Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

10 May 2017*

(Reference for a preliminary ruling — Union citizenship — Article 20 TFEU — Access to social assistance and child benefit conditional on right of residence in a Member State — Third-country national responsible for the primary day-to-day care of her minor child, a national of that Member State — Obligation on the third-country national to establish that the other parent, a national of that Member State, is not capable of caring for the child — Refusal of residence possibly obliging the child to leave the territory of the Member State, or the territory of the European Union)

In Case C-133/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Higher Administrative Court, Netherlands), made by decision of 16 March 2015, received at the Court on 18 March 2015, in the proceedings

H.C. Chavez-Vilchez,

P. Pinas,

U. Nikolic,

X.V. Garcia Perez,

J. Uwituze,

I.O. Enowassam,

A.E. Guerrero Chavez,

Y.R. L. Wip

v

Raad van bestuur van de Sociale verzekeringsbank,

College van burgemeester en wethouders van de gemeente Arnhem,

College van burgemeester en wethouders van de gemeente 's-Gravenhage,

College van burgemeester en wethouders van de gemeente 's-Hertogenbosch,

College van burgemeester en wethouders van de gemeente Amsterdam,

* Language of the case: Dutch.

College van burgemeester en wethouders van de gemeente Rijswijk,

College van burgemeester en wethouders van de gemeente Rotterdam,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, E. Juhász, M. Berger, A. Prechal and E. Regan, Presidents of Chambers, A. Rosas (Rapporteur), C. Toader, M. Safjan, D. Šváby, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: M. Szpunar,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2016,

after considering the observations submitted on behalf of:

— Ms Guerrero Chavez, Ms Enowassam, Ms Uwituze, Ms Garcia Perez, Ms Nikolic, Ms Pinas and Ms Chavez-Vilchez, by E. Cerezo-Weijsenfeld, J. Kruseman, S. Çakici-Reinders and W. Fischer, advocaten,

— Ms Wip, by H. de Roo and T. Weterings, advocaten,

— the Netherlands Government, by C.S. Schillemans and K. Bulterman, acting as Agents,

— the Belgian Government, by C. Pochet, M. Jacobs and S. Vanrie, acting as Agents,

— the Danish Government, by C. Thorning, M. Lyshøj and M. Wolff, acting as Agents,

— the French Government, by R. Coesme, acting as Agent,

— the Lithuanian Government, by R. Krasuckaitė and V. Čepaitė, acting as Agents,

— the Polish Government, by B. Majczyna, acting as Agent,

— the United Kingdom Government, by V. Kaye, C. Crane and M. Holt, acting as Agents, and by D. Blundell and B. Lask, Barristers,

— the Norwegian Government, by I. Jansen and K. Moen, acting as Agents,

— the European Commission, by D. Maidani, C. Tufvesson and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20 TFEU.

2 The request has been made in proceedings between, on the one hand, Ms H.C. Chavez-Vilchez and seven other third-country nationals, who are each mothers of one or more minor children who are of Netherlands nationality and for whose primary day-to-day care they are responsible, and, on the other, the competent Netherlands authorities, concerning the refusal of their applications for social assistance and child benefit, on the ground that they did not have a right of residence in the Netherlands.

Legal context

European Union law

3 Article 2 of Directive 2004/38/EC 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, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), headed 'Definitions', states:

'For the purpose of this Directive:

(1) "Union citizen" means any person having the nationality of a Member State;

(2) "Family member" means:

…

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

(3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

4 Article 3(1) of that directive, that article being headed 'Beneficiaries', provides:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

5 Article 5 of Directive 2004/38, headed 'Right of entry', states:

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

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with [Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1)] or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

…’

6 Article 7(1) and (2) of that directive read as follows:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c)

— …

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).’

Netherlands law

7 Article 1 of the Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000), in the version applicable at the material time (‘the Law on Foreign Nationals’), provides:

‘For the purposes of the present Law and of the provisions adopted on the basis thereof:

…

(e) Community nationals shall mean:
1° nationals of the Member States of the European Union who, under the Treaty establishing the European Community, have the right to enter and reside on the territory of another Member State;
2° the family members of those persons referred to in paragraph 1 who are nationals of a third State and who, on the basis of a decision taken in application of the EC Treaty, are entitled to enter and reside on the territory of a Member State;

…’

8 Article 8 of that Law provides:

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

…

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

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

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

(h) if, pending the decision on an application for administrative or judicial review, the present law, a provision adopted on the basis of the latter or a court order provides that the deportation of the applicant should be deferred until a decision has been taken on the application for review.’

9 Article 10 of the Law on Foreign Nationals provides:

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

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

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

10 The Vreemdelingencirculaire 2000 (the Circular of 2000 on Foreign Nationals), in the version applicable at the material time (‘the Circular on Foreign Nationals’), consists of a number of guidelines issued by the Staatssecretaris van Veiligheid en Justitie (the Secretary of State for Security and Justice, Netherlands). That circular is accessible to all and anyone may rely on those guidelines. In assessing applications for residence permits, the competent national authority, in this case the Immigratie- en Naturalisatiedienst (the Immigration and Naturalisation Service; ‘the IND’) is required to comply with those guidelines. It may depart from them only if it provides reasons for so doing and in exceptional cases that were not considered when the guidelines were drawn up.

11 Section B, point 2.2 of the Circular on Foreign Nationals states:

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

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

— that child is dependent on the foreign national and lives with that foreign national; and

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

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

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

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

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

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

— is in detention; or

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

12 Pursuant to the Wet Werk en Bijstand (Law on Work and Social Assistance; 'Law on social assistance') and the Algemene Kinderbijslagwet (General Law on Child Benefit; 'Law on child benefit'), parents who are third-country nationals must be lawfully resident in the Netherlands and therefore qualify for a right of residence in order to be entitled to claim social assistance and child benefit.

13 On 1 July 1998 the Wet tot wijziging van de Vreemdelingenwet en enige andere wetten teneinde de aanspraak van vreemdelingen jegens bestuursorganen op verstrekkingen, voorzieningen, uitkeringen, ontheffingen en vergunningen te koppelen aan het rechtmatig verblijf van de vreemdeling in Nederland (Law to amend the Law on Foreign Nationals and other laws in order to link the claim of foreign nationals against administrative bodies in respect of provisions, facilities, benefits, exemptions and permits to the lawful residence of the foreign national in the Netherlands) of 26 March 1998 (Stb. 1998, No 203) entered into force. For foreign nationals other than nationals of a Member State of the European Union, that law introduced, into the social assistance legislation, the requirement to obtain from the competent authority a residence permit in order to be treated in the same way as a Netherlands national, and, into the legislation on child benefit, the equivalent requirement in order to be regarded as an insured person.

14 An application for a residence permit is to be submitted to the IND. The IND makes the decision on a right of residence on behalf of the Secretary of State for Security and Justice.

15 Applications for child benefit under the Law on child benefit are to be submitted to the Sociale verzekeringsbank (Social Insurance Fund, Netherlands; 'the SvB').

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

17 Article 11 of the Law on social assistance provides:

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

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

…’

18 Article 16 of the Law on social assistance provides:

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

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

19 Article 6 of the Law on child benefit provides:

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

(a) residents;

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

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

The disputes in the main proceedings and the questions referred for a preliminary ruling

20 The eight disputes in the main proceedings relate to applications for social assistance (*bijstandsuitkering*) and child benefit (*kinderbijslag*), submitted to the competent Netherlands authorities, pursuant to, respectively, the Law on social assistance and the Law on child benefit, by third-country nationals who are each mothers of one or more children of Netherlands nationality, whose fathers are also of Netherlands nationality. Those children have all been acknowledged by their fathers but live mainly with their mothers.

21 Ms Chavez-Vilchez, a Venezuelan national, came to the Netherlands in 2007 or 2008 on a tourist visa. Her relationship with a Netherlands national led, on 30 March 2009, to the birth of a child who has Netherlands nationality. The parents and the child lived in Germany until June 2011, when Ms Chavez-Vilchez and her child were compelled to leave the family home. They went to the emergency refuge in the municipality of Arnhem (Netherlands) and stayed there for some time. Ms Chavez-Vilchez has since then been responsible for the care of her child and has stated that the child’s father does not contribute to the child’s support or upbringing.

22 Ms Pinas, a national of Surinam, had been from 2004 the holder of a residence permit in the Netherlands; that permit was withdrawn in 2006. She lives in Almere (Netherlands) and is the mother of four children. One of the children, born on 23 December 2009 from a relationship with a Netherlands national, accordingly has Netherlands nationality. Ms Pinas and the father have joint custody with respect to that child but they live apart, and the father does not contribute to the child's support. The two parents remain in contact but there is no agreement on access rights. On 17 May 2011, Ms Pinas and her children were granted a residence permit for a fixed period. Consequently, child benefit was granted as from the third quarter of 2011.

23 Ms Nikolic came to the Netherlands in 2003 from the former Yugoslavia. Since she has no identity papers, her nationality is unclear. Her application for a residence permit was rejected in 2009. On 26 January 2010 her relationship with a Netherlands national led to the birth of a child, who has Netherlands nationality. Ms Nikolic lives in Amsterdam (Netherlands) and has custody of the child. Both live in a community refuge. Ms Nikolic has stated that she and the father of her child cannot live together, because he has been placed in a young persons' institution within which he is in a supported accommodation scheme.

24 Ms García Pérez, a Nicaraguan national, came to the Netherlands in 2001 or 2002 from Costa Rica, accompanied by a Netherlands national. Their relationship led to the birth on 9 April 2008 of a child, who has Netherlands nationality. Ms García Pérez lives in Haarlem (Netherlands) in a community refuge. She has custody of her child; the father does not contribute to the child's support, and his present whereabouts are unknown.

25 Ms Uwituze, a Rwandan national, gave birth on 12 December 2011 to a child who, like her father, has Netherlands nationality. The father does not contribute towards the child's support or upbringing. He has stated that he neither wishes to nor is able to care for the child. Ms Uwituze lives with her child in 's -Hertogenbosch (Netherlands) in a community refuge.

26 Ms Wip, a national of Surinam, has given birth to two children, on 25 November 2009 and 23 November 2012. Like their father, the children have Netherlands nationality. The parents are separated but the father maintains contact with the children several times a week. He receives social assistance and child benefit. He does not contribute to the support of the children and does no more than transfer the child benefit to Ms Wip. In the material period, Ms Wip was living in Amsterdam.

27 Ms Enowassam, a national of Cameroon, came to the Netherlands in 1999. Her relationship with a Netherlands national led to the birth, on 2 May 2008, of a child who has Netherlands nationality. The parents have joint custody of their child but live apart. The child is registered as living at the address of her father, but lives in fact with her mother, who lives in emergency reception facilities in The Hague (Netherlands). The child stays three week-ends a month with her father and sometimes spends holidays with him. The father pays EUR 200 a month in child support. He also receives child benefit which he transfers to Ms Enowassam. The father is in full-time work, and has stated that, for that reason, he is not able to care for the child.

28 Ms Guerrero Chavez, a Venezuelan national, arrived in the Netherlands on 24 October 2007 and then returned to Venezuela on 2 November 2009. She came back to the Netherlands in January 2011 and is living in Schiedam (Netherlands). Her relationship with a Netherlands national led to the birth, on 31 March 2011, of a child who has Netherlands nationality. Ms Guerrero Chavez is separated from the father of her child. The father has almost daily contact with the child but is unwilling to take care of the child, and makes a limited contribution to costs of support. Ms Guerrero Chavez takes day-to-day care of the child and has custody of the child.

29 In each of the disputes in the main proceedings, the applications for social assistance and child benefit made by the parties concerned were rejected by the competent authorities on the ground that, since the parties did not have a right of residence, they did not, under the national legislation, have any right to receive such assistance and benefits.

30 Over the periods, covering the years from 2010 to 2013, in which the applicants in the main proceedings sought to obtain social assistance and child benefit, none of them were the holders of a residence permit in the Netherlands. While some of them, pending a decision on an application for a residence permit, were nonetheless staying legally in the Netherlands, others were staying there illegally, although no steps had been taken to remove the latter from the Netherlands. Last, the applicants in the main proceedings were not permitted to work.

31 After actions brought to challenge the decisions refusing them entitlement to the assistance and benefits applied for were dismissed by judgments of the national courts of first instance, the applicants in the main proceedings brought appeals against those judgments before the Centrale Raad van Beroep (Higher Administrative Court, Netherlands).

32 The referring court seeks to ascertain whether the applicants in the main proceedings, who are all nationals of third countries, may, as mothers of a child who is a Union citizen, derive a right of residence under Article 20 TFEU in the circumstances specific to each individual case. The referring court considers that, in that event, the individuals concerned could rely on the provisions of the Law on social assistance and the Law on child benefit that allow foreign nationals who are staying lawfully in the Netherlands to be treated as Netherlands nationals, and to be entitled, where appropriate, to receive social assistance or child benefit under that legislation; that entitlement not being subject to a requirement that the IND decide to grant them a residence permit or a document certifying that they are staying legally.

33 In the opinion of the referring court, it is apparent from the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734), that the applicants in the main proceedings would acquire under Article 20 TFEU a right of residence in the Netherlands, derived from the right of residence of their children, who are Union citizens, provided that those children are in a situation such as that described in those judgments. It is necessary, in each of the disputes in the main proceedings, to determine whether the circumstances are such that those children would be obliged, in practice, to leave the territory of the European Union if the right of residence was refused to their mothers.

34 The referring court seeks to ascertain, in those circumstances, what importance is to be given, in the light of the Court's case-law, to the fact that the father, a Union citizen, is staying in the Netherlands or in the European Union, as a whole.

35 The referring court states, further, that it is the task of the administrative bodies responsible for the application of the Law on social assistance and the Law on child benefit and of the courts with jurisdiction to make an independent assessment of whether a parent who is a third-country national may, in the light of the Court's case-law relating to Article 20 TFEU, rely on that provision in order to qualify for a right of residence. Those administrative bodies, namely the Colleges of Aldermen and the SvB, are obliged, on the basis of the information provided to them by the persons concerned and such additional information as might have to be provided, if necessary, to carry out, in cooperation with the IND, an examination in order to determine whether a right of residence in the Netherlands can be obtained under Article 20 TFEU.

36 In that regard, the referring court states that, in practice, various administrative bodies interpret the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734), restrictively and hold that the case-law enshrined in those judgments is applicable only in situations where the father is not, on the basis of objective

criteria, in a position to care for the child because he is, for example, in prison, confined to an institution or hospitalised, or even dead. Other than in such situations, it is for the third-country national parent to establish a plausible case that the father is incapable of caring for the child, even with the possible assistance of third parties. According to the referring court, such rules stem from the guidelines in the Circular on Foreign Nationals.

37 The referring court adds that, in each of the disputes in the main proceedings, the Colleges of Aldermen concerned, the SvB and the IND considered the following factors to be irrelevant: the fact that it was the mother, a third-country national, and not the father, a Union citizen, who was responsible for the primary day-to-day care of the child; the nature of contact between the child and his or her father; the extent to which the father contributed to the support and upbringing of the child, even whether the father was willing to take care of the child. The fact that the father had no rights of custody with respect to the child was also not considered to be relevant where no plausible case had been made that rights of custody could not be awarded to him. The referring court seeks to ascertain whether the case-law of the Court should be subject to such restrictive interpretation.

38 If the Court were to consider, in each of the cases in the main proceedings, that the mere fact that the child is dependent on his or her mother for daily support is not a criterion that is determinative of the issue of whether the child is dependent on his or her mother to such an extent that the child would, in practice, be obliged to leave the territory of the European Union if a right of residence were refused to the mother, the referring court asks what other circumstances of those cases might be relevant to that issue.

39 In those circumstances the Centrale Raad van Beroep (Higher Administrative Court) decided to stay proceedings and refer to the Court the following questions for a preliminary ruling:

‘1. Must Article 20 TFEU be interpreted as precluding a Member State from depriving a third-country national who is responsible for the day-to-day and primary care of his/her minor child, who is a national of that Member State, of the right of residence in that Member State?

2. In answering that question, is it relevant that it is that parent on whom the child is entirely dependent, legally, financial and/or emotionally and, furthermore, that it cannot be excluded that the other parent, who is a national of the Member State, might in fact be able to care for the child?

3. In that case, should the parent/third-country national have to make a plausible case that the other parent is not able to assume responsibility for the care of the child, so that the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?’

Consideration of the questions referred

Preliminary observations

40 As a preliminary point, it should be noted that the situations at issue in the main proceedings reveal, in addition to some common features, a number of particular features which must be taken into consideration.

41 Admittedly, as stated in paragraph 30 of this judgment, each of the situations at issue in the main proceedings concerns a third-country national who, over the periods relevant to the rejection of applications for child benefit or social assistance: was staying in the Netherlands without holding a

residence permit; was the mother of at least one minor child of Netherlands nationality who lived with her; was responsible for the primary day-to-day care of that child, and was separated from the father of the child, the father also being of Netherlands nationality and acknowledging the child as his.

42 However, the situations at issue in the main proceedings reveal differences, with respect to the relationships between the parents and the children in terms of custody and contributions to costs of support, the situations of the mothers in terms of their right to stay within the territory of the European Union, and the situations of the minor children themselves.

43 First, as regards the relationships between the parents and the children, it is apparent from the order for reference that contact between the children and their fathers was, variously, frequent, seldom or even non-existent. Thus, in one case, the father could not be traced, and in another the father was in a supported accommodation scheme. In three cases, the father was contributing to maintenance costs for the child, while, in five other cases, no contribution was made. Whereas in two out of the eight cases the parents shared custody, in the six other cases the primary day-to-day care of the child was the responsibility of the mother alone. Last, in half of the cases, the child was living with the mother in an emergency refuge.

44 As regards, second, the situation of the applicants in the main proceedings in terms of their right to stay within the territory of the European Union, it has to be noted that a residence permit has, in the interim, been granted to two of them.

45 Accordingly, at the hearing, the representatives of Ms Wip and Ms Chavez-Vilchez and the Netherlands Government stated that those two persons can now be described as residing lawfully. Ms Wip has obtained a residence permit in Belgium, where she lives and works with her daughter. Ms Chavez-Vilchez was, in April 2015, issued with a residence permit in the Netherlands, on the basis of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and she is working in Belgium.

46 Third, as regards the situation of the minor children themselves, it must be stated that the child of Ms Chavez-Vilchez lived in Germany with her parents until June 2011 before returning to the Netherlands with her mother, who then submitted an application for child benefit to the Netherlands authorities.

47 On the other hand, the minor children of the other seven applicants in the main proceedings never exercised their right of free movement before or during the period relevant to the applications for social assistance or child benefit at issue in the main proceedings, and they have resided since birth in the Member State of which they are nationals.

48 As the Court has consistently held, even though, formally, the referring court has limited its questions to the interpretation of Article 20 TFEU alone, such a situation does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the cases before it, whether or not that court has specifically referred to them in its questions (see, to that effect, judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 24; of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 41; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 20).

49 In this case, it is appropriate to analyse, first, the situation of the child of Ms Chavez-Vilchez and of Ms Chavez-Vilchez herself in the light of Article 21 TFEU and of Directive 2004/38, whose objective is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, a right which is conferred directly on Union citizens by Article 21(1) TFEU and whose objective is in particular to reinforce that right (see, to that effect, judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 28, and of 12 March 2014, *O. and B.*,

C-456/12, EU:C:2014:135, paragraph 35) and, second, the respective situations of the children of the other applicants in the main proceedings, who have always resided with their mothers before and during the period relevant to the applications for social assistance or child benefit at issue in the main proceedings, in the Member State of which they are nationals, and the situations of those applicants themselves, from the perspective of Article 20 TFEU.

50 As regards the child of Ms Chavez-Vilchez, that child exercised her freedom of movement before an application was made, by her mother, for benefits in the Netherlands for periods between 7 July 2011 and the end of March 2012, since the child stayed, until June 2011, with her parents in Germany, the Member State where her father lives and works, before returning, in the company of her mother, to the Netherlands, the Member State of which she is a national.

51 As stated by the Netherlands Government at the hearing, although Ms Chavez-Vilchez has, subsequently, obtained a residence permit in the Netherlands, the referring court considers that an examination of her situation and that of her child with respect to the law on EU citizenship remains necessary, since the grant of that residence permit post-dated the periods that are relevant to the applications for the benefits at issue in the main proceedings.

52 As regards the existence of a derived right of residence, based on Article 21(1) TFEU and Directive 2004/38, the Court has held that that directive confers rights of entry into and residence in a Member State not on all third-country nationals, but solely on those who are a 'family member', within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national (judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 56; of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 41; and of 18 December 2014, *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 36).

53 The Court has, moreover, held that Directive 2004/38 is only applicable to the conditions governing whether a Union citizen can enter and stay in Member States other than that of which he is a national. Directive 2004/38 does not therefore confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national (see, to that effect, judgment of 12 March 2014, *S. and G.*, C-457/12, EU:C:2014:136, paragraph 34).

54 However, the Court has held that, when a Union citizen returns to the Member State of which he is a national, the conditions for granting a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see, to that effect, judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 50).

55 Even though Directive 2004/38 does not cover such a return, it should be applied, by analogy, in respect of the conditions that it lays down for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the reference person if it is to be possible for a derived right of residence to be granted to a third-country national who is a family member of that Union citizen (judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 50).

56 It is for the referring court to assess whether the conditions laid down by Directive 2004/38, in particular in Articles 5 to 7 thereof, which govern entry into and residence in the territory of Member States, were satisfied in the period relevant to the refusal of the applications for benefits, so that Ms Chavez-Vilchez could rely on a derived right of residence based on Article 21 TFEU and on Directive 2004/38.

57 If not, it would then be appropriate to examine the situation of the child, a Union citizen, and the child's mother, a third-country national, in the light of Article 20 TFEU.

58 As regards the children of Ms Wip, who were living with their mother in the Netherlands when Ms Wip sought social assistance for the months of October and November 2012, it was stated, at the hearing, that they now reside with their mother in Belgium, where she has obtained a residence permit and is in employment. Since the period in which those children exercised their freedom of movement and freedom to reside as Union citizens in a Member State other than that of which they are nationals and in which their mother obtained a residence permit in that other Member State post-dates the period relevant to the dispute in the main proceedings, it remains necessary to assess whether their mother could have been entitled, for the period under consideration, to a derived right of residence under Article 20 TFEU.

The first and second questions referred

59 By the first and second questions referred, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 20 TFEU must be interpreted as precluding a Member State from refusing a right of residence in its territory to a parent, a third-country national, who is responsible for the primary day-to–day care of a child who is a national of that Member State, when it cannot be excluded that the other parent, who is also a national of that Member State, might be able to take charge of the primary day-to–day care of the child. The referring court seeks to ascertain whether the fact that the child is not entirely dependent, legally, financially or emotionally, on the third-country national is relevant to that issue.

60 In accordance with the Court's settled case-law, the children concerned in the disputes in the main proceedings may, as nationals of a Member State, rely on the rights pertaining to their status as Union citizens conferred on them by Article 20 TFEU, including against the Member State of which they are nationals (see, to that effect, judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 48; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 63; and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 43 and 44).

61 The Court has held that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status (judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 42, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 45).

62 On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are not autonomous rights of those nationals but rights derived from those enjoyed by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with a Union citizen's freedom of movement (judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraphs 72 and 73, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraphs 27 and 28 and the case-law cited).

63 In this connection, the Court has already held that there are very specific situations in which, despite the fact that 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 must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 66 and 67; of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 74; and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 29).

64 The situations referred to in the preceding paragraph have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of EU secondary legislation, which provide for the grant of such a right under certain conditions, those situations nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which precludes the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order to avoid interference with that freedom (judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 75, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 30 and the case-law cited).

65 In this case, if it were to be established, that being a matter for the referring court, that a refusal to allow residence to the third-country nationals at issue in the main proceedings would have the effect that the parties concerned would have to leave the territory of the European Union, the consequence might be a restriction on the rights conferred on their children by their status as Union citizens, in particular the right of residence, since those children might be compelled to accompany their mothers and therefore to leave the territory of the European Union, as a whole. In the event that the mothers were obliged to leave the territory of the European Union, their children would thus be deprived of genuine enjoyment of the substance of the rights conferred on them by their status as Union citizens (see, to that effect, judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 78 and the case-law cited).

66 The Netherlands Government maintains, however, that the mere fact that a third-country national parent undertakes the day-to–day care of the child and is the person on whom that child is in fact dependent, legally, financially or emotionally, even in part, does not permit the automatic conclusion that a child who is a Union citizen would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. The presence, in the territory of the Member State of which that child is a national or in the territory of the Union, as a whole, of the other parent, who is himself a Union citizen and is capable of caring for the child, is, according to the Netherlands Government, a significant factor in that assessment.

67 The Netherlands Government also states that, in certain circumstances, the competent national authorities assume that the parent who is a Union citizen is unfit or unable to care for the child. That applies where that parent is dead or cannot be traced; where that parent has been imprisoned, confined to an institution or admitted to hospital for long-term treatment; where, according to objective sources, such as a statement from the police or youth assistance services, that parent is shown to be incapable of caring for the child, and, last, where an application by that parent to obtain custody, even jointly, has been dismissed by the courts.

68 In that regard, it must be recalled that, in the judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 51 and 56), the Court held that factors of relevance, for the purposes of determining whether a refusal to grant a right of residence to a third-country national

parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status, include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent.

69 As regards the second factor, the Court has stated that it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in 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 (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 45; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 65 to 67; and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 56).

70 In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.

71 For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.

72 In the light of the foregoing, the answer to the first and second questions is that Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a Union citizen would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

Consideration of the third question referred

73 By the third question submitted for a preliminary ruling, the referring court seeks in essence to ascertain whether Article 20 TFEU must be interpreted as precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State, and for whose primary day-to-day care that parent is responsible, is subject to the condition that the third country national must establish that the other parent, who is a national of that same Member State, is not in a position to provide the primary day-to-day care of the child.

74 According to the Netherlands Government, pursuant to the general rule that a party who seeks to rely on certain rights must establish that those rights are applicable to his situation, a rule that is accepted in EU law (see, to that effect, judgments of 8 May 2013, *Alarape and Tijani*, C-529/11, EU:C:2013:290, paragraph 38, and of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraphs 25 to 27), the burden of proof of the existence of a right of residence under Article 20 TFEU lies on the applicants in the main proceedings. It is for them to demonstrate that, because of objective impediments that prevent the Union citizen parent from actually caring for the child, the child is dependent on the third-country national parent to such an extent that the consequence of refusing to grant that third-country national a right of residence would be that the child would be obliged, in practice, to leave the territory of the European Union.

75 In that regard, it must be stated that, in the event that a third-country national, the parent of a minor child who is a national of a Member State and for whose primary day-to-day care that parent is responsible, seeks to obtain from the competent authorities of that Member State recognition of a derived right of residence based on Article 20 TFEU, it is for that third-country national to provide evidence on the basis of which it can be assessed whether the conditions governing the application of that article are satisfied, in particular, evidence that a decision to refuse a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole.

76 However, as stated by the European Commission, while it is, as a general rule, for the third-country national parent to provide evidence to prove that he or she has a right of residence under Article 20 TFEU, in particular evidence that, if residence were to be refused, the child would be obliged to leave the territory of the European Union, the fact remains that, when undertaking the assessment of the conditions required in order for the third-country national to be able to qualify for such a right of residence, the competent national authorities must ensure that the application of national legislation on the burden of proof such as that at issue in the disputes in the main proceedings does not undermine the effectiveness of Article 20 TFEU.

77 Accordingly, the application of such national legislation on the burden of proof does not relieve the authorities of the Member State concerned of the obligation to undertake, on the basis of the evidence provided by the third-country national, the necessary inquiries to determine where the parent who is a national of that Member State resides and to examine, first, whether that parent is, or is not, actually able and willing to assume sole responsibility for the primary day-to-day care of the child, and, second, whether there is, or is not, such a relationship of dependency between the child and the third-country national parent that a decision to refuse the right of residence to the latter would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole.

78 In the light of the foregoing, the answer to the third question is that Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the

requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.**

2. **Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences.**

[Signatures]