derived from the right of residence of their child, since that child is in a situation similar to that referred to in those judgments. It considers that it should be determined whether the circumstances are such that the child would be obliged in practice to leave the territory of the European Union if the mother is denied a right of residence. The referring court asks, in the circumstances of the cases in the main proceedings, how much weight should be given, in the light of the case-law of the Court of Justice, to the fact that the father who is a Union citizen, resides in the Netherlands.

36. It is in that context that the Centrale Raad van Beroep (Higher Social Security Court), by judgment of 16 March 2015, received at the Registry of the Court of Justice on 18 March 2015, decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 20 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?

(3) 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?'

5 — The period for each of the applicants was a period of three months, between 2010 and 2013.

6 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

7 — Judgment of 15 November 2011 (C-256/11, EU:C:2011:734).

37. At the request of the referring court, the President of the Court decided that the present case should be given priority, in accordance with Article 53(3) of the Rules of Procedure of the Court of Justice.

38. Written observations were submitted on behalf of Ms Chavez-Vilchez and Ms Wip, the Netherlands, Belgian, Danish, Lithuanian, Polish and United Kingdom Governments and the European Commission. Ms Chavez-Vilchez and Ms Wip, the Danish, French, Lithuanian, Netherlands, Polish, United Kingdom and Norwegian Governments and the European Commission made oral submissions at the hearing, which was held on 10 May 2016.

IV – Analysis

39. I shall examine first of all the premisses on which the referring court based its order for reference, before analysing the main aspects of the questions it puts to the Court.

A – *Preliminary considerations*

40. I should like to point out first of all that the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. [8]

41. In those circumstances, I shall carry out my analysis in three stages. First, I shall make reference to the principle of the primacy of the best interests of the child. Secondly, in order to have a better understanding of the situations at issue in the main proceedings, I shall examine the differences between those situations. Thirdly, I shall describe the background to those situations, setting out the considerations of the referring court with regard to the Netherlands legislation and administrative practice and to the outcome of the applications for residence of the applicants in the main proceedings in the proceedings brought under the Law on Foreign Nationals.

1. The principle of the best interests of the child

42. The primacy of the best interests of the child is one of the principles permeating the EU legal order. [9]

43. First, all the Member States have ratified the United Nations Convention on the Rights of the Child, concluded at New York on 20 November 1989 ('the Convention on the Rights of the Child'). [10] Article 3(1) of that convention provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. [11] Furthermore, the Court has also already had occasion to point out that the Convention on the Rights of the Child binds each of the Member States and is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of EU law. [12]

8 — For a recent example of that settled case-law, see judgment of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412, paragraph 36).

9 — For an overview of the Union *acquis* regarding the rights of the child, see European Commission, DG Justice, *EU acquis and policy documents on the rights of the child*, December 2015, pp. 1 to 83.

10 — The convention entered into force on 2 September 1990.

11 — Article 9(1) of that convention provides that 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence'.

12 — See judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 37 and the case-law cited).

44. Secondly, Article 3(3) TEU, the first subparagraph of which provides that 'the Union shall establish an internal market', provides in the second subparagraph that the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and *protection of the rights of the child*'. The rights of the child are also enshrined in the Charter.[13] Article 24 of the Charter recognises that children are independent and autonomous holders of rights. That article also makes the child's best interests a primary consideration for public authorities and private institutions.[14]

45. In that regard, the Court has held that the principle of the primacy of the best interests of the child is the prism through which the provisions of EU law must be read.[15]

46. More particularly, so far as citizenship of the Union and Articles 20 and 21 TFEU are concerned, the Court's interpretation has permitted a consistent application of the provisions of the Treaty and of secondary law.[16] It seems to me important inter alia that the Court has held that '[a child who is a Union citizen] can take advantage of the *rights of free movement and residence* guaranteed by [EU] law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally'.[17]

47. That principle provides the starting point for my analysis.

2. The differences between the situations at issue in the main proceedings

48. The first point to make is that when one examines the situations at issue in the main proceedings it is obvious that they are not all the same.

49. As is clear from the order for reference, the eight applicants in the main proceedings are third-country nationals, without valid residence permits,[18] and mothers of at least one young child (aged between three and seven years) who is a Union citizen residing in his or her own Member State, in this case the Kingdom of the Netherlands. Those children have in each case been acknowledged by their father, a Netherlands national, but live with their mother, who is responsible for their day-to-day and primary care. In each situation the father did not (any longer) live with the child and the mother as a family at the time the benefit applications in question were rejected.

13 — It is true that, according to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. However, in the present case, if, after examination of the situations at issue in the main proceedings, it is held that those situations are covered by EU law, the referring court must determine whether the refusal of the derived right of residence of the applicants in the main proceedings and of their benefit applications in question undermines the right to respect for private and family life provided for in Article 7 of the Charter. See, to that effect, judgment of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 72).

14 — See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 15 February 2011, entitled 'An EU Agenda for the Rights of the Child' (COM(2011) 60 final, p. 3).

15 — See, inter alia, regarding the right to family reunification of minors who have never made use of their right of freedom of movement and have always resided in the Member State of which they are nationals, judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012: 776, paragraphs 76 to 78). As regards the free movement of goods, see judgment of 14 February 2008, *Dynamic Medien* (C-244/06, EU:C:2008:85, paragraphs 39 to 42 and 52). Regarding 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 (OJ 2003 L 338, p. 1), see, inter alia, judgment of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraphs 61 and 64).

16 — It should be noted that consistency of the EU legal order must be achieved through reading EU law 'not in its entirety but as a whole'. See, to that effect, Simon, D., 'Cohérence et ordre juridique communautaire', *Le droit, les institutions et les politiques de l'Union européenne face à l'impératif de cohérence*, V. Michel (ed.), Presses universitaires de Strasbourg, Strasbourg 2009, pp. 25 to 40, and, in particular, p. 30. In that regard, Pierre Pescatore has stressed the importance of the courts in ensuring the consistency of a complex legal order based on the relationships between the systems of a number of different legal orders. See, Pescatore, P., *Le droit de l'intégration. Émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, A.W. Sijthoff, Leiden, 1972, p. 82.

17 — See judgment of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 20 and the case-law cited). Emphasis added.

18 — This is so in the case of Ms Nikolic, Ms García Pérez, Ms Uwituze, Ms Enowassam and Ms Guerrero Chavez. As regards Ms Chavez-Vilchez, Ms Pinas and Ms Wip, see point 52 of this Opinion.

50. Besides those similarities, the situations at issue in the main proceedings exhibit a number of specific features that should be borne in mind.

51. Thus, as regards, first of all, the situation of the fathers who are Netherlands nationals, their contribution to the maintenance costs of their respective children and the custody of those children, it is clear from the order for reference that in some cases there was frequent contact,[19] and in other cases there was very little or no contact[20] between the child and the father. In one case, the father could not be traced[21] and in another he was in a supported living scheme.[22] In three cases, the father contributed to the maintenance of the child,[23] whilst in the others no contribution was paid.[24] In two out of the eight cases the parents shared custody,[25] whilst in the others the day-to-day and primary care of the child rested with the mother alone.[26] In only one case was the mother the primary carer of her child and they both lived with the father's stepfather and brother.[27] In half the cases the children lived with their mothers in emergency reception facilities.[28]

52. As regards, next, the *situation of the applicants in the main proceedings in the territory of the Union*, it is also apparent from the order for reference that on 17 May 2011 Ms Pinas was granted a permit to reside in the Netherlands for a fixed period. Furthermore, the representatives of Ms Wip and Ms Chavez-Vilchez and the Netherlands Government stated at the hearing that Ms Wip and Ms Chavez-Vilchez are now legally resident. Ms Wip recently obtained a permit to reside in Belgium, where she is working and living with her daughter.[29] Ms Chavez-Vilchez has been granted a permit under Article 8 ECHR to reside in the Netherlands, and has a job in Belgium.

53. Lastly, so far as *the specific situations of the respective daughters of Ms Chavez-Vilchez and Ms Wip* are concerned, both appear to have exercised their right of free movement.

54. I shall return later to the impact of those aspects for the cases in the main proceedings.

19 — It is clear from the order for reference that this is so in the case of Shalomie, Joe, Philomena and Salamo. See points 28 to 30 of this Opinion.

20 — According to the referring court, this is so in the case of Angelina, Angely and Habibatou. See points 23, 26 and 27 of this Opinion.

21 — As regards Mr Schwencke, the father of Angely, it was stated at the hearing that Ms García Pérez was a victim of domestic violence. Furthermore, according to the order for reference, the personal records database shows that Mr Schwencke left for Costa Rica on 8 July 2009. See point 26 of this Opinion.

22 — In that regard, at the hearing Ms Nikolic's representative explained that Mr Van de Pluijm, the father of Esther, is a young parent who has been placed in an institution to receive long-term care, and is therefore unable to care for the child.

23 — According to the order for reference, the respective fathers of Shalomie, Joe, Philomena and Salamo contribute to their maintenance. See points 28 to 30 of this Opinion.

24 — According to the description of the facts by the referring court, that is so in the case of Angelina, Shine, Esther, Angely and Habibatou. See points 23 to 27 of this Opinion.

25 — According to the order for reference, custody is shared in the case of Shine and Philomena. However, it should be noted that Philomena lives with her mother in an emergency reception facility. See points 24 and 29 of this Opinion.

26 — The mother has custody only in the case of Angelina, Esther, Angely, Habibatou, Shalomie, Joe and Salamo. See points 23, 25 to 28 and 30 of this Opinion.

27 — This is the situation of Ms Guerrero Chavez and her son Salamo. See point 30 of this Opinion.

28 — This is the situation of Angelina, Esther, Angely, Habibatou and Philomena.

29 — According to Ms Wip's written observations, her application for a permit to reside in the Netherlands under Article 8 of the European Convention on Human Rights ('ECHR') (signed at Rome on 4 November 1950) was also rejected. The administrative body took the view that the relationship between the father and Shalomie, Ms Wip's daughter, *was insufficient for the existence of a family life to be recognised*.

3. The practice of the Netherlands administrative authorities and proceedings under the Law on Foreign Nationals

55. As regards, first, *the practice of the administrative authorities*, the referring court states that, in the Netherlands, various administrative authorities interpret the judgments in *Ruiz Zambrano* [30] and *Dereci and Others* [31] restrictively and take the view that that case-law is applicable only where the father who is a Netherlands national, measured by objective criteria, would be unable to care for the child who is a Netherlands national, for example, if he were in detention, in an institution or clinic, or deceased. Outside of those situations, the third-country national parent must make a plausible case to show that the father who is a Netherlands national is not able, even with the help of others, to care for the child. According to the referring court, the Circular on Foreign Nationals provides that the burden of proof that the parent who is a Netherlands national would not in fact be able to care for the child who is a Netherlands national lies with the third-country national parent.

56. The referring court adds that, in the disputes in the main proceedings, the bodies responsible for payment of the assistance and benefits, namely the Colleges of Aldermen concerned and the SvB, were required to conduct an investigation to the requisite standard, in consultation with the IND, on the basis of the information supplied by the parties concerned, into whether a right to reside in the Netherlands can be derived from Article 20 TFEU. In a number of cases the IND has provided an opinion on request to those bodies. In some cases a judgment had already been handed down in proceedings under the Law on Foreign Nationals brought by one of the applicants. In assessing the right of residence, the IND applies the policy rules laid down in the Circular on Foreign Nationals.

57. As regards, secondly, *applications for a residence permit* in the context of proceedings under the Law on Foreign Nationals, the referring court explains that, in the present case, the Colleges of Aldermen concerned, the SvB and the IND did not consider relevant the fact that the day-to-day and primary care of the child who is a Union citizen rested not with the father who was a Union citizen but with the mother who was a third-country national. They did not consider it relevant to examine the amount of contact between child and the father, the extent to which the latter contributed to the child's maintenance and upbringing or whether he was prepared to assume responsibility for the care of the child. Nor was the fact that the father did not have custody of the child considered relevant as no plausible case was made to show that custody could not be awarded to him. The burden of proof that the parent who is a Netherlands national would not in fact be able to care for the child lies with the third-country national parent. Only where the mother who is a third-country national makes a plausible case to show that there are objective obstacles precluding the father from caring for the child will it be assumed that the child is so dependent on her that the child will be obliged in practice to leave the territory of the European Union if that parent is denied a right of residence.

58. In view of the differences between the situations at issue in the main proceedings and the specific aspects of Netherlands administrative practice detailed by the referring court in its order for reference, it is necessary to determine whether young children who are Union citizens, and their third-country national mothers who are their sole carers, come within the scope of EU law. In that regard, I shall examine, first, the specific cases of the respective daughters of Ms Chavez-Vilchez and Ms Wip from the perspective of Article 21 TFEU and of Directive 2004/38 and, secondly, the case of the children who have always resided, together with their mothers, in the Member State of which they are nationals, from the point of view of Article 20 TFEU.

30 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

31 — Judgment of 15 November 2011 (C-256/11, EU:C:2011:734).

B – *Examination of the situations of Ms Chavez-Vilchez and Ms Wip and of their daughters from the perspective of Article 21(1) TFEU and of Directive 2004/38*

59. As the Court has consistently held, even though, formally, the referring court has limited its questions to the interpretation of Article 20 TFEU alone, such a situation does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in its questions. [32]

60. I note first of all that, according to recital 3 of Directive 2004/38, the objective of that directive is to simplify and strengthen the right of free movement and residence of all Union citizens. That right covers, as I mentioned in point 46 of this Opinion, a young child who is a Union citizen. [33]

1. The impact of the exercise by Ms Chavez-Vilchez's daughter of her freedom of movement

61. With regard to Ms Chavez-Vilchez's daughter, both because she made use of her freedom of movement by residing until 2011 in Germany, the Member State in which her father was working, [34] and because the referring court found that she is currently residing with her mother in Belgium, where her mother has a job, I take the view that Directive 2004/38 applies, in principle, to Ms Chavez-Vilchez, since she is a family member of a Union citizen, as defined in Article 2(2) of that directive, who accompanies her. [35] However, the consequences of the application of Directive 2004/38 for Ms Chavez-Vilchez and her daughter are, in my view, different depending on the point of time when the move in question took place.

62. Since Ms Chavez-Vilchez is now working in Belgium and, consequently, it cannot be excluded that she is resident in that Member State with her daughter, it should be pointed out that, in view of the fact that Ms Chavez-Vilchez recently obtained a permit to reside in the Netherlands under Article 8 ECHR, the impact of any residence in Belgium would be relevant only in two circumstances: either in respect of any application for a permit to reside in that Member State or, in view of her lawful residence in the Netherlands, in order to assess the criteria for interpreting Article 20 TFEU, as laid down in the case-law of the Court. [36]

63. As regards Ms Chavez-Vilchez's daughter's exercise of her freedom of movement, it is apparent from the order for reference and from the written and oral observations that she was living with her parents in Germany, the Member State in which her father resided and worked, until 2011, before her father turned her out of the family home along with her mother. [37] Then, with her mother, she returned to the Netherlands, the Member State of which she is a national.

32 — See, to that effect, inter alia, judgments of 19 September 2013, *Betriu Montull* (C-5/12, EU:C:2013:571, paragraph 41), and of 1 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 20).

33 — See judgment of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 20 and the case-law cited).

34 — I note that it is not stated either in the order for reference or in the documents before the Court whether the Member State of birth of Ms Chavez-Vilchez's daughter is the Federal Republic of Germany or the Kingdom of the Netherlands. In any event, according to that order, the daughter of Ms Chavez-Vilchez has Netherlands nationality, having been acknowledged by her father, a Netherlands national.

35 — I would point out in that regard that any rights conferred on third-country nationals by the provisions of EU law on Union citizenship are not autonomous rights but rights derived from the exercise of freedom of movement by a Union citizen. See, inter alia, judgments of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 35); of 1 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 22); and of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 36).

36 — In that regard, if Ms Chavez-Vilchez now has a permit to reside in the Netherlands, it is unlikely that her daughter would be obliged in practice to leave the territory of the European Union altogether, thus denying her the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status.

37 — It is apparent from Ms Chavez-Vilchez's written observations that, as she had been turned out onto the street with her daughter, the German support and police services considered it preferable that Angelina and her mother should go to the Netherlands since, being a Netherlands national, Angelina could enjoy full rights there.

64. I think it would be useful to analyse this move to Germany by Ms Chavez-Vilchez and her daughter in the light of Directive 2004/38. Such an analysis might be of assistance to the referring court because of its impact on the periods to which the benefit applications at issue in the main proceedings relate.

a) Brief summary of the case-law on the applicability of Directive 2004/38 where a Union citizen, who has made genuine and prior use of his freedom of movement, travels to the Member State of which he is a national

65. I note that, regarding any rights of family members of a Union citizen who are not nationals of a Member State, recital 5 of Directive 2004/38 states that the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality. [38]

66. According to the Court's case-law, the right to be accompanied by a third-country national family member is granted to a Union citizen, whether economically active [39] or non-active, [40] who returns to the Member State of which he is a national after exercising his freedom of movement in another Member State in which he resided with that family member. [41] That case-law concerns therefore the right of family reunification granted to the citizen following the prior exercise of freedom of movement, and is based on the prohibition of obstacles. In that case-law, the Court applied Directive 2004/38 by analogy. [42] It is appropriate now to analyse the case-law in which the Court gave a broader interpretation of that directive, applying it not by analogy but directly.

b) The applicability of Article 5 of Directive 2004/38 where a young child who is a Union citizen, who has made genuine and prior use of his freedom of movement, travels to the Member State of which he is a national accompanied by a third-country national relative in the ascending line who is his sole carer

67. As regards the short-term right of entry and residence provided for in Article 6 of Directive 2004/38, the Court, in its judgment in *McCarthy and Others*, [43] applied Directive 2004/38 to a third-country national family member of a Union citizen. In that judgment, the Court gave an interpretation of Directive 2004/38 consistent with the system of sources of EU law and of the role played by Union citizenship. Accordingly, the Court noted first of all that 'as is apparent from settled case-law, Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move

38 — See judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 83), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 33).

39 — See judgment of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296). In that judgment, the Court held that a citizen who returned to the Member State of which he was a national in order to pursue an activity as a self-employed person, after having worked as an employed person for a time in another Member State, derived from the Treaties and from secondary legislation the right to be accompanied by his spouse, a third-country national, on the same conditions as those provided for in the secondary legislation.

40 — See judgment of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771). The Court considered that a national of a Member State who had brought his daughter from a third country when he was working in another Member State was entitled to be accompanied by her when he returned, as a non-active person, to the Member State of which he was a national.

41 — For an analysis of that case-law, see points 61 to 88 of my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345).

42 — In the judgment of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296), derived rights of residence were accepted by the Court on the basis of Article 52 EEC (now Article 49 TFEU) and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), which was repealed and replaced by Directive 2004/38. The reasoning of the judgment of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771) is based both on Treaty provisions (Article 39 EC, now Article 45 TFEU) and on the provisions of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), which was amended by Directive 2004/38. In the judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135), the Court held that Article 21(1) TFEU must be interpreted as meaning that Directive 2004/38 applies by analogy where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in accordance with the conditions set out in Article 7(1) and (2) or Article 16(1) and (2) of Directive 2004/38, in a Member State other than that of which he is a national and returns, with the family member in question, to the Member State of which he is a national. See, in that regard, point 77 et seq. of my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345).

43 — Judgment of 18 December 2014 (C-202/13, EU:C:2014:2450).

and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and to strengthen that right'.[44] It went on to say that 'having regard to the context and objectives of [that directive], [its] provisions cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness'.[45] In that context, the Court held, lastly, that 'there is nothing at all in Article 5 [of Directive 2004/38] indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member States other than the Member State of origin of the Union citizen'.

68. In that regard, I am of the view that Directive 2004/38 applies to third-country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, where, following the prior exercise of the right of freedom of movement by the Union citizen and after he has genuinely resided in another Member State, the Union citizen and his family members travel to the Member State of which that citizen is a national.

69. In the present case, the question that arises is whether the fact that Ms Chavez-Vilchez's daughter made use of her right of freedom of movement by residing with her parents in Germany, the Member State in which her father resides and works in a self-employed capacity, enables her to receive for herself and for her mother protection under Directive 2004/38 when she returns to the Netherlands, the Member State of which she is a national.

70. In my view, it does.

71. Of course, in contrast with Ms McCarthy,[46] who is also a third-country national and a family member of a Union citizen and who was in possession of a valid residence card issued by the authorities of a Member State under Article 10 of Directive 2004/38, it is not clear from the order for reference that Ms Chavez-Vilchez was in possession at the time of her entry into the territory of the Netherlands, of a travel document within the meaning of Article 5 of that directive. It seems to me, nonetheless, that a combined interpretation of paragraphs (1) and (4) of Article 5 of Directive 2004/38 would have enabled Ms Chavez-Vilchez to be granted short-term leave to enter and reside in the territory of the Kingdom of the Netherlands. Article 5(4) of that directive provides that 'where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence'.

72. Thus, as a young Union citizen, who has moved within the Union[47] and who is returning, as the result of unfortunate circumstances,[48] to the Member State of which she is a national, Ms Chavez-Vilchez's daughter should have been entitled to the application of Article 21(1) TFEU and Article 5(1) and (4) of Directive 2004/38 and, accordingly, to short-term leave to enter and reside for her mother, enabling the latter, who is her primary carer, to find work enabling her to have sufficient resources in order to avoid becoming a burden on the social security system of the Kingdom of the Netherlands.[49]

44 — See judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 31). See also judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 35 and the case-law cited).

45 — See judgment of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84).

46 — Judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450).

47 — I note that that travel was connected with the exercise of freedom of movement by her father, a Netherlands national, seeking to settle and work in another Member State. Consequently, in my view, the case-law referred to above can certainly apply by analogy.

48 — See footnote 37 to this Opinion.

49 — In that regard, I note that, in the absence of a residence permit, the national legislation in question does not entitle a family member of a Union citizen who is a third-country national to work.

73. Where a third-country national relative in the ascending line does not manage, within the period of three months referred to in Article 6 of Directive 2004/38, to obtain sufficient resources to be entitled to protection under that directive, I take the view that Article 21 TFEU does not preclude a right of residence being denied to that relative, even though he or she is the primary carer of a young child who is a Union citizen and who is residing with him or her.

74. In that case, it is appropriate nonetheless to examine the situation of the child who is a Union citizen and his third-country national relative in the ascending line in the light of Article 20 TFEU. However, as mentioned above, Ms Chavez-Vilchez recently obtained a permit to reside in the Netherlands under Article 8 ECHR. Consequently, I do not consider it necessary to determine whether, in the light of Article 20 TFEU 'a right of residence may nevertheless be granted to her, exceptionally — if the effectiveness of the Union citizenship that her [child enjoys] is not to be undermined — in light of the fact that, as a consequence of such a refusal, [that child] would find [herself] obliged in practice to leave the territory of the European Union altogether, thus denying [her] the genuine enjoyment of the substance of the rights conferred by virtue of that status'. [50]

2. The impact of the exercise by Ms Wip's daughter of her freedom of movement

75. It was confirmed at the hearing by Ms Wip's representative and by the Netherlands Government that Ms Wip and her daughter are currently residing in Belgium, where Ms Wip has obtained a residence permit and has a job. It is therefore clear that her daughter has made use of her freedom of movement as a Union citizen in a Member State other than that of which she is a national and, accordingly, that Article 3(1) of Directive 2004/38 applies to the case of Ms Wip, as a family member accompanying her. In her capacity as a Netherlands national and, therefore, a Union citizen, Ms Wip's daughter is entitled to rely on Article 21(1) TFEU. That Treaty article and Directive 2004/38 confer on her, in principle, a right of residence in the host Member State, in this case the Kingdom of Belgium.

76. In that regard, it follows from the case-law of the Court that 'a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence'. [51] That right for Union citizens to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect. [52] In that regard, I note that those limitations and conditions must be applied in compliance with the limits imposed by EU law and in accordance with the general principles of that law, [53] which, in my view, include the principle of the best interests of the child.

77. However, since Ms Wip has obtained a residence permit and has a job in Belgium, which are matters for the referring court to ascertain, her daughter, who is a Union citizen, cannot be obliged in practice to leave the territory of the European Union altogether, thus denying her the genuine enjoyment of the substance of the rights conferred by her citizenship. Consequently, as in the case of Ms Chavez-Vilchez (who has obtained a permit to reside in the Netherlands) and of her daughter, I do not consider it necessary to analyse that situation in the light of Article 20 TFEU.

50 — See judgment of 1 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 33).

51 — See, inter alia, judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 45); of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 69); and of 1 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 28).

52 — See, inter alia, judgments of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraphs 84 and 85), and of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 26).

53 — See judgments of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 91), and of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 32).

C – Examination of the situations of children who have always resided in their own Member State, in the company of their mothers as their primary carer, from the point of view of Article 20 TFEU

1. The first and second questions

78. By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 20 TFEU precludes a Member State from depriving a third-country national parent,[54] who is responsible for the primary care of his/her young child who is a Union citizen, of residence in the child's Member State of residence, of which that child is a national, where it has not been demonstrated that the other parent, who is a citizen of that same Member State, might be able to assume alone the primary care of the child.

79. It is necessary, in order to answer those questions, to determine, in the light of Article 20 TFEU and of the case-law of the Court, whether such a situation falls within the scope of EU law.

a) Union citizenship: the fundamental status of Union citizens

80. On 1 November 2016 Union citizenship will be 23 years old.[55] Starting life in 1992, with the signing of the Treaty of Maastricht, its aim is to help ensure that nationals of the Member States can identify with the Union.[56] As the fundamental status of Union citizens, Union citizenship embodies, particularly for new generations, the opportunity to build a Europe in which all citizens may, as human beings, move, reside, work, study, provide a service or settle in another Member State, prosper, marry or choose to live in an equivalent form of partnership, found a family, if they so wish, and live in peace[57] and security.

81. Thus, Union citizenship legitimises the process of European integration by strengthening their participation as citizens. That legitimation has been highlighted at the Court, by its Advocates General, since the introduction of Union citizenship. Inter alia, Advocate General Lenz noted, in 1994, that 'the introduction of citizenship of the Union raises the expectation that citizens of the Union will enjoy equality, at least before Community law'.[58]

82. Two years later, in 1996, Advocate General Léger, with reference to the recognition of such citizenship, addressed the Court in the following words: '[that citizenship] is of considerable symbolic value and is probably one of the advances in the construction of Europe which has received most public attention. Admittedly the concept embraces aspects which have already largely been established

54 — According to legal literature, in the context of Article 20 TFEU it is no longer relevant to use the words 'third-country nationals'. In the context of Directive 2004/38, in which exercise of the right of free movement and residence concerns two Member States (the one of which the Union citizen is a national and the host State), the family member of the Union citizen is, indeed, a third-country national. However, in the context of Article 20 TFEU, as interpreted by case-law, a single Member State is concerned, namely the one of which the Union citizen is a national. Consequently, since the family member of that citizen is not a national of a 'third country', it is suggested that another term should be used, such as 'non-EU national' or 'non-European national'. See, to that effect, Davies, G., 'The Family Rights of European Children: Expulsion of non-European Parents', *EUI Working Papers*, RSCAS 2012/04, pp. 1 to 22, p. 3. However, in this Opinion, I use the term 'third-country national' to refer to a national of a country that is not a Member of the European Union.

55 — For an overview of the case-law of the Court relating to citizenship of the Union, see Trifonidou, A., *The Impact of Union Citizenship on the EU's Market Freedoms*, Hart Publishing, London, 2016, pp. 23 to 58. The author examines the case-law in four phases, namely, infancy (1993-1997), growth (1998-2005), adolescence (2006-2009) and coming of age (since 2010).

56 — See, to that effect, Barnard, C., *The Substantive Law of the EU. The Four Freedoms*, Oxford University Press, Oxford, 2013, pp. 431 and 432. That author considers citizenship to be 'the glue to help bind together nationals of all the Member States'.

57 — See Article 3 TEU.

58 — See point 53 of the Opinion of Advocate General Lenz in *Faccini Dori* (C-91/92, EU:C:1994:45).

in the development of Community law and in this respect it represents a consolidation of existing Community law. *However, it is for the Court to ensure that its full scope is attained*. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations'. [59]

83. To that effect, Advocate General Ruiz-Jarabo Colomer noted, a year later, that 'the creation of citizenship of the Union, with the corollary … of freedom of movement for citizens throughout the territory of the Member States, represents a considerable *qualitative step forward* in that, as the Commission rightly points out, it separates that freedom from its functional or instrumental elements (*the link with an economic activity or attainment of the internal market*) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union'. [60]

84. Since then, citizenship of the Union has progressively been made an effective reality by means of a vast jurisprudential endeavour, which the Court has carried out in close cooperation with national courts in the context of references for a preliminary ruling. [61] The first and second questions are raised by the referring court against the background of that case-law. They concern essentially the interpretation of Article 20 TFEU in the light of the judgments in *Ruiz Zambrano* [62] and *Dereci and Others* [63] in situations, such as those at issue in the main proceedings, where it has not been established that the parent, who is a citizen of the Member State of which the child is a national and in which he has always resided, is able to care for the child in the event of the third-country national parent being deported.

b) The specific nature of the situations at issue in the main proceedings

85. In the present case, [64] as regards the young children of Ms Pinas, [65] Ms Nikolic, Ms García Pérez, Ms Uwituze, Ms Enowassam and Ms Gerrero Chavez, since they have never made use of their right of freedom of movement and have always resided in the Member State of which they are nationals, I consider that they are not covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38, so that directive is not applicable either to them or to their mothers.

86. On the other hand, can we regard the situations at issue in the main proceedings as coming within the scope of Article 20 TFEU?

59 — See point 63 of the Opinion of Advocate General Léger in *Boukhalfa* (C-214/94, EU:C:1995:381). To that effect, see also point 50 of the Opinion of Advocate General La Pergola in *Stöber and Piosa Pereira* (C-4/95 and C-5/95, EU:C:1996:225). Emphasis added.

60 — Point 34 of the Opinion of Advocate General Ruiz-Jarabo Colomer in *Shingara and Radiom* (C-65/95 and C-111/95, EU:C:1996:451). Emphasis added. More recently, Advocate General Wathelet stated in his Opinion in *NA* (C-115/15, EU:C:2016:259, point 111), that if the status of citizen is destined to be the fundamental status of Union citizens 'it cannot therefore be an empty shell'.

61 — See, on this aspect, point 107 et seq. of my Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75).

62 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124). It is clear to me that that judgment of the Court is no mere accident. In that regard, as I stated in points 111 to 115 and 117 of my Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75), that ruling was the outcome of a major development in the case-law which provided a basis for the Court's decision in *Ruiz Zambrano*.

63 — Judgment of 15 November 2011 (C-256/11, EU:C:2011:734).

64 — Since the situations of the daughters of Ms Chavez-Vilchez and Ms Wip, whose mothers recently obtained residence permits, in the Netherlands (under Article 8 ECHR) and in Belgium, respectively, were analysed in points 61 to 77 of this Opinion, I shall concentrate on whether the situations of the six other applicants in the main proceedings and their respective children come within the scope of EU law.

65 — With regard to Ms Pinas, according to the order for reference, she obtained a residence permit for a fixed period, which is a matter for the referring court to ascertain. Therefore, in principle there is no likelihood of her deportation and, accordingly, her daughter is not obliged in practice to leave the Netherlands. Nonetheless, the referring court should examine Ms Pinas's situation in the light of Article 20 TFEU if it finds that she no longer has a valid permit to reside in the Netherlands.

87. In that connection, I note that in the judgment in *Ruiz Zambrano* the Court ruled that Article 20 TFEU 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.[66] According to the principles set out in that judgment, that protection under EU law applies in the case in the main proceedings since the children of Ms Pinas, Ms Nikolic, Ms García Pérez, Ms Uwituze, Ms Enowassam and Ms Gerrero Chavez may, in the absence of a derived right of residence for their mothers, into whose sole care they have been entrusted, be obliged, in practice, to accompany them and thus to leave the territory of the Union 'altogether'. The possible deportation of their mothers would deny them the genuine enjoyment of the substance of the rights conferred by their status of citizen of the European Union. Accordingly, such denial might undermine the effectiveness of the Union citizenship they enjoy.

88. The Court subsequently clarified the scope of the judgment in *Ruiz Zambrano*[67] by ruling that it applies to 'very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the European Union'.[68]

89. In that context, it is necessary to assess, in the light of Article 20 TFEU, whether situations such as those at issue in the main proceedings constitute specific situations within the meaning of the abovementioned case-law.

90. There is no doubt in my mind that the fact that those children all have the nationality of a Member State, namely the Netherlands, the conditions for acquiring which very clearly fall within the sphere of competence of the Kingdom of the Netherlands,[69] means that they have the status of citizen of the Union.[70] Therefore, as citizens of the Union, those children have the right to move and reside freely throughout the territory of the European Union and *any restriction* of that right falls within the ambit of EU law.[71]

66 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124, paragraph 42). As I stated in point 116 of my Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75), the judgment in *Ruiz Zambrano* involves recognition of the rights claimed by nationals of the Member States who, as Union citizens, give voice to their need for legal protection and their desire for integration not only within host Member States but also within their own Member States. Indeed, the conferral on nationals of the Member States of a status as fundamental as that of citizen of the Union implies, according to the Court, that EU law precludes national measures the effect of which is to deprive those nationals of the genuine enjoyment of the substance of the rights which they derive from that status. That would occur if a third-country national who has assumed sole responsibility for his minor children, who are citizens of the Union, were to be refused the right to reside in the Member State in which those children reside and of which they are nationals, since such a measure would also compel the children to leave the territory of the European Union.

67 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

68 — Judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraphs 43 and 44), and of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 67). See also judgments of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 71); of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 48); of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 36); and of 1 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32). In particular, Mr Dereci was a Turkish national whose *wife and three children were Austrian* and had always resided in Austria, where he wished to live with them. In that situation, neither the three children nor the mother were denied the genuine enjoyment of the substance of their rights because, contrary to the situation in the case that gave rise to the judgment of 8 March 2011 in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), those children were not dependent on their father for their subsistence and were therefore able to remain in Austria.

69 — Judgments of 7 July 1992, *Micheletti and Others* (C-369/90, EU:C:1992:295, paragraph 29), and of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 39).

70 — Judgments of 2 October 2003, *García Avello* (C-148/02, EU:C:2003:539, paragraph 21), and of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 21). See also points 47 to 52 of the Opinion of Advocate General Tizzano in *Zhu and Chen* (C-200/02, EU:C:2004:307).

71 — See my Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75, point 120). The fact that the children have not exercised their right of free movement and residence in the European Union does not mean that they do not, as Union citizens, enjoy that right. On the other hand, I would point out that the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. See judgments of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 66), and of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 34).

91. Consequently, in principle, it seems clear to me from the information available to the Court that the situations at issue in the main proceedings constitute specific situations within the meaning of the case-law stemming from the judgment in *Ruiz Zambrano*.[72] Those situations might lead to the children concerned being denied the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. I therefore consider that those situations come within the scope of EU law.

92. In those circumstances, it is therefore necessary to determine whether the national decisions at issue in the main proceedings constitute interference with the right of residence enjoyed by the children concerned and whether it is justifiable.

93. It is clear to me that there would be potential interference with the rights of the children concerned, being Union citizens, if, as a result of the refusal of a residence permit for their mothers, those children were obliged, in practice, to leave the territory of the Union altogether. But is such interference acceptable or not in the specific circumstances of the situations at issue?

c) Compliance with the principle of proportionality and the extent of the dependence between the third-country national parent and the child who is a Union citizen

94. The first question which arises is whether the mere presence of the father, a Netherlands national, in the Netherlands[73] *automatically* precludes the child who is a Union citizen from receiving the protection of Article 20 TFEU, as interpreted by the case-law of the Court.

95. In my view, the mere presence of the father who is a Netherlands national in the Netherlands cannot, in itself, justify the national decisions in the cases in the main proceedings or call into question the criterion of 'denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen' without the referring court determining whether the national decisions at issue comply with the principle of proportionality, in particular so far as concerns the consequences they entail for the position of the children of the applicants in the main proceedings who are Union citizens in the light of EU law.[74]

96. In the context of compliance with the principle of proportionality, several interests are concerned, namely, national immigration interests,[75] the rights of Union citizens, the best interests of the child and rights under national family law, for example, the right of custody.

97. Thus, in order to determine whether the national decisions in question comply with the principle of proportionality, several factors must be taken into account, the most important being, in my view, the extent of the dependence between the third-country national parent and the child who is a Union citizen.

72 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124). I note that those specific situations in which the Union citizen did not exercise his right of free movement are characterised by the fact that, 'although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of provisions of secondary legislation which, under certain conditions, provide for the attribution of such a right, they nonetheless have an intrinsic connection with the freedom of movement of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom'. See judgments of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 72), and of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 37).

73 — I note that Mr Schwencke, the father of Angely, cannot be traced and, according to information on the personal records database he has not resided in the Netherlands since 2009.

74 — See, by analogy, judgment of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 54 to 56).

75 — On the principle of the conferral of powers in the field of immigration law, see points 74 and 75 of my Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75): 'the Member States retain, in principle, their competence in the area of immigration law. On the other hand, in a situation in which rights of free movement and residence under EU law are at issue, the Member States' discretion in immigration matters *is not to affect the application of provisions concerning citizenship of the Union or freedom of movement*, even if those provisions concern not only the position of a citizen of the Union but also that of a member of his family who is a third-country national'.

98. In that regard, it is especially important to know 'on whom [the child is] legally, financially *or* emotionally dependent'.[76] As the Court found, '*it is the relationship of dependency between the Union citizen who is a minor and the third country national* who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal'.[77]

99. Subject to that being ascertained, which is a matter for the referring court, it seems clear from the documents available to the Court that such a relationship of dependency exists between all the children who are Union citizens concerned and their respective mothers who are third-country nationals.[78]

100. In addition, when weighing up the interests at stake and in so far as the situations at issue in the main proceedings come within the scope of EU law, the referring court must also take into account fundamental rights, observance of which is ensured by the Court, in particular the right to respect for family life, as laid down in Article 7 of the Charter; that article should be read in conjunction with the obligation to take into consideration the best interests of the child, laid down in Article 24(2) of the Charter.[79]

101. In that context, it seems to me relevant to ask whether it is consistent with EU law to restrict the right of a child who is a Union citizen to reside freely in the territory of the Union purely on the basis of considerations such as *the fact that it has not been established that the father would not be able to take full responsibility for care of the child*, where such a consideration is also equivalent to stating *that neither has it been established that he would be able to take responsibility for care of the child*! In that regard, it seems to me important to note that the referring court explained that it has not been established in the cases in question that a change in the custody arrangement is still a possibility.[80]

102. This therefore leads me to conclude that, in situations such as those at issue in the main proceedings, it would be disproportionate to refuse to grant, automatically and on the basis merely of the presence of the father who is a Union citizen in the Member State concerned, a derived right of residence to third-party national mothers of young children who are Union citizens. I note that any justification for a derogation from the right of residence of Union citizens 'must be interpreted strictly and its scope cannot be determined unilaterally by the Member States without any review by the EU institutions'.[81]

76 — I have a preference for that term, which was used by the Court, with regard to family reunification, in the judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 56). Emphasis added. In my view, that term is equivalent to 'primary carer'.

77 — See judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraphs 43 and 45); of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraphs 65 to 67); and of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 56).

78 — That conclusion must be drawn, even in the two cases where custody is legally shared, that is to say, those of Shine, Ms Pinas's daughter, and Philomena, Ms Enowassam's daughter. It should be noted that the latter resides with her daughter in an emergency reception facility.

79 — See, in that regard, point 125 of the Opinion of Advocate General Wathelet in *NA* (C-115/15, EU:C:2016:259): 'the inclusion of Article 7 of the Charter in the national court's reflection on the application of Article 20 TFEU is not such as to have the effect of extending the scope of EU law in a manner that would be contrary to Article 51(2) of the Charter'.

80 — I should like to point out that, as is apparent from the documents before the Court, according to Netherlands administrative practice, where a father cannot be traced, has serious physical impairment, has inflicted domestic violence on the mother (as in the case of Ms García Pérez), has been placed in an specialist institution in order to receive long-term treatment (as in the case of Mr Van de Pluijm, the father of Esther) or has not had any contact with the child for a long time (as in the case of the children of Ms García Pérez and Ms Uwituze), it is considered that it would not in fact be impossible for him to care for his children!

81 — Judgment of 7 June 2007, *Commission* v *Netherlands* (C-50/06, EU:C:2007:325, paragraph 42 and the case-law cited).

d) Interim conclusion

103. Article 20 TFEU must be interpreted as precluding a Member State from depriving a third-country national parent, who is responsible for the primary care of his/her young child who is a Union citizen, of residence in the latter's Member State of residence, of which the child is a national, in so far as such a decision would deny that child the genuine enjoyment of the substance of the rights attaching to the status of Union citizen, where it has not been demonstrated that the other parent, who is a citizen of that same Member State, might be able to assume alone the primary care of the child. It is not sufficient, in that regard, to demonstrate that it cannot be excluded that the other parent might in fact be able to care for the child.

2. Third question referred for a preliminary ruling

104. The third question referred concerns the burden of proof regarding genuine dependence of the child who is a Union citizen on the third-country national parent.

105. According to the order for reference, the Circular on Foreign Nationals, which the bodies responsible in the Netherlands for the payment of assistance and benefits take into consideration, provides that the burden of proof for demonstrating that the Netherlands parent is not in fact able to care for the child lies with the third-country national parent. The latter must demonstrate that objective obstacles preclude the parent who is a Union citizen from caring for the child in order for it to be accepted that the child is dependent on the third-country national parent to the extent that he/she will in practice have to leave the territory of the Union if the right of residence is denied to that parent.

106. The referring court asks, in that regard, whether that provision of the Circular on Foreign Nationals might be too restrictive an interpretation of the judgment in *Ruiz Zambrano*.[82]

107. The Netherlands Government, in its written observations, stated that the burden of proof lies with applicants for a residence permit, under the general rule that persons who rely on particular rights or on particular consequences of those rights must establish that those rights apply to their situation.

108. I take the view that, where a party claims that his situation comes within the scope of Article 20 TFEU, it is for the national authorities of a Member State to examine *ex officio* whether or not the conditions for the application of that provision are met.

109. When the competent national authorities are assessing the conditions required in order for a third-country national who is the parent of a child who is a Union citizen to be granted a residence permit, it is clear that those authorities must consider, first, issues directly linked to the status of the child as a Union citizen and, secondly, issues strictly covered by national family law.

110. As regards issues concerning the status of the child concerned as a Union citizen, the issue of the assignment of the burden of proof should not render rights conferred by EU law ineffective. Thus, it seems to me that strict application of the national rules in question concerning the burden of proof may undermine the effectiveness of Article 20 TFEU.

82 — Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

111. With regard to the assessment of aspects of national family law, in so far as situations such as those at issue in the main proceedings come within the scope of EU law, the competent national authorities, bearing in mind the principles of proportionality and the best interests of the child, must raise *ex officio* the preliminary issue of whether responsibility for the care of the child can be assumed by the other parent who is a national of the Member State of which the child is a national and hence a citizen of the Union.

112. Furthermore, it seems to me to undermine the effectiveness of Article 20 TFEU and the general principles of law, in particular the principle of proportionality, to oblige the third-country national parent who is responsible for the primary care of the child, in this case the mother, to bring an action that is not in her own interests and, potentially, not in the interests of the child! It should be pointed out that the purpose of such an action is to apply for responsibility for care to be transferred to the other parent in order to prove that the father who is a Netherlands national is not in fact able to care for the child and, consequently, that it should be accepted that the child is dependent on the mother to such an extent that he/she will be obliged in practice to leave the territory of the European Union if the mother is deprived of the right of residence. [83]

113. Bearing those considerations in mind, I propose that the answer the Court should give to the third question should be that it is for the competent authorities of the Member State to raise the issue *ex officio* and establish whether the other parent is able to assume responsibility for the primary care of the child. Those authorities must take into account all the circumstances of the case, whilst observing the principles of proportionality and the best interests of the child.

V – Conclusion

114. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Centrale Raad van Beroep (Higher Social Security Court, Netherlands) as follows:

(1) Article 20 TFEU must be interpreted as precluding a Member State from depriving a third-country national parent, who is responsible for the primary care of his/her young child who is a Union citizen, of residence in the child's Member State of residence, of which that child is a national, in so far as such a decision would deny that child the genuine enjoyment of the substance of the rights attaching to the status of Union citizen, where it has not been demonstrated that the other parent, who is a citizen of that same Member State, might be able to assume alone the primary care of the child. It is not sufficient, in that regard, to demonstrate that it cannot be excluded that the other parent might in fact be able to care for the child.

(2) It is for the competent authorities of the Member State to raise the issue *ex officio* and establish whether the other parent is able to assume responsibility for the primary care of the child. Those authorities must take into account all the circumstances of the case, whilst observing the principles of proportionality and the best interests of the child.

83 — It is apparent from the documents before the Court and from the observations submitted at the hearing that in order to prove that the Netherlands father cannot care for the child the mother who is a third-country national who has primary care must institute, even against her will, family law proceedings in order to establish the inability of the father to care for the child.