

Case C-147/24 [Safi] ⁱ**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:**

26 February 2024

Referring court:

Rechtbank Den Haag (Netherlands)

Date of the decision to refer:

26 February 2024

Appellant:

V

Respondent:

Staatssecretaris van Justitie en Veiligheid

Subject of the action in the main proceedings

Appeal against the refusal of a derived right of residence in the Netherlands under Article 20 TFEU for a third-country national who already has a right of residence in another Member State and is the parent of a child of Netherlands nationality living in the Netherlands.

Subject and legal basis of the request for a preliminary ruling

Interpretation of Article 20 TFEU on the possible grant of a derived right of residence where the third-country national does not have to leave the territory of the Union in the event of the refusal of a right of residence, but may return to the Member State where he or she has a right of residence. Weight to be given in such a case to the child's relationship of dependency with that parent, the best interests of that child, respect for family life and the possible need for the child to exercise the rights of free movement. Article 267 TFEU

ⁱ This is a fictitious name, which does not correspond to the actual name of any party to these proceedings.

Questions referred for a preliminary ruling

I Is Article 20 TFEU to be interpreted as meaning that it is not excluded that a third-country parent must be granted a derived right of residence in the Member State of which his or her minor child is a national and where his or her child resides without having made use of his or her citizenship rights, while that third-country parent has a right of residence in another Member State?

If it is not excluded that a third-country parent must be granted a derived right of residence in the Member State of which his or her minor child is a national and where his or her child resides without having made use of his or her citizenship rights, while that third-country parent has a right of residence in another Member State:

II Having regard to Article 5(a) and (b) of Directive 2008/115 and Article 6(2) of Directive 2008/115, does it follow from Article 20 TFEU, where a relationship of dependency exists, such as that which provides grounds for the grant of a derived right of residence under Article 20 TFEU, that there is an obligation on the decision-making authority to ascertain whether the exercise of the right of free movement and residence is in the best interests of the child, and whether the exercise of family life can continue, before instructing the third-country parent to move immediately to the Member State where he or she holds a residence permit or other authorisation offering a right to stay, and should these factors be taken into account when assessing the application for a derived right of residence?

Provisions of EU law and international law relied on, and case-law of the Court

Article 3 of the Convention on the Rights of the Child

Article 8 ECHR

Article 20 TFEU

Articles 7 and 24 of the Charter of Fundamental Rights

Directive 2008/115/EC, Articles 5 and 6

Judgments of 5 May 2022, *Subdelegación del Gobierno en Toledo v XU and QP* (Joined Cases C-451/19 and C-532/19); 8 March 2011, *Zambrano* (C-34/09); 7 September 2022, *Staatssecretaris van Justitie en Veiligheid* (Nature of the right of residence under Article 20 TFEU) (C-624/20); 22 June 2023, *Staatssecretaris van Justitie en Veiligheid* (Thai mother of a Netherlands minor) (C-459/20); 15 November 2011, *Dereci* (C-256/11); 14 January 2021, *Staatssecretaris van Justitie en Veiligheid* (Return of an unaccompanied minor) (C-441/19); 22 November 2022, *Staatssecretaris van Justitie en Veiligheid* (Removal –

Medicinal cannabis) (C-69/21); 11 March 2021, *État belge* (Return of the parent of a minor) (C-112/20)

Opinions in the cases of *Zambrano* (C-34/09), and *Staatssecretaris van Justitie en Veiligheid* (Persons who identify with the values of the Union) (C-646/21)

Provisions of national law relied on

Article 8 of the *Vreemdelingenwet 2000* (Law on Foreign Nationals of 2000) provides that a foreign national is lawfully resident in the Netherlands as a community national as long as the national concerned resides in the Netherlands pursuant to a regulation under the TFEU.

Paragraph B10/2.2 of the *Vreemdelingen-circulaire 2000* (Circular of 2000 on Foreign Nationals) provides that such lawful residence is subject to all the following conditions being met:

- ‘a. the foreign national must make a plausible case with regard to his or her identity and nationality [...];
- b. the foreign national has a minor child who has Netherlands nationality;
- c. the foreign national, whether jointly with the other parent or not, performs tasks relating to the care of the minor; and
- d. there is such a relationship of dependency between the foreign national and the child that the child would be forced to leave the territory of the Union if the foreign national were refused a right of residence.

[...]

Under this provision, the foreign national who seeks residence as a custodial parent will not be granted a residence permit if he or she already has a right of residence in another Member State.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant has Moroccan nationality and, with her Netherlands/Moroccan husband, is the parent of a minor son who has Netherlands nationality. This son has a speech and language impairment and receives special education. He is cared for jointly by the cohabiting parents. Due to medical problems, the father has no income from work but receives social assistance benefits. He is exempt from the obligation to work.
- 2 The appellant resided in Spain between 1999 and 2014 and has a right of residence there, which is still valid despite her request to the Spanish authorities to

revoke it. Since 2014, she has been residing in the Netherlands without a valid permit, and she has never had any encounter with the justice system.

- 3 She applied for a derived right of residence as a family member of a Union citizen under Article 20 TFEU, which was refused by the respondent. She has made no other applications in the Netherlands. For their part, the father and son never exercised their freedom of movement.

The essential arguments of the parties in the main proceedings

- 4 The appellant claims that she can derive a right of residence under Article 20 TFEU because her son is dependent on her. In response to the respondent's refusal of that right, she argues that she must be granted a residence permit on the basis of Article 8 ECHR.
- 5 The respondent justifies its refusal of a right of residence under Article 20 TFEU by the fact that the appellant already has a right of residence in Spain. It examined *ex officio* whether she was then still eligible for a residence permit on the basis of Article 8 ECHR. However, despite its finding that a family and private life did exist in the Netherlands, it held that the interests of the Netherlands Government outweighed the personal interests of the appellant and her family.
- 6 The resulting refusal of the residence permit is also an order to move immediately to Spain. The minor son can accompany the appellant and therefore does not have to leave the territory of the Union as a whole.

Succinct presentation of the reasoning in the request for a preliminary ruling

(a) *Characteristics of a derived right of residence*

- 7 The referring court infers from the Court's judgment of 5 May 2022, *XU* and *QP* (C-451/19 and C-532/19), that in order for a derived right of residence to be granted under Article 20 TFEU, there must not only be a very particular situation and a relationship of dependency, but also that that grant is only a possibility where no rights of residence can be derived from secondary European Union law or from national law (as is the case for the appellant). The derived right of residence is thus subsidiary in scope.
- 8 In the Netherlands, a derived right of residence is granted if there is a relationship of dependency between the third-country parent and the Netherlands child who lives in the Netherlands and who has not (yet) exercised his [or her] right of free movement and residence. If a right of residence is refused under Article 20 TFEU, an application to that effect must still be examined *ex officio* by the respondent under Article 8 ECHR, but not under secondary Union or national law. Nor do the courts usually examine *ex officio* whether a right of residence can be granted under any other provision.

- 9 According to the referring court, Article 8 ECHR and Article 20 TFEU require substantially different assessments. In the case of the former, the State may weigh up the individual interest (family life) of the appellant against the interest of the State, and it has a certain margin of discretion in doing so. Thus, weight can be given to factors such as possible objective obstacles to establishing family life elsewhere and the best interests of the child. In the case of Article 20 TFEU, however, the two interests are not weighed up against each other. Only the degree of dependency between the child and the third-country parent is decisive.
- 10 The respondent refused a right of residence under Article 20 TFEU on the basis of its interpretation of the Court's case-law to the effect that a derived right of residence is granted only if a relationship of dependency exists between the third-country parent and his or her Union citizen child such that, in the absence of a right of residence for the parent, the child would be obliged to leave *the territory of the Union as a whole*.
- 11 The referring court raises the question whether, when examining the appellant's application under Article 20 TFEU, it is sufficient to apply the principles that can be inferred from the case-law of the Court. More specifically, its question is whether the appellant's right of residence in Spain means that, when assessing the best interests of her child, it is only necessary to establish that his or her Union citizenship rights are safeguarded because he or she is not required to leave the Union.
- 12 In that regard, the referring court considers that, according to the judgment of 7 September 2022, *Staatssecretaris van Justitie en Veiligheid* (Nature of the right of residence under Article 20 TFEU) (C-624/20), when assessing the relationship of dependency between parent and child with a view to the child's best interests, all the circumstances concerned must be taken into account. These include the cohabitation on a stable basis of the third-country parent with the other parent who is a Union citizen and the existence of personal and direct contacts with both parents. These conditions are met in the present case. However, in refusing the application, the respondent did not examine the child's best interests, the existence of a relationship of dependency or the implications for family life.
- 13 According to the Court's judgment in *Subdelegación del Gobierno* and *Toledo* (C-451/19 and C-532/19), the mere existence of a family relationship between a Union citizen and a third-country national is not in itself sufficient to confer a derived right of residence. The referring court considers that it can infer from this that the Court requires a particular relationship of dependency.
- 14 It found that the relationship of dependency between the appellant and her child was sufficiently intense for a derived right of residence under Article 20 TFEU. Without that right of residence, the child would be obliged to accompany the appellant. At the same time, however, the child also has a relationship of dependency with his father.

- 15 If a child who is a Union citizen is forced to leave the Union, he [or she] is deprived of the effective enjoyment of his [or her] Union rights. The referring court infers from the Court’s case-law that it is precisely those rights of the child that constitute the justification for the grant of a derived right of residence. That right under Article 20 TFEU is not a personal right of the third-country parent, but a right derived from the Union citizenship of the minor child who is dependent on that parent.
- 16 The referring court raises the question whether the Court’s case-law on Article 20 TFEU and the obligation to leave the territory of the Union applies in full where the third-country parent has a right of residence in a Member State other than that of which the child is a national and where he [or she] resides.

(b) Assessment of the relationship of dependency

- 17 According to the Court, the assessment of the relationship of dependency must take due account of all the circumstances and the child’s best interests, such as his or her age and emotional development. According to the judgment of 22 June 2023, *Staatssecretaris van Justitie en Veiligheid* (Thai mother of a minor Netherlands child) (C-459/20), those interests cannot be invoked to reject an application, but rather to prevent the adoption of a decision obliging the child to leave the Union.
- 18 The European Commission appears to infer from that judgment that the child’s best interests should not, however, be the primary consideration when assessing an application for a derived right of residence.
- 19 The referring court wishes to ascertain from the Court whether the authorities must take due account of the best interests of the child and of respect for private and family life exclusively when assessing the relationship of dependency, or whether those elements form an integral part of the assessment and constitute a primary consideration in the decision-making process.
- 20 So far, the Court has only mentioned the child’s best interests when explaining which circumstances should be taken into account when assessing the intensity of the relationship of dependency. That does not necessarily mean that the child’s best interests carry no further weight. Indeed, in previous cases, the assessment of the relationship of dependency was the core of the assessment to be made. If the need – because of the relationship of dependency – to leave the Member State in which the child resides and of which he [or she] is a national is also relevant when assessing the application for a derived right of residence, thus requiring additional and more extensive investigation, the child’s best interests will have to be included in that investigation.
- 21 The answer to the questions cannot be deduced from the Court’s case-law. The situation featured in this case has not yet come before the Court. It is clear to the referring court that in cases where the third-country parent was not granted a right

of residence in the Union because there was no relationship of dependency, the child's best interests were only a relevant factor when assessing the intensity of that relationship. However, if the assessment of whether a relationship of dependency exists cannot be regarded as constituting a full assessment of whether a derived right of residence should be granted, the question arises as to how the decision-making authority should involve the child's interests in the final assessment of the application to grant a derived right of residence.

(c) Need to exercise the right of free movement

- 22 The relationship of dependency between the appellant and her child is such that, if the appellant is not granted a right of residence, the child will have to follow her and leave Netherlands territory, but not that of the Union. The child is thus compelled to exercise his right of free movement and residence.
- 23 In the judgment in *Subdelegación del Gobierno and Toledo*, the Court held that a principle of international law precludes a Member State from denying its own nationals the right to enter and reside in its territory. Thus, a Member State may not oblige a national to leave its territory. In the present case, however, that would indeed be the case as a result of the relationship of dependency.
- 24 A derived right of residence is not a personal right of the third-country parent, but a right derived from the Union citizenship of the minor child who is dependent on that parent. According to the referring court, it is precisely the rights of the child that determine whether his parent should be granted a right of residence.
- 25 If the Court interprets Article 20 TFEU to mean that, in the present case, the appellant need not be granted a derived right of residence in the Netherlands, it means that the child, a Union citizen, is compelled to exercise his right of free movement and residence because of the relationship of dependency.
- 26 The rationale of Article 20 TFEU is that the child retains his rights as a Union citizen. In the present case, the child must exercise his right of free movement and residence in order to maintain personal contact with both his parents. According to the referring court, the essence of a right is that there is also the freedom not to exercise it. That freedom is negated when, because of the relationship of dependency, the child must follow his mother to Spain.
- 27 The question is whether this obligation on a minor Union citizen is justified when merely assessing whether the child will be able to remain in the territory of the Union. This does not entail a more far-reaching examination of the interests of the minor Union citizen and whether it is in his [or her] interests to have to exercise his [or her] right of free movement and residence.
- 28 It may in fact be in the child's interest to remain in the Member State of which he [or she] is a national. This interest is not taken into account if it is only necessary to assess whether the refusal of a derived right of residence means that the Union

citizen child should leave the Union as a whole. The question then is whether further examination of the child’s best interests can be dispensed with, since the preservation of his [or her] Union citizenship rights is the justification for granting a derived right of residence to his [or her] parent.

- 29 According to the Charter, every child has the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, and the right to family life must be respected. That family life is given weight only when assessing the intensity of the relationship of dependency. Where a derived right of residence is refused because the third-country parent is not required to leave the Union, no further examination is made of the consequences of that refusal for family life. Thus, in the present case, the spouse will also have to go to Spain to preserve family unity.
- 30 The respondent, when refusing the derived right of residence, did not examine the family’s options for continuing family life in Spain. According to the appellant, the father does not meet the conditions for residing in Spain for an indefinite period. The child will then have to choose the parent with whom he wishes to reside. This cannot be required of a child and is probably not in his best interests. Moreover, the relationship of dependency exists not only in relation to the third-country parent, but also in relation to the Union citizen parent.
- 31 The respondent did examine that circumstance when making an assessment under Article 8 ECHR, but in so doing it gave greater weight to the general interest of the State. The referring court notes that the appellant must formulate and substantiate her interests in that context and wishes to ascertain whether the respondent has a more far-reaching duty of investigation in a situation such as that in the present case.

(d) Weight of the interests of the child

- 32 According to the referring court, the best interests of the child encompass more than having and preserving Union citizenship rights. From the Court’s case-law [Opinion in Case C-646/21, *Staatssecretaris van Justitie en Veiligheid* (Individuals who identify with the values of the Union), and the judgments in *État belge* (Return of the parent of a minor) (C-112/20) and *Belgische Staat* (Married refugee minor) (C-230/21)], it deduces that even if the minor is not the appellant, but the outcome of the proceedings has consequences for that minor, the child’s best interests must be taken into account in assessing the application in those proceedings.
- 33 The Court has already ruled that the best interests of the child could be invoked to prevent the adoption of a decision that would oblige that child to leave the territory of the Union as a whole. However, case-law on the situation where the child is obliged to leave the territory of his [or her] Member State is lacking. The referring court does not automatically accept that, according to the Court, the child’s best interests and respect for family life do not carry any weight where, in

the event of a refusal of a right of residence for his [or her] parent, a child does not have to leave the Union but must follow his [or her] parent to another Member State.

- 34 According to the referring court, the question is how the fundamental rights under Articles 7 and 24 of the Charter can have weight in a situation such as that in the present case, and it refers to AG Sharpston's Opinion in *Zambrano* (C-34/09). There it is stated that the exercise of the rights of free movement takes place under the protection of those fundamental rights.
- 35 If, when assessing a derived right of residence, it is only necessary to establish that the appellant does not have to leave the Union, the child's interests are limited to establishing that his Union citizenship rights have been preserved. The question is whether that is acceptable in the specific context of Union citizenship.
- 36 According to Article 24(2) of the Charter, the child's best interests must be a primary consideration in all actions relating to children. The protection of the best interests of the child can be regarded as a general objective of the Union. However, Union law does not seem to explicitly provide that the decision-making authority must determine the best interests of the child in any specific proceedings concerning the law relating to foreign nationals.
- 37 The Committee on the Rights of the Child of the United Nations has elaborated in its General Comments that and how the best interests of the child should be determined. Once these interests have been determined, they must be weighed up. The Court pointed out in its judgment in *Staatssecretaris van Justitie en Veiligheid* (Return of an Unaccompanied Minor) (C-441/19) that the best interests of the child must be a primary consideration in all actions where minors are involved in proceedings, but did not elaborate in that judgment on the weight to be given to those interests.
- 38 Further clarification on this point was sought in *Staatssecretaris van Justitie en Veiligheid* (Individuals who identify with the values of the Union) (C-646/21). In the Opinion in that case, the AG, in accordance with his reasoning in points 54, 56, 58, 60 and 61, suggested to the Court that a substantive assessment of an application for international protection that does not take into account, as a primary consideration, the best interests of the child, or weighs up the best interests of the child without first determining, in each procedure, what the best interests of the child are, is incompatible with Union law. According to the referring court, the answer to the question in Case C-646/21 is also relevant to the reference for a preliminary ruling on the further interpretation of Article 20 TFEU.
- 39 It is difficult to see why a Member State's legal obligations under the Convention on the Rights of the Child and the Charter should not apply, or should apply to a lesser extent, when assessing an application for a derived right of residence under Article 20 TFEU. If the Court interprets that article to mean that only the preservation of the minor son's Union citizenship rights is relevant and the

possibility of the appellant acquiring a derived right of residence under Article 20 TFEU is therefore precluded, the best interests of the appellant's minor child are not being examined further. The respondent cannot then fulfil its obligation under the Treaty and EU law to give full consideration to the child's best interests in all its actions and thus in the decision on the appellant's application.

- 40 Although the rationale of Article 20 TFEU is the preservation of the citizenship rights of the Union citizen, the referring court is of the view that that cannot mean that the child's more comprehensive interests – such as his interest in being able to remain in his Member State and not being separated from his third-country parent – are not further examined and are not taken into account when assessing the application for a derived right of residence.

(e) Respect for family life

- 41 The Court held in the *Dereci* judgment (C-256/11) that the right to respect for family life is not among the principal rights conferred by the status as a citizen of the Union and that that right is not sufficient in itself to bring within the scope of Union law the situation of a Union citizen who has not exercised his or her right of free movement.
- 42 In the present case, family life does constitute a relevant factor in assessing the relationship of dependency. If the appellant is excluded from a derived right of residence, family life would not carry any weight in assessing whether that right should be granted.
- 43 The derived right of residence serves to protect the genuine enjoyment of the citizenship rights of the Union citizen who has a relationship of dependency with the third-country national. According to the referring court, that enjoyment encompasses not only the right of free movement but also the Charter. Its question is therefore whether it is justified not to give any weight to the child's family life when assessing whether the appellant should be granted a derived right of residence. The respondent completely disregarded such family life in its decision-making.

(f) Interpretation of Directive 2008/115

- 44 Refusal of the derived right of residence implies that the appellant is not or is no longer lawfully resident in the territory of the Member State where this application was made. The Member State must then, according to Directive 2008/115, issue a return decision and, if applicable, order the third-country national to return immediately to the Member State where he [or she] has a right of residence.
- 45 In principle, Directive 2008/115 only regulates departure from Member States, not admission to them. However, the refusal of a derived right of residence also establishes unlawful residence and thus – in principle – imposes a duty to leave the territory of the Netherlands in implementation of this Directive. According to

Article 5 of Directive 2008/115, when implementing this Directive, Member States must take due account of – inter alia – the best interests of the child and family life.

- 46 The Court has ruled in greater detail on the obligation to take due account of the best interests of the child [see judgment of 14 January 2021, *Staatssecretaris van Justitie en Veiligheid* (Return of an unaccompanied minor) (C-441/19, paragraphs 43-47, 51 and 60)] and family life [see judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid* (Removal – Medicinal cannabis), C-69/21, paragraphs 88-91] *before* a return decision is issued. The referring court asks the Court to clarify whether that obligation has the same scope and extent if no return decision is issued but the illegal residence is terminated by ordering the third-country national to move immediately to the territory of another Member State.
- 47 The referring court considers it to be apparent from the cited case-law of the Court that, when assessing an application for a derived right of residence, it must be clear to the respondent that it is complying with the obligation under Directive 2008/115 and must therefore take due account of the best interests of the child and family life, as well as the consequences of a refusal. The referring court wishes to ascertain from the Court how the obligations under Directive 2008/115 relate to the assessment of an application under Article 20 TFEU.
- 48 In the present case, the respondent did not carry out any further investigation into the consequences of the refusal or whether the family meets the conditions for long-term residence in Spain. The referring court raises the question of whether a situation such as that in the present case gives rise to a duty to investigate so as to ascertain from the Spanish authorities whether family life is able to continue in Spain.
- 49 According to the Court's interpretation, the rights guaranteed by Articles 7 and 24 of the Charter do not have an absolute character. However, the referring court is not seeking to ascertain from the Court whether the best interests of the child and family life in the Netherlands entail a duty to grant the appellant a derived right of residence. It seeks only a clarification of the provisions obliging the respondent to order the appellant to move to Spain, and to ascertain whether the consequences for family life of the forced departure to Spain are a relevant factor in assessing whether the appellant should be granted a derived right of residence and, if so, whether this entails a duty of investigation for the respondent.
- 50 It also in essence raises the question whether the obligations laid down in Article 6(2) and Article 5 of Directive 2008/115 impose a similar duty of investigation on the authorities when assessing an application for a derived right of residence submitted by a third-country parent.
- 51 Clarification of the foregoing is necessary for the referring court to give a ruling in the main proceedings.