

Case C-459/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

15 September 2020

Referring court:

Rechtbank Den Haag, zittingsplaats Utrecht (Netherlands)

Date of the decision to refer:

10 September 2020

Applicant:

X

Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject of the action in the main proceedings

The subject of the action in the main proceedings is the decision to refuse the applicant's application for a residence permit lodged after her divorce from her Dutch husband. During her marriage, she had a child who is a Dutch national but who is being raised in Thailand and has never lived in the Netherlands. The issue is whether she can derive a right of residence from the Dutch nationality of her child, because that child, without a right of residence for his mother, would be deprived of the rights he enjoys as a citizen of the European Union.

Subject and legal basis of the request for a preliminary ruling

That application under Article 267 TFEU concerns the question whether Article 20 TFEU is to be interpreted as precluding the refusal of an application for a residence permit from a third-country national where that third-country national has a dependent minor child who is a national of a Member State of the Union but has never resided in the Union, since such a refusal would have the effect of

preventing the child from exercising his rights of residence as a citizen of the Union.

Questions referred for a preliminary ruling

I.

Is Article 20 TFEU to be interpreted as precluding a Member State from denying a third-country national, who has a dependent minor child, a Union citizen, where that minor is in an actual relationship of dependency in respect of that third-country national, a right of residence in the Member State of which the minor Union citizen is a national, where the minor Union citizen is located outside the territory of that Member State or of the Union and/or has never been in the territory of the Union, with the result that the minor Union citizen is effectively denied access to the territory of the Union?

II.

(a) Should (minor) Union citizens declare or demonstrate an interest in exercising the rights conferred on them by citizenship of the Union?

(b) In that regard, could a relevant factor be that, as a rule, minor Union citizens cannot independently assert their rights and have no say over their place of residence, but are dependent on their parent(s) in that respect, and that this could involve a claim being made on behalf of a minor Union citizen for the right to exercise his rights as a Union citizen, whereas that might possibly be contrary to their other interests as referred to, for example, in the *Chavez-Vilchez* judgment?

(c) Are those rights absolute, in the sense that no obstacles may be placed in their way or that the Member State of which the (minor) Union citizen is a national might even have a positive obligation to enable that citizen to exercise those rights?

III.

(a) In assessing whether there is a relationship of dependency as referred to in I. above, is the decisive factor whether or not the third-country national parent, prior to the application or prior to the decision refusing a right of residence, or prior to the time when a (national) court has to make a decision in legal proceedings brought because of that refusal, was responsible for the day-to-day care of the minor Union citizen, and whether there are others who were responsible for such care in the past and/or can (continue to) be responsible for it?

(b) In that connection, can the minor Union citizen, in order to be able to exercise his Union rights effectively, be required to settle on Union territory with his other parent, who is a citizen of the Union, who may no longer have parental responsibility for the minor?

(c) If so, does it make a difference whether or not that parent has or had parental responsibility and/or whether the minor is or was legally, financially or emotionally dependent on that parent and whether or not that parent is willing to take on those responsibilities and/or the care of the minor?

(d) If it were to be established that the third-country national parent has sole parental responsibility for the minor Union citizen, does that then mean that less weight should be attached to the question of the legal, financial and/or emotional dependence?

The provisions of Union law cited

Article 20 TFEU

The provisions of national law cited

None

Brief summary of the facts and the procedure in the main proceedings

- 1 The applicant has Thai nationality and was married to a Dutch national. During her marriage, a child was born who has Dutch nationality but who was born in Thailand. The applicant returned to the Netherlands after the birth, but the child was raised in Thailand by the applicant's mother and has never been to the Netherlands.
- 2 Following her divorce, the applicant's right of residence in the Netherlands was withdrawn in 2017. On 6 May 2019, the defendant notified the applicant that she was to be deported to Bangkok. Then, on 7 May 2019, she applied for a residence permit to reside with [B]. That application was refused by decision of 8 May 2019, after which the applicant was deported. By decision of 2 July 2019, the defendant rejected the objection lodged by the applicant. As a result, the applicant brought the present action before the rechtbank Den Haag (District Court, The Hague).
- 3 Initially, both parents had joint parental responsibility for the child by operation of law. On 5 February 2020, the court in Surin, Thailand, granted sole parental responsibility to the applicant. However, as the rechtbank Den Haag does not have a certified copy of that judgment, it is unclear whether the applicant, from a legal point of view, is acting as the sole parent.

Main submissions of the parties to the main proceedings

- 4 According to the applicant, she has a right to reside in the Netherlands because her child has Dutch nationality and she can derive a right of residence from his Union

citizenship. She points out that she has parental responsibility for the child, that she has always had an affectionate relationship with him and he has always been legally and financially dependent on her. Initially, she maintained contact with him from the Netherlands by digital means, while her mother took care of the child in Thailand. Since her return to Thailand, she has personally taken care of the child. Her mother is no longer able to do so for medical reasons. Previously, the child had contact with his father once a year at most, but because he does not speak Dutch or English, he could not communicate with his father. Since 2017, there has no longer been any contact with the father. The child is thus entirely dependent on her. Therefore, by denying her a right of residence in the Netherlands, the child is also being deprived of the possibility of exercising his rights as a Union citizen.

- 5 The defendant submits that the criteria laid down by the Court of Justice of the European Union ('the Court of Justice') in the judgment in *Chavez-Vilchez and Others*¹ for assessing whether a child is deprived of his or her rights as a Union citizen if he or she is compelled to leave the territory of the Union (see paragraph 9 below) are not applicable in the present case. The refusal of the applicant's residence application does not have the effect of compelling the child to leave the territory of the Union, since the child has been resident in Thailand since birth. Furthermore, according to the defendant, it is unclear whether the child is so dependent on his mother (from whom he has been separated for almost his entire life) that her forced residence outside the Union compels the child to reside outside the Union as well. Moreover, there is a lack of clarity about the relationship with the father in the Netherlands. Nor has it been demonstrated that it is in the interests of the child to allow the applicant to reside in the Netherlands.

Brief summary of the reasons for the referral

- 6 The referring court observes that the question that is particularly relevant to the present case is whether the judgments of the Court of Justice in *Ruiz Zambrano*,² *Dereci*,³ *O. and Others*⁴ and *Chavez-Vilchez and Others* are also applicable if a minor child who is a Union citizen is located outside the territory of the Union or may never even have been there.
- 7 The referring court deduces from the *Dereci* judgment that nationals of a Member State of the European Union may, as such, rely as against that Member State on European Union law, including Article 20 TFEU. In *Ruiz Zambrano*, the Court of Justice held that that article is to be interpreted as meaning 'that it precludes a

¹ Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354.

² Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

³ Judgment of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734.

⁴ Judgment of 6 December 2012, *O. and Others*, C-356/11 and C-357/11, EU:C:2012:776.

Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, [in so far as such a decision] deprive[s] those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'. Of relevance in that regard is whether such a decision would result in the children being compelled to leave the territory of the Union.

- 8 The highest Netherlands administrative court, the Afdeling bestuursrechtspraak (Chamber for Contentious Administrative Proceedings) of the Raad van State (Council of State), ruled in 2012⁵ that the *Ruiz Zambrano* and *Dereci* judgments are also relevant in a case in which the child, as a minor citizen of the Union, is located outside the territory of the Union. That judgment concerned two children, of whom one was born in the Netherlands and had initially lived there and the other had never resided in the Netherlands. In that case, however, it was established that the third-country national was the sole parent of the minor Union citizens because the other parent had died. The referring court deduces from the judgment in *O. and Others* that it is also relevant to the present case whether the applicant has sole parental responsibility for the child. After all, it is precisely the fact that a child is dependent on a third-country national that prevents that child from exercising his or her rights as a Union citizen.
- 9 Finally, the judgment in *Chavez-Vilchez and Others* laid down criteria for assessing whether a relationship of dependency does in fact exist between the minor Union citizen and the parent who is a third-country national, which would compel the child to leave the territory of the Union as a result of the parent's departure. Such an assessment must 'take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium'.
- 10 In the judgment of the Afdeling Bestuursrechtspraak referred to above, it was indeed held that the case-law of the Court of Justice on Union citizenship also applies when the minor Union citizen resides outside the Union, but the question of whether that is in fact the case has never been referred to the Court of Justice. In any event, without the application of that case-law, the third-country parent concerned would never be able to derive a right of residence in the Netherlands from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That article only allows residence with a family member of at least 21 years of age. By definition, the minor Union citizen cannot comply with that requirement.
- 11 The referring court observes that, according to case-law cited, a European Union citizen derives his rights directly from Union citizenship. That means that it is not

⁵ Judgment of 7 March 2012, ABRvS, ECLI:NL:RVS:2012:BV8631.

necessary for a Union citizen to demonstrate an interest in the exercise of his European Union rights. However, minors cannot exercise those rights independently. They have no say over their place of residence, but are dependent on their parent(s). That could involve a claim being made on behalf of a minor Union citizen for the right to exercise his rights as a Union citizen, whereas that might possibly be contrary to other interests of the child as referred to in the judgment of *Chavez-Vilchez and Others*. In that regard, the *Dereci* judgment raises the question of whether the Member States may not place any obstacles at all in the way of the minor exercising the rights associated with Union citizenship or whether there might even be a positive obligation to enable the exercise of those rights.

- 12 Finally, the referring court asks the Court of Justice whether, in assessing whether there is a relationship of dependency compelling the grant of a residence permit to the third-country parent, the decisive factor is whether or not that parent was responsible for the day-to-day care of the child and whether others assumed the responsibility for that care in the past and could continue to do so. Or could the child be required to settle with the parent who is a Union citizen, regardless of whether that parent wishes to assume the legal and financial responsibilities and care of the child? A further question is whether the situation is any different if only one parent has parental responsibility for the child.