Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 26 October 2017[1]

Case C-82/16

K.A.
M.Z.
M.J.
N.N.N.
O.I.O.
R.I.
B.A.
v
Belgische Staat

(Request for a preliminary ruling from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium))

(Reference for a preliminary ruling — Union citizenship — Article 20 TFEU — Application by a third-country national to reside in the Member State of an EU citizen who has never exercised his rights to freedom of movement — National administrative practice not to examine applications for a residence permit for the purposes of family reunification where the third-country national concerned is subject to a valid and definitive entry ban under national law — Articles 7 and 24 of the Charter of Fundamental Rights of the European Union — Directive 2008/115/EC)

1. By this request for a preliminary ruling the Court is primarily asked for guidance as to whether EU law precludes a national administrative practice of not examining applications for a residence permit by third-country nationals for the purposes of family reunification with an EU citizen, where that citizen has never exercised rights to freedom of movement under the Treaties. The administrative practice at issue is applied by the national competent authorities where the third-country national is subject to an entry ban under domestic law and is therefore obliged to leave not only Belgium (the State concerned), but the territory of the Member States as a whole. The Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) asks in particular whether that practice is compatible with Article 20 TFEU, interpreted in the light of the Charter of Fundamental Rights of the European Union[2] and Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.[3] If Article 20 TFEU is engaged, the referring court asks what factors should be considered in assessing whether there is a relationship of dependency between the EU citizen and the third country national concerned.

1 Original language: English.

2 OJ 2010 C 83, p. 389 ('the Charter').

3 Directive of the European Parliament and of the Council of 16 December 2008 (OJ 2008 L 348, p. 98) ('the Return Directive'). I have used the expression 'the territory of the Member States' as that term is used in the Return Directive to define its territorial scope. That directive does not apply to Ireland and the United Kingdom. Conversely, it does apply to Denmark and to Liechtenstein, Iceland, Norway and Switzerland. References to 'the territory of the Member States' in the context of the Return Directive, should be construed accordingly.

EU legislation

The Charter

2. Article 7 of the Charter provides that everyone has the right to respect for family life.[4]

3. Article 24 is entitled 'The rights of the child'. It states:

'1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

4. In accordance with Article 51(1), the provisions of the Charter are addressed to the Member States only when they are implementing EU law.[5]

Treaty on the Functioning of the European Union

5. 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'.

Directive 2004/38

6. Directive 2004/38/EC,[6] lays down the conditions surrounding the exercise of the right of free movement and residence within EU territory, the right of permanent residence and the limits placed on those rights. The directive applies to all EU citizens who move to or reside in a Member State (the host Member State) other than that of which they are a national and to their family members who accompany or join them.[7]

The Return Directive

7. The recitals of the Return Directive explain that it aims to establish rules applicable to all third-country nationals who do not or no longer fulfil the conditions for entry, stay or residence in a Member State.[8] Ending of the illegal stay of third-country nationals should be carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under the

4 Article 8 is the corresponding right to Article 7 of the Charter under the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR').

5 Article 52(7) of the Charter states that the explanations drawn up as a way of providing guidance in the interpretation of the Charter are to be given due regard by the EU Courts and the courts of the Member States (Explanations relating to the Charter of fundamental rights) (OJ 2007 C 303, p. 17).

6 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).

7 See Article 1: such persons are beneficiaries for the purposes of Directive 2004/38 as set out in Article 3(1).

8 Recital 5.

Return Directive should be adopted on a case-by-case basis and be founded on objective criteria, implying that consideration goes beyond the mere fact of the illegal stay of the person concerned.[9] Primary considerations of Member States when implementing the Return Directive should include the best interests of the child and respect for family life.[10] It is affirmed that the directive respects fundamental rights.[11]

8. Article 1 provides that the Return Directive sets out common standards and procedures to be applied in Member States for 'returning' illegally staying third-country nationals, in accordance with, inter alia, fundamental rights as general principles of EU law.

9. Under Article 2(1), third-country nationals staying illegally within the territory of a Member State fall within the directive's scope.

10. Article 3(1) defines a 'third-country national' as 'any person who is not a citizen of the Union within the meaning of [Article 20(1) TFEU] and who is not a person enjoying the [EU] right of free movement, as defined in Article 2(5) of the Schengen Borders Code'.[12] Article 3(2) defines 'illegal stay' as 'the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.[13] A 'return decision' means 'an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return' (Article 3(4)). The word 'removal' means the enforcement of the obligation to return, namely the physical transportation out of the Member State (Article 3(5)). An 'entry ban' is 'an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision' (Article 3(6)). Minors and unaccompanied children are included within the definition of 'vulnerable persons' in Article 3(9).

11. In accordance with Article 5, Member States are obliged to take due account of, inter alia, the best interests of the child and family life when implementing the directive.

12. Pursuant to Article 6(1) Member States must issue a return decision to any third-country national staying illegally within their territory.[14]

9 Recital 6.

10 Recital 22.

11 Recital 24.

12 Third-country nationals who are family members of an EU citizen who has exercised his free movement rights (see further point 6 above) or those third-country nationals (and their family members) who enjoy rights of free movement equivalent to those of EU citizens pursuant to agreements between the European Union and its Member States and the relevant third country are excluded from the scope of the Return Directive, pursuant to Article 2(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ 2006 L 105, p. 1) ('the Schengen Borders Code'). That Regulation was repealed and replaced from 11 April 2016 by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (OJ 2016 L 77, p. 1). The content of Article 2(5) of that regulation remains the same as its predecessor.

13 The entry conditions for third-country nationals for intended stays in EU territory for no more than 90 days in any 180-day period are laid down in Article 5 of the Schengen Borders Code (now Article 6 of Regulation 2016/399). In essence the conditions are that the person concerned is in possession of a valid travel document and visa, that he can justify the purpose and conditions of the intended stay, that he is not a person for whom an alert has been issued in the Schengen Information System, and that he is not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States.

14 That requirement is subject to the following exceptions. Member States may refrain from issuing a return decision where the third-country national: holds a valid residence permit issued by another Member State (Article 6(2)); is taken back by another Member State under bilateral agreements or arrangements existing at the date that the Return Directive entered into force (Article 6(3)); is granted a residence permit on humanitarian grounds (Article 6(4)); or is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay (Article 6(5)).

13. The general rule in Article 7(1) is that return decisions should provide for an appropriate period for voluntary departure. That period may be extended taking into account the specific circumstances of the individual case, such as family and social links, as provided for by Article 7(2). If, inter alia, the person concerned poses a risk to public policy, Member States may refrain from granting a period for voluntary departure, pursuant to Article 7(4). Article 8 regulates the enforcement of return decisions by removal of the third-country national concerned. Specific arrangements are to be made for the return and removal of unaccompanied minors with due consideration being given to the best interests of the child, in accordance with Article 10.

14. Article 11 is entitled 'Entry ban'. It states:

'1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

…

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

…'

15. Chapter III contains certain procedural safeguards. In particular, Article 13(1) provides that the third-country national concerned must be afforded an effective remedy to appeal against or seek review of decisions related to return, before a competent judicial or administrative authority. In accordance with Article 14 ('Safeguards pending return'), Member States are to ensure that, inter alia, family unity is maintained pending return.

National law

Provisions on family reunification

16. Pursuant to Article 40a(2) of the wet van 15 December 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (Law of 15 December 1980 on the admission, residence, establishment and repatriation of foreign nationals ('the Vreemdelingenwet')), the following are regarded as family members of an EU citizen: (i) the partner,

who accompanies him or joins him, with whom an EU citizen has concluded a registered partnership in accordance with a law; (ii) 'the descendants, and those of the spouse or partner … who are under 21 years of age or who are dependent on them …'; (iii) the father or the mother of a minor citizen of the European Union as referred to in Article 40(4)(1)(2), provided that the latter is in fact dependent on him or her and he or she actually has the right of custody.

17. Article 43 of the Vreemdelingenwet states: 'entry and residence may not be denied to EU citizens and their family members except on grounds of public policy [or] of public security … and then only subject to the following limitations'. Such measures must be proportionate and be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Provisions on removal and entry bans

18. Article 74/11 of the Vreemdelingenwet provides:

'(1) The duration of the entry ban shall be determined by taking account of the specific circumstances of each case.The decision on removal shall be accompanied by an entry ban of a maximum of three years in the following cases:

1. if no period for voluntary departure was granted; or

2. if an earlier decision on removal was not enforced.The maximum period of three years referred to in the second paragraph may be extended to a maximum of five years if:

1. the third-country national has committed fraud or has used other illegal means in order to obtain permission to stay or to retain his right to stay;

2. the third-country national has entered into a marriage, a partnership or an adoption solely in order to obtain permission to stay or to retain his right to stay in [Belgium].

The decision on removal may be accompanied by an entry ban exceeding five years, if the third-country national represents a serious threat to public policy or national security.

(2) …

The Minister or his representative may refrain from issuing an entry ban in individual cases for humanitarian reasons.

(3) The entry ban shall take effect on the day on which the entry-ban decision is notified.

The entry ban cannot run counter to the provisions regarding the right to international protection, as defined in Articles 9b, 48/3 and 48/4.'

19. Article 74/12 of the Vreemdelingenwet states:

'(1) The Minister or his representative may lift or suspend the entry ban for humanitarian reasons.

…

Save where provided otherwise by international treaty, a law or a royal decree, the third-country national must lodge a reasoned application with the competent Belgian diplomatic mission or consul in his place of residence or stay abroad.

(2) The third-country national may lodge an application with the Minister or his representative to lift or suspend the entry ban on the basis of compliance with the removal obligation which had been issued earlier, if he provides written evidence that he left Belgian territory in full compliance with the removal decision.

…

(4) During the examination of the application for lifting or suspension the third-country national concerned shall have no right of entry into or stay in [Belgium].

…'

20. Under Article 74/13 of the Vreemdelingenwet, in taking a decision on removal the Minister or his representative must take due account of the best interests of the child, family life and the state of health of the third-country national concerned.

Facts, procedure and the questions referred

21. Each of the seven applicants is a third-country national subject to an order to leave Belgium. In all cases an entry ban is attached to that order to leave, pursuant to the national legislation transposing the Return Directive.

22. Subsequent to the orders to leave and the associated entry bans, each of the individuals concerned applied for a residence permit for the purposes of family reunification with a Belgian national who lives in Belgium and has never moved to or is not residing in another Member State.[15] Those applications were made on the basis of the following family relationships: (i) parents of a minor child who is an EU citizen (Mr R.I., Ms M.J., Ms N.N.N. and Mr O.I.O.); (ii) the adult child of an EU citizen (Ms K.A. and Mr M.Z.); and (iii) a cohabitee of an EU citizen (Mr B.A.).[16]

23. Mr R.I. is an Albanian national. His child was born on 23 June 2010 and has Belgian nationality. He married the child's mother (also a Belgian national) in Albania on 31 July 2013. An order to leave Belgium and an entry ban were issued against him on 17 December 2012.[17]

15 I wish to make three linguistic points regarding the text of this Opinion. First, I shall refer simply to 'family reunification' to cover the applications made by the seven third-country nationals in the main proceedings. Second, the referring court uses the expression 'static Union citizen' to describe the position of the Belgian national family members in the cases at issue. Third, in certain cases in the main proceedings the competent authorities did not grant the third-country national concerned a period for voluntary departure. Such decisions were based, inter alia, upon the ground that the person concerned poses a risk to public policy (Article 7(4) of the Return Directive). I have stated previously that the concept of 'public policy' is more accurately described as 'public order'. The French text of that directive and other linguistic versions use the term 'ordre public'. See my Opinion in *Ouhrami*, C-225/16, EU:C:2017:398, point 69 and footnote 59.

16 According to the explanation of the referring court in its order for reference all seven applicants are regarded as family members of EU citizens for the purposes of national law. See point 16 above.

17 The order to leave and an entry ban for a period of five years were imposed on the grounds that Mr R.I. had fraudulently given a false age and had declared himself to be an unaccompanied minor when he was in fact an adult at the time of making an earlier application requesting admission to Belgium.

24. Ms M.J. is a Ugandan national. She is the mother of a child born on 26 October 2013 who is a Belgian national (as is the child's father). Ms M.J. is subject to an order to leave Belgium and an entry ban dated 11 January 2013. [18]

25. Ms N.N.N. is a national of Kenya. Her child, who is a Belgian national, was born on 25 June 2011. She is subject to an order to leave Belgium and an entry ban dated 24 April 2014. [19]

26. Mr O.I.O. is a Nigerian national. His child was born on 15 January 2009. The child's mother is a Belgian national as is Mr O.I.O.'s daughter. He is divorced from the mother, who has sole custody of the child. The mother and child are not financially dependent on Mr O.I.O. and his contact with his daughter is currently suspended pursuant to a court order. Mr O.I.O. is subject to an entry ban and an order to leave Belgium dated 28 May 2013. [20]

27. Ms K.A. is an Armenian national whose father has Belgian nationality. In her case an order to leave and an entry ban were issued on 27 February 2013. Her two sons who rely on the same familial line made corresponding applications for residence permits. [21]

28. Mr M.Z. is a Russian national. His father, a Belgian national, submitted evidence to the competent authorities indicating that his son is financially dependent on him. An order to leave the territory and an entry ban were issued against him on 2 July 2014. [22]

29. Mr B.A. is a national of Guinea. He cohabits with his partner who is a Belgian national. There is evidence to the effect that their relationship is genuine. An order to leave the territory and an entry ban were issued against him on 13 June 2014. [23]

30. The applications for family reunification were lodged with the Dienst Vreemdelingenzaken (Office for asylum and immigration; 'the DVZ') as agent of the staatssecretaris (State Secretary) responsible for Asylum and Migration. [24] The DVZ took the view that it was unable to examine those applications, because each of the respective applicants was subject to an entry ban and therefore obliged to leave Belgian territory. [25] Thus the DVZ adopted decisions rejecting each of the applications for family reunification ('the contested decisions').

31. The applicants challenged the contested decisions before the referring court. They are of the view that the DVZ was wrong to refuse to examine the substance of their requests for family reunification on the ground that they are subject to valid entry bans. They maintain that such entry bans constitute an unlawful condition as to admissibility, and that applications for family reunification should be

18 The order to leave did not allow a period for voluntary departure. An associated entry ban for a period of three years was imposed. The grounds for those decisions were that Ms M.J. had failed to comply with an earlier order to leave Belgium, that an official report had been filed against her for committing assault and battery and there was a risk that she might abscond. Ms M.J. was thus described as being a threat to public policy.

19 The order to leave and an entry ban for a period of three years were imposed on the ground that Ms N.N.N. had failed to comply with an earlier order to leave Belgium.

20 The order to leave did not allow a period for voluntary departure. An associated entry ban for a period of eight years was imposed. The grounds for those decisions were that Mr O.I.O. had failed to comply with earlier orders to leave. It was considered that he posed a serious threat to public policy or national security taking account of the fact that he had been convicted of serious criminal offences, as demonstrated by his convictions for domestic violence for which custodial sentences were imposed.

21 The order to leave did not allow a period for voluntary departure. An associated entry ban for a period of three years was imposed. The grounds for those decisions were that Ms K.A. had failed to comply with an earlier order to leave and that she was considered to be a threat to public policy, as she had been apprehended for shoplifting. Her sons are also named in the order to leave Belgium and the associated entry ban.

22 The order to leave did not allow a period for voluntary departure. An associated entry ban for a period of three years was imposed. The grounds for those decisions were that Mr M.Z. had failed to comply with an earlier order to leave and that he was considered to be a threat to public policy, because an official report had been prepared against him relating to theft and breaking into a garage.

23 Mr B.A. and his cohabitee have formalised their relationship by entering into a partnership agreement before a notary. The order to leave and the entry ban of three years were imposed on the ground that Mr B.A. had failed to comply with an earlier order to leave.

24 In each of the seven cases the applicants for a residence permit for the purposes of family reunification were lodged after the date of the expulsion orders.

25 See points 18 to 20 above.

considered as an implicit request to withdraw or suspend the entry ban.[26] They argue that in accordance with the Return Directive the DVZ must take account of family life and the best interests of the child in examining applications for family reunification. They also point out that that directive does not state that an application for withdrawing or suspending an entry ban must be lodged from abroad in order to be valid. The applicants are of the view that the entry and stay of family members of Belgians may be refused only on grounds of public policy, national security or public health, and within the limits laid down by law. They submit that, contrary to Article 20 TFEU in particular as interpreted by the Court in *Ruiz Zambrano*,[27] their removal from Belgian territory and the territory of the European Union would mean that their dependent Belgian family members would not be able to exercise their rights as EU citizens in full. Last, the applicants argue that in taking the contested decisions the DVZ did not weigh up the interests in each case in the context of Article 8 of the ECHR and Article 7 of the Charter.

32. The DVZ disputes the applicants' contentions. It submits that a definitive entry ban constitutes an impediment for the person concerned to enter or reside in Belgium, and that the person concerned must leave Belgian territory and make an application from abroad for the entry ban to be withdrawn or suspended in accordance with Article 74/12(1) of the Vreemdelingenwet before being able to lodge a request for residence in the context of an application for family reunification.

33. The referring court states that, in accordance with Article 74/11(3) of the Vreemdelingenwet, an entry ban takes effect from the date it is notified. In each of the seven cases at issue the applicant is subject to a valid and definitive entry ban which cannot be challenged while they remain within Belgium. They must first leave the national territory in order to make such an application at the Belgian consul or diplomatic mission in their country of origin or residence, in accordance with Article 74/12 of the Vreemdelingenwet.[28]

34. Any such application for an entry ban to be withdrawn or suspended lodged in the country of origin must be decided within four months. If no decision is taken within that period, the decision is deemed to be negative. When a third-country national against whom an entry ban has been issued lodges a visa application in his country of origin with a view to family reunification with a Belgian national, a decision must first be made on withdrawing or suspending the entry ban. Then a decision will be taken on the visa application. Article 42(1) of the Vreemdelingenwet lays down a period of six months in that regard. Only if the entry ban is withdrawn or suspended and a visa or right of residence is granted in the context of family reunification can it be said that the separation between the third-country nationals concerned and the Belgian national is 'temporary', or that the period for which Belgians as EU citizens are actually forced to leave the territory of the Union in its entirety is limited.

35. It does not appear from the contested decisions that the EU citizenship of the Belgian family members concerned was taken into account. Nor is it clear that the DVZ examined whether the entry bans were imposed for reasons of, inter alia, public policy or national security, or whether account was taken of the best interests of the children concerned and/or family life within the meaning of Articles 7 and 24 of the Charter.

26 Article 11(3) of the Return Directive uses the expression 'withdrawing or suspending an entry ban'. I understand the terms 'opheffing of opschorting' used by the referring court in the questions in the order for reference as referring to a decision to withdraw or suspend ('intrekking of schorsing') an entry ban as set out in that provision of the directive.

27 Judgment of 8 March 2011, C-34/09, EU:C:2011:124.

28 The referring court states that there are two exceptions to the general rule. The first is on medical grounds, the second relates to applications for international protection.

36. In those circumstances, the referring court considers that the main question raised by the applications for family reunification in the cases at issue concerns the relationship between the entry bans imposed pursuant to the Return Directive and the protection of fundamental rights, in particular the right to respect for family life and the best interests of the child, as well as compliance with Article 20 TFEU. Accordingly, the following questions have been referred to the Court for a preliminary ruling:

'(1) Should EU law, in particular Article 20 TFEU and Articles 5 and 11 of [the Return Directive], read in the light of Articles 7 and 24 of the Charter, be interpreted as precluding in certain circumstances a national practice whereby a residence application, lodged by a family member who is a third-country national in the context of family reunification with an EU citizen in the Member State where the EU citizen concerned lives and of which he is a national and who has not made use of his right of freedom of movement and establishment (a "static EU citizen"), is not considered — whether or not accompanied by a removal decision — for the sole reason that the family member and third-country national concerned is subject to a valid entry ban with a European dimension?

(a) Is it important when assessing such circumstances that there is a relationship of dependence between the family member and third-country national and the static Union citizen which goes further than a mere family tie? If so, what factors play a role in determining the existence of a relationship of dependence? Can guidance be drawn in that regard from the case-law relating to the existence of a family life under Article 8 of the ECHR and Article 7 of the Charter?

(b) With reference to minor children in particular, does Article 20 TFEU require more than a biological tie between the parent who is a third-country national and the child who is an EU citizen? Is it important in that regard that cohabitation is demonstrated or do emotional and financial ties suffice, such as a residential or visiting arrangement and the payment of maintenance? Can guidance be drawn in that regard from what was stated in the Court of Justice judgments [in *Ogieriakhi*;[29] *Singh and Others*;[30] and *O and Others*.[31] See also in that regard *Chavez-Vilchez and Others*, currently pending before the Court[32]]?

(c) Is the fact that family life came into being at a moment when the third-country national was already subject to an entry ban and thus aware of the fact that his stay in the Member State was illegal, important for the assessment of such circumstances? Could that fact be of relevance to combat the possible abuse of residence procedures in the context of family reunification?

(d) Is the fact that no legal remedy under Article 13(1) of [the Return Directive] was applied for against the decision to impose an entry ban or the fact that the appeal against the decision to impose an entry ban was rejected important for the assessment of such circumstances?

(e) Is the fact that the entry ban was imposed on grounds of public policy or on grounds of irregular stay a relevant factor? If so, must an examination also be undertaken of whether the third-country national concerned also represents a genuine, real and sufficiently serious threat to one of the fundamental interests of society? In that regard, can Articles 27 and 28 of [Directive 2004/38], which were transposed in Articles 43 and 45 of the Vreemdelingenwet,

29 Judgment of 10 July 2014, C-244/13, EU:C:2014:2068, paragraphs 38 and 39.

30 Judgment of 16 July 2015, C-218/14, EU:C:2015:476, paragraph 54.

31 Judgment of 6 December 2012, C-356/11 and C-357/11, EU:C:2012:776, paragraph 56.

32 Judgment of 10 May 2017, C-133/15, EU:C:2017:354. The latter case was pending at the time the referring court made its order for reference.

and the associated case-law of the Court of Justice on public policy, be applied by analogy to family members of static Union citizens? (See *Rendón Marín* and *CS*, currently pending before the Court).[33]

(2) Should EU law, in particular Article 5 of [the Return Directive] and Articles 7 and 24 of the Charter, be interpreted as precluding a national practice whereby a valid entry ban can be invoked in order not to consider a subsequent application for family reunification with a static EU citizen, lodged in the territory of a Member State, without taking due account of family life and the best interests of the children involved, which were mentioned in that subsequent application for family reunification?

(3) Should EU law, in particular Article 5 of [the Return Directive] and Articles 7 and 24 of the Charter, be interpreted as precluding a national practice whereby a decision on removal is taken with regard to a third-country national who is already subject to a valid entry ban, without taking due account of family life and the best interests of the children involved, which were mentioned in a subsequent application for family reunification with a static EU citizen, lodged after the entry ban was imposed?

(4) Does Article 11(3) of the [Return Directive] imply that a third-country national must in principle always lodge an application for withdrawing or suspending a current and final entry ban outside the European Union or are there circumstances in which he can also lodge such an application in the European Union?

(a) Must the third and fourth subparagraphs of Article 11(3) of [the Return Directive] be understood to mean that the requirement laid down in the first subparagraph of Article 11(3) of [that directive], to the effect that the withdrawal or the suspension of the entry ban can be considered only if the third-country national concerned is able to demonstrate that he or she has left the territory in full compliance with a return decision, must plainly have been met in every individual case or in all categories of cases?

(b) Do Articles 5 and 11 of [the Return Directive] preclude an interpretation whereby a residence application in the context of family reunification with a static EU citizen, who has not exercised his right of freedom of movement and establishment, is regarded as an implicit (temporary) application to withdraw or suspend the valid and final entry ban, if it is shown that the residence conditions have not been met, the valid and final entry ban is revived?

(c) Is the fact that the obligation to lodge a request for withdrawing or suspending an entry ban in the country of origin may entail only a temporary separation between the third-country national and the static EU citizen a relevant factor? Are there nevertheless circumstances in which Articles 7 and 24 of the Charter preclude such a temporary separation?

(d) Is the fact that the only effect of the obligation to lodge a request for withdrawing or suspending an entry ban in the country of origin is that the EU citizen would, if necessary, only have to leave the territory of the European Union in its entirety for a limited time a relevant factor? Are there circumstances in which Article 20 TFEU nevertheless precludes the fact that the static EU citizen would have to leave the territory of the European Union in its entirety for a limited time?'

37. Written observations have been submitted on behalf of Ms K.A. and Mr M.Z., the Belgian and Greek Governments and the European Commission. At the hearing on 28 February 2017, all of those parties presented oral submissions together with Ms M.J. and Ms N.N.N.

33 Judgments of 13 September 2016, C-165/14, EU:C:2016:675, and C-304/14, EU:C:2016:674. Those cases were pending at the time the referring court made its order for reference.

Assessment

Preliminary observations

38. The seven cases at issue have the following common features. Each concerns: (i) an EU citizen who has never exercised his rights of freedom of movement (prima facie a purely internal situation); (ii) a third-country national recognised under national law as a family member of that EU citizen who makes a residence application for the purposes of family reunification; and (iii) a situation in which that application is not examined by the DVZ: it is refused because the third-country national concerned is subject to an entry ban which is both valid and final and the application has not been made from outside the territory of the European Union.

39. All seven cases fall outwith the scope of Directive 2004/38 since they concern EU citizens who have always resided in Belgium (the Member State of nationality). The EU citizens are not therefore covered by the definition of 'beneficiary' for the purposes of that directive.[34] In the light of the exposition of the factual background given by the referring court, I add for the sake of good order that those cases are also not within the ambit of Directive 2003/86/EC on the right to family reunification.[35] That directive applies to third-country national sponsors who reside lawfully within EU territory and whose family members seek entry into and residence in a Member State in order to preserve the family unit. That is plainly not the position here.

40. Identifying when EU citizenship will give rise to derived rights for third-country nationals and the limitations that may be placed upon such rights now forms a rich seam of this Court's case-law. The Court's ruling in *Ruiz Zambrano*[36] is the landmark decision. That case established that Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status. That criterion was qualified in *Dereci and Others*, where the Court stated that that criterion 'refers to situations in which the Union citizen has, in fact to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole'.[37] The Court's recent judgment in *Chavez-Vilchez and Others*[38] sets out how the case-law has evolved.

41. The Court has held that 'there are 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'.[39] In *Ruiz Zambrano*, the parent of minor children who were Belgian nationals was subject to an expulsion order and the competent authorities refused his request for a

34 See point 6 above and see also, judgment of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 50, and 52 to 54.

35 Council Directive of 22 September 2003 (OJ 2003 L 251, p. 12). That directive applies to sponsors: that is, third-country nationals residing lawfully in a Member State who apply, or whose family members apply, for family reunification to be joined with him or her. The family members of EU citizens are expressly excluded from the scope of that directive (Article 3(3)). Article 5 makes provision for the submission and examination of applications that fall within the scope of Directive 2003/86, see point 56 below.

36 Judgment of 8 March 2011, C-34/09, EU:C:2011:124, paragraphs 41 to 43.

37 Judgment of 15 November 2011, C-256/11, EU:C:2011:734, paragraph 66. The reference to the territory of the Union as a whole in the context of Article 20 TFEU refers to all 28 Member States (see footnote 3 above).

38 Judgment of 10 May 2017, C-133/15, EU:C:2017:354, paragraphs 60 to 65.

39 Judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32 and the case-law cited.

work permit. The Court ruled that such decisions would have the effect of depriving Mr Ruiz Zambrano's children of the genuine enjoyment of the rights flowing from Article 20 TFEU. The decisions at issue in that case would have resulted in the children, EU citizens, being obliged to leave the territory of the European Union. [40]

42. Is the practice applied in the present seven cases of refusing even to examine an application for family reunification so closely linked to the rights conferred on EU citizens under Article 20 TFEU (read in the light of Articles 7 and 24 of the Charter) that it falls within the scope of EU law?

43. The referring court asks specifically whether the Return Directive applies in that context. Whilst that directive sets out common standards and procedures for 'returning illegally staying third-country nationals', it does not necessarily provide for an associated and equivalent process to the examination that is to be conducted in cases where a third-country national applies for family reunification (as in the main proceedings).

44. The referring court frames its questions by reference to an entry ban accompanied by a decision on *removal*. It appears from the order for reference that the entry bans were imposed pursuant to measures that implement the Return Directive into national law. That directive distinguishes between a 'return decision' (Article 3(4)) and a decision, on 'removal' (Article 3(5)). [41] It follows from the definition of an 'entry ban' (Article 3(6)) that such bans accompany a return decision, not a decision on removal. [42] In each of the seven cases at issue the national administration has adopted a decision requiring the third-country national concerned to leave Belgium. I understand those decisions to equate to return decisions for the purposes of Directive 2008/115. The referring court has not indicated that measures were taken to enforce a return decision in any particular case, or that a decision on removal was adopted.

Questions 1, 2 and 3

45. By Question 1 the referring court essentially asks whether, where third-country nationals subject to an entry ban (under the Return Directive) apply to join EU citizen family members in the Member State of nationality who have never exercised rights to freedom of movement, a national practice of refusing to examine such applications, in particular whereby the competent authorities do not examine whether the circumstances fall within the concept of 'very specific situations' [43] identified in the Court's case-law under Article 20 TFEU, is precluded by EU law. Five detailed sub-questions concerning the factors to be taken into account in order to assess whether a relationship of dependency exists have also been raised. [44]

46. In brief, Question 2 seeks to establish whether Article 5 of the Return Directive precludes the administrative practice at issue in cases which do not fall within the ambit of Article 20 TFEU. Question 3 asks whether, in circumstances where a third-country national is already subject to an entry ban, such an administrative practice is precluded if a decision on removal is taken without due regard for family life and the best interests of the child (as raised in a subsequent application for family reunification). The three questions are closely linked and the issues to be assessed are tightly interwoven. I shall therefore examine them together.

40 See, more recently, judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 74, and *CS*, C-304/14, EU:C:2016:674, paragraph 29.

41 Judgment of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraph 47.

42 See points 10, 12 and 14 above. Return decisions are not necessarily always accompanied by an entry ban. Article 6(6) allows Member States to adopt a return decision and an entry ban at the same time, but it is clear from the directive's general scheme that those two decisions are separate. A return decision results from the fact that the initial stay is unlawful whereas an entry ban applies to any subsequent stay making it unlawful. See Article 11(1) of the Return Directive and see further judgment of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraph 50.

43 Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 63.

44 See point 60 below.

National practice of not examining applications for family reunification and Article 20 TFEU

47. The administrative practice at issue operates as follows. Where a third country national subject to a valid entry ban of at least three years which has become final subsequently makes an application from within Belgium for residence for the purposes of family reunification with an EU citizen, his application is not examined by the competent authorities. There is no leeway in specific cases to take account of family life, the best interests of the child where relevant or the fact that the Belgian family member has EU citizenship.

48. The Belgian Government submits that that administrative practice falls within the wide margin of discretion afforded to Member States and therefore the answer to Question 1 should be 'no'. The Commission and the applicants who made observations in these proceedings disagree with Belgium. Greece considers that subject to an assessment of the circumstances of the case, the applications in the main proceedings fall within the scope of Article 20 TFEU.

49. I too reject the Belgian Government's submissions.

50. First, it seems to me that the administrative practice is so closely bound up with the EU citizen's right to move and reside freely within the territory of the Member States that it has an intrinsic connection with the rights guaranteed by Article 20 TFEU. The effect of such a practice is automatically to exclude consideration of whether, in an individual case, the third-country national and the EU citizen concerned come within the concept of 'very specific situations', which might require the Member State to give effect to that citizen's rights within EU territory. In my view that situation risks undermining the genuine enjoyment of the substance of the rights which flow from the status of EU citizenship.

51. The referring court points out that under national rules the third-country nationals concerned must in principle leave Belgium and the territory of the Member States altogether. While an entry ban is in force no residence application may be lodged on Belgian territory. Any request to withdraw or suspend the entry bans can be made only from outside Belgium and requires written proof that the applicant has left that Member State.

52. Against that background, a practice of not even examining applications for family reunification may have potentially drastic consequences for the EU citizen concerned where there is a dependent relationship that comes within the concept of the 'very specific situations' referred to above.[45] That view is reinforced by the referring court's observation that where there is a relationship of dependence between the EU citizen family member and the third-country national, the Belgian national can be forced to leave EU territory in order to accompany his family member. That in turn results in depriving the EU citizen concerned of the genuine enjoyment of his rights as a citizen of the European Union.

53. Second, in so far as the administrative practice described by the referring court falls within the scope of EU law, it is necessary to take account of Articles 7 and 24 of the Charter.[46] The automaticity of the national practice at issue means that there is no scope for establishing in an individual case whether the EU citizen's rights enshrined in those provisions are guaranteed.[47]

45 See points 40 and 41.

46 Article 51(1) of the Charter, see further judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 78.

47 See points 2 and 3 above.

54. Third, while it is true that Member States enjoy a margin of discretion to lay down in their domestic legal systems procedural rules governing actions for safeguarding rights which individuals derive from EU law, those rules must not be such as to render virtually impossible or excessively difficult the rights conferred by Article 20 TFEU on EU citizens. [48]

55. Where there is a relationship of dependency with the third-country national concerned, a national practice such as that described in the order for reference applied automatically and with no scope for exceptions is liable adversely to affect the EU citizen's right to reside in not only the Member State of nationality, but the EU territory as a whole. [49]

56. Finally, the practice described by the referring court creates a potential anomaly. The process for submitting and examining applications for family reunification under Directive 2003/86 is not on all fours with the national procedures in the cases at issue. That said, a third-country national sponsor residing legally in the European Union is guaranteed more rigorous scrutiny of his application for family reunification under that directive than is afforded to EU citizens such as those in the seven cases at issue.

57. Article 5 of Directive 2003/86 deals with the submission and examination of applications for family reunification. Unlike the administrative practice described by the referring court, the obligations on Member States to examine applications for family reunification under that directive mean that the competent authorities cannot automatically refuse to examine applications under that directive where the third-country national family member is already in the Member State in question. [50] Thus, the process for submitting and examining applications under Directive 2003/86 appears to place the third-country national sponsor (within the meaning of that directive) in a more favourable position than that of an EU citizen in a position such as that set out in the order for reference, whose rights are enshrined in Article 20 TFEU.

58. I therefore consider that the reply to the issue of principle raised by the referring court in its first question is that the administrative practice at issue is incompatible with Article 20 TFEU read in the light of Articles 7 and 24 of the Charter.

59. If, contrary to my view this Court considers that the administrative practice at issue does not fall within the scope Article 20 TFEU, the fundamental rights of the individuals concerned would not necessarily be unprotected. The national court would need to consider whether that practice is compatible with Article 8 of the ECHR. [51] In that context the principle of proportionality must be observed. [52] Thus, it is doubtful whether an administrative practice that is applied automatically to reject applications for a residence permit for the purposes of family reunification without substantive examination could be said to take account of the factors to be assessed in establishing whether the right to family life is ensured. [53]

48 See, by analogy, judgment of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 80.

49 See further point 33 above.

50 By virtue of Article 5(3), the *general* rule is that such applications should be submitted and examined when the family members are residing outside the territory of the Member State where the sponsor resides. However, 'by way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory'.

51 All the Member States are parties to the ECHR, which enshrines in Article 8 the right to respect for private and family life. That provision would be relevant to any aspect of these seven cases that was deemed to fall outwith the scope of EU law. See judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 79.

52 See, for example, ECtHR, 3 November 2011, *Arvelo Aponte v. the Netherlands*, CE:ECHR:2011:1103JUD002877005, §§ 57 and 58.

53 See by analogy judgment of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 99.

The relationship of dependency for the purposes of Article 20 TFEU

60. The following detailed sub-questions are posed with a view to establishing the factors to be considered in any assessment concerning the relationship of dependency for the purposes of Article 20 TFEU, construed in the light of Article 7 of the Charter.[54] What are the relevant factors to take into account in relation to family life and minor children (Questions 1(a) and (b))? Are the following factors relevant to that assessment: whether there is a likelihood of abuse of process, namely whether family life came into being when the third-country national was already subject to an entry ban; whether steps were taken to challenge the entry ban before it became final; and whether the ban in question was imposed on grounds of public policy or on grounds of an irregular stay (Questions 1(c), (d) and (e))?

61. Article 7 of the Charter must be construed in the light of Article 8 of the ECHR.[55] The European Court of Human Rights ('the Strasbourg Court') has ruled that the essential object of Article 8 is to protect the individual concerned against arbitrary action by the public authorities, although that provision does not impose on a State a general obligation to authorise family reunification.[56] The assessment for the purposes of Article 8 of the ECHR involves balancing the competing interests of the individual concerned and the State. It is necessary to consider the consequences of the rupture of the family unit that would ensue if the third-country national family member is expelled. In so doing, account is taken of the length of time that the State concerned has tolerated the presence of that person on its territory: whether spouses (or cohabitees) have a common background, whether the third-country national is responsible for the day-to-day care of any children and the financial responsibilities and emotional ties within the family.[57]

62. On the other hand, this Court has already ruled that the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in EU territory, for the members of his family who do not have the nationality of a Member State to be able to reside with him in EU territory is not sufficient in itself to support the view that the EU citizen will be forced to leave the European Union if such a right is not granted.[58]

63. There is no corresponding right in the ECHR to Article 24 of the Charter. Although the Charter does not define the word 'child', it appears to be common ground that the offspring of Mr R.I., Ms M.J., Ms N.N.N, and Mr O.I.O. are children for the purposes of that provision. It is necessary to assess whether maintaining the relationship with the parent is in each child's best interests. A child's status as an EU citizen and the residence rights which flow therefrom do not of themselves guarantee a right of residence to his parents. Relevant factors include who has custody of the child and whether the child is legally, financially or emotionally dependent on the third-country national parent.[59]

64. In response to the referring court's question as to whether the Court's case-law on Directive 2004/38 should apply, it seems to me that, as situations within the scope of that directive are also within the ambit of EU law, it may be possible to extrapolate certain principles, particularly those concerning the application of the Charter, which might apply by analogy. However, the specific criteria that are considered under that directive cannot be transposed to an assessment under Article 20 TFEU. The conditions that apply where an EU citizen wishes to obtain a right of residence

54 See point 45 above.

55 The Explanation on Article 7 of the Charter states that the rights guaranteed therein correspond to those enshrined in Article 8 of the ECHR which states that everyone has the right to respect for, inter alia, his family life (Article 8(1)). There shall be no interference with that right by a public authority, 'except such as in accordance with the law and is necessary in a democratic society in the interests of national security or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or moral, or for the protection of the rights and freedoms of others' (Article 8(2)).

56 ECtHR, 3 October 2014, *Jeunesse v. the Netherlands* [GC], CE:ECHR:2014:1003JUD001273810, §§ 106 to 109.

57 ECtHR, 3 October 2014, *Jeunesse v. the Netherlands* [GC], CE:ECHR:2014:1003JUD001273810, §§ 115 to 121.

58 Judgment of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 68.

59 Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraphs 68 to 70.

in another Member State for a period longer than three months, pursuant to Article 7(1) of Directive 2004/38, and the derived right of residence which may extend to third-country national family members of that EU citizen by virtue of Article 7(2) of that directive are not directly relevant in any assessment for the purposes of Article 20 TFEU. [60]

65. In my view, whether family life came into being at a point when the third-country national was already subject to an entry ban is not automatically a relevant consideration. It is of course true that the scope of EU law cannot be extended to cover abuses. However, it is also right that, in the context of the assessment which must be conducted under Article 20 TFEU, there is no place for a *general* presumption of abuse when a family link arises at the point when a third-country national finds himself to be an irregular stayer. It should not be assumed *ipso facto* that the person concerned created the family link in order to remain in EU territory. Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining that advantage. [61] Moreover, whilst it is true that the Strasbourg Court has described the circumstance of the third-country national concerned becoming a parent during the period when their immigration status was precarious as an 'important consideration', that Court has assessed that particular factor in relation to other elements of the case. [62] Becoming the parent of a child during such a period of uncertainty is not necessarily considered to be an attempt to abuse the immigration rules. [63]

66. I have already expressed the view that the issuing of a return decision accompanied by an entry ban should not play a part in the assessment of whether there are 'very specific situations' which give rise to a dependent relationship for the purposes of Article 20 TFEU. [64] It is therefore unnecessary to consider whether a third-country national has appealed against or sought review of any such measure. It is likewise unnecessary to examine in that context whether the entry ban was imposed on grounds of public policy or solely because of an irregular stay. In relation to the latter point, it should be noted that under the Return Directive entry bans do not exist independently of the return decision. [65] Thus, the public policy ground can be invoked only in relation to the latter. There is no basis for issuing an entry ban alone on such grounds. [66]

67. Conversely, if an assessment of the factual circumstances in any particular case demonstrates that that case falls outwith the concept of 'very specific situations', such a case is not within the ambit of EU law as regards the rights of the EU citizens concerned. In those circumstances the competent authorities would nevertheless be obliged to make an assessment on the basis of Article 8 of the ECHR, as all Member States are signatories to the Convention. [67]

60 In its judgment of 10 July 2014, *Ogieriakhi*, C-244/13, EU:C:2014:2068, the Court referred in particular to Articles 7(2) and 16(1) of Directive 2004/38. The latter provision confers a right of permanent residence to EU citizens who reside in the host Member State for a continuous period of five years and who have the right of permanent residence there. Pursuant to Article 16(2) of that directive, third-country national family members who have legally resided with that EU citizen in the host State for such a period are also able to claim a right of permanent residence. See also the judgment of 16 July 2015, *Singh and Others*, C-218/14, EU:C:2015:476, paragraphs 56 to 59 and point 6 above.

61 Judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 58 and the case-law cited.

62 See point 61 above.

63 See, for example, ECtHR, 3 November 2011, *Arvelo Aponte v. the Netherlands*, CE:ECHR:2011:1103JUD002877005, § 60.

64 See point 40 above.

65 See Article 11(1) of the Return Directive and point 44 together with footnote 42 above.

66 An entry ban may exceed five years if the third-country national represents a serious threat, inter alia, to public policy (Article 11(2)).

67 Judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 72 and 73, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 44.

The Return Directive

68. The referring court also seeks to ascertain whether Article 5 of the Return Directive read in the light of Articles 7 and 24 of the Charter precludes the administrative practice at issue in so far as these seven cases do not fall within the ambit of Article 20 TFEU (Question 2).

69. Belgium submits that the administrative practice described by the referring court in its order for reference is in accordance with the Return Directive. Such a practice seeks to ensure that return decisions are truly definitive and are not re-opened by a 'back door' mechanism which allows third-country nationals subject to a valid entry ban to submit claims for family reunification. That would be incompatible with an effective removal policy and it would be to the detriment of other third-country nationals who comply with return decisions.

70. I disagree with Belgium's analysis.

71. The rights of EU citizens to move and reside freely within the territory of the European Union are not governed by the Return Directive. That act establishes rules applicable to third-country nationals who do not fulfil or no longer fulfil the conditions for entry, stay or residence in a Member State.[68] In principle the Return Directive has no bearing as to whether a third-country national benefits from derived rights under Article 20 TFEU to reside with an EU citizen within the territory of a Member State. That assessment is made through the prism of the rights enjoyed by the EU citizen, a matter which the Return Directive is not designed to regulate. Still less does the Return Directive provide a basis for a national policy of automatically refusing to examine requests for family reunification.

72. The assessment conducted for the purposes of Article 5 of the Return Directive is not necessarily the same as that required to determine an application for family reunification based upon Article 20 TFEU. Article 5 of the Return Directive refers to the need to take account of the best interests of the child and family life when implementing the directive.[69] Within the context of the Return Directive, unaccompanied minors are recognised as a particularly vulnerable group when required to return to their State of origin.[70] The best interests of the child should therefore be taken into account in such circumstances and their return should be ordered only after those interests have been assessed.[71] With regard to family life, the scheme of the directive indicates that Member States should consider that element in making a case-by-case assessment of the circumstances relating to the individual concerned.[72]

73. Thus, whether the competent authorities have taken account of the best interests of the child and family life in accordance with Article 5(a) and (b) of the Return Directive does not necessarily cover the factors that are to be taken into account in an application for family reunification.[73] Moreover, when the entry bans were imposed in the cases at issue there could not have been any such assessment because the applications for family reunification post-dated the return decisions and the accompanying entry bans.

68 See recitals 5 and 6 and Article 1 of the Return Directive.

69 See recital 22 of the Return Directive.

70 See Article 3(9) of the Return Directive. See further Article 5 of the Return Directive and judgment of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraphs 49 and 50.

71 See Article 10 and recital of 6 the Return Directive. See further judgment of 5 November 2014, *Mukarubega*, C-166/13, EU:C:2014:2336, paragraph 62.

72 That is confirmed by the provisions concerning the exception to the general rule that Member States must issue return decisions to illegally staying third-country nationals in their territory, such as set out in Article 6(4). See further the provisions on voluntary departure in Article 7(2) and the procedural safeguards in Chapter III of the Return Directive.

73 See points 61 to 63 above.

74. The referring court also seeks guidance on whether the administrative practice at issue is compatible with EU law in cases where a decision on removal is adopted (Question 3). However, there is no indication in the account of the facts set out in the order for reference that such a decision (within the meaning of Article 3(5) of the Return Directive) was adopted in relation to any of the applicants. It therefore seems to be unnecessary to answer that question. I add for the sake of good order that in view of the confusion caused by using 'decision on removal' as a synonym for 'return decision' it may be that the referring court is alluding to the fact that in all cases apart from that of Mr R.I., the third-country national concerned is subject to more than one return decision. When implementing the Return Directive Member States are obliged to take account of Article 5.[74] There is no provision for an exception to those obligations in cases where an individual is subject to subsequent return decisions. Thus, it is necessary to take account of the obligations in Article 5(a) and (b) in relation to such decisions.

75. Notwithstanding that applications for family reunification and return decisions are separate procedures, it may be true that there is some overlap between the issues that arise. However, it does not follow that the former is an 'appeal' or a mechanism to re-open the return procedure. The criterion that must be met of 'very specific situations' to establish derived rights of residence for a third-country national on the basis of Article 20 TFEU is exacting. In the light of those circumstances I do not accept that simply examining such applications undermines the procedures laid down by the Return Directive.

The cases at issue

76. If the Court agrees with me that these seven cases fall within the scope of Article 20 TFEU and that the rules in the Return Directive should not form part of the assessment on the merits, it will be necessary for the competent authorities to determine in each case at issue whether there is in fact a relationship of dependency between the EU citizen and the third-country national family member.[75] The assessment for each applicant must be made with due regard for Articles 7 and 24 of the Charter.

77. As regards Mr R.I., Ms M.J., Ms N.N.N., and Mr I.O.O, all of whom are parents of an EU citizen who is a minor child, it is relevant, inter alia, to take account of the fact that the child has one parent who is an EU citizen and to proceed to examine which parent has (or whether both have) custody and whether the child is legally, financially or emotionally dependent on the third-country national parent.[76]

78. Mr O.I.O.'s position is particular in so far as the referring court states in the order for reference that the Belgian mother of his child has sole custody, that she is not financially dependent on him and that his contact with his daughter is suspended pursuant to a court order. That information indicates that he might not be considered to be the main or primary carer of the child and that there may be no relationship of dependence.

79. In relation to Ms K.A. and Mr M.Z., the adult children of a Belgian father, the competent authorities should take into account that a desire to bring about family reunification in Belgium is not sufficient of itself.[77] In determining whether there is a relationship of dependency the fact that the EU citizen provides financial support for the third-country national adult child (see the case of Mr M.Z.) is not a relevant consideration. Rather, the Court has stated 'that it is the relationship of dependency

74 Naturally, the Return Directive takes account of fundamental rights, see recital 24.

75 See by analogy judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 70.

76 The parental relationship of the third-country national with his EU citizen child is not of itself sufficient: see judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 50 to 52. See also judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 71.

77 Judgment of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 39.

between the Union citizen … 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 practice, 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'.[78] As regards the adult children of an EU national parent, an example of such circumstances might be where an elderly or infirm parent relies on the presence of his third-country national adult child and would be obliged to leave the European Union if that child is expelled from the Member State concerned.

80. Equally, an assessment taking that essential element into account should be made in relation to Mr B.A. The fact that he and his cohabitee are not blood relatives does not seem to me to be a relevant factor, since he is considered to be a family member for the purposes of national law.[79]

81. I therefore conclude that EU law, in particular Article 20 TFEU read together with Articles 7 and 24 of the Charter, precludes a national practice whereby the competent authorities of a Member State automatically refuse to examine applications for residence within their territory made by a third-country national, who is the subject of a return decision and an associated entry ban, to join a family member who is an EU citizen residing in the Member State of which he has nationality and who has never exercised his rights to freedom of movement. The Return Directive does not provide a basis for justifying such a practice. Rather, there must be an assessment of the individual circumstances of the case at issue before the national authorities adopt a decision on the application for family reunification.

Question 4

82. The referring court seeks clarification as to the interpretation of Article 11(3) of the Return Directive concerning the withdrawal or suspension of an entry ban. Four specific questions are put. These cover matters including the interpretation of the third and fourth subparagraphs of Article 11(3)[80] and whether the national provisions at issue, particularly those concerning withdrawing or suspending an entry ban, are compatible with EU law.[81]

83. I shall start with some general comments concerning entry bans which are the focus of the fourth question. Under national rules, an entry ban applies from the date of notification, rather than the date when the third-country national concerned leaves Belgian territory. However, the Court has ruled that such bans are intended to supplement return decisions.[82] It has also held that the period of application of an entry ban begins to run from the date on which the person concerned has actually left EU territory.[83] The illegal stay of the third-country national concerned is governed by the return decision rather than the entry ban. The national rules as described in the order for reference do not appear to reflect the wording, purpose and scheme of the Return Directive in that respect.

84. Next, given my view that the administrative practice at issue is precluded by Article 20 TFEU, it follows that I consider that the rules relating to entry bans are not relevant to the assessment that is to be carried out for the purposes of that provision, as the applications for family reunification must be examined on their merits. Thus, should the competent authorities determine in any given case that

78 Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 69.

79 Judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 55.

80 See point 14 above.

81 See points 18 and 19.

82 Judgment of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraphs 45 and 51.

83 Judgment of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraph 53.

any such application should be allowed, it will follow that the applicant's residence on the national territory will be lawful and, by virtue of Article 2(1), that the Return Directive can no longer apply to him, as his stay would no longer be considered to be illegal within the meaning of Article 3(2) of that directive. [84]

85. Conversely, if those authorities determine that the application cannot succeed, the applicant's presence on the national territory will continue to fall within the definition of an 'illegal stay' and he will be subject to the existing return decision with the associated entry ban. It will then be for the relevant competent authorities to implement that decision in accordance with the Return Directive, by adopting the necessary measures, such as a decision on removal pursuant to Article 8 of that directive. Any such decision will naturally be subject to the procedural safeguards in Chapter III.

86. As no decision on the merits has yet been taken in relation to the cases at issue in the main proceedings, it is not strictly speaking necessary to interpret Article 11(3) of the Return Directive in order to resolve those cases. It is conceivable that that provision might be relevant at a later stage, but that depends on the result of the competent authorities' assessment of each case on its merits. I therefore propose that the Court should not answer Question 4.

Conclusion

87. In the light of the foregoing considerations, I consider that the reply to the questions referred by the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) should be as follows:

– European Union law, in particular Article 20 TFEU read together with Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, precludes a national practice whereby the competent authorities of a Member State automatically refuse to examine applications for residence within their territory made by a third-country national, who is the subject of a return decision and an associated entry ban to join a family member who is an EU citizen residing in the Member State of which he has nationality and who has never exercised his rights to freedom of movement.

– Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals does not provide a basis for justifying such a practice.

– Rather, in such a case there must be an assessment of the individual circumstances of the case at issue before the national authorities adopt a decision on the application for family reunification.

84 The competent authorities dealing with applications for family reunification and the competent authorities charged with administration of the immigration rules may not necessarily be the same. Likewise, it does not follow that a successful application for family reunification will automatically render invalid or otherwise cancel an earlier return decision. The immigration status of the individual concerned may have to be regularised in a separate administrative process, in accordance with the relevant national rules.