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Can a non-EU national be able to invoke a secondary right of residence in the EU as a parent of a child who is a citizen of the Union?

On 10-05-2017 the Court of the European Union ruled on the question referred for a preliminary ruling in Case C-133/15 H.C. Chavez-Vilchez and Others against Raad van Bestuur van de Sociale verzekeringsbank and Others concerning the grant of social assistance and child benefit to mothers of children of Dutch nationality, whose fathers are also Dutch nationals, and are themselves nationals of non-member States.

In all the cases in the main proceedings, the children have been acknowledged by their father, but they live primarily or exclusively with their mother, who applied for social assistance and family allowances. However, the Dutch authorities rejected the applications for social assistance and child benefits on the grounds that, in the absence of a residence permit, they are not entitled to such assistance under national law. The applicants have first appealed against the rejection decisions and then appealed against the first-instance decisions before the Court of Appeal for social insurance cases. That court referred the following questions to the European Court for a preliminary ruling:

a) Does article 20 of the TFEU prohibit a Member State from depriving a third-country national who is solely responsible for the day-to-day care of his or her minor child, who is a national of that State, the right of residence in that Member State?

b) The fact that the legal, economic and emotional burden of bringing up the child does not entirely belong to the third-country national, but the other parent-EU national would also be able to take on the child's daily care is a sufficient reason to refuse a residence permit? In other words, is it necessary to establish that the refusal to grant a residence permit to a parent who is a national of a non-Member State does not entail for the child an obligation to leave the territory of the Union because there is no such relationship of dependence between the child and that parent?

In the present situation, in all the cases in the main proceedings parental responsibility is exercised solely by the mother, either because of the reluctance of the father to participate in the cost of raising or because of his legal or factual incapacity to take care of the child. The referring court wonders whether, in line with previous ECJ's case-law, it should be emphasized that the father-Union citizen is resident in the EU and is objectively able to exercise parental responsibility. At the same time, it notes that national administrations often interpret restrictively previous relevant decisions of the ECJ and consider that a third-country national is entitled to reside within the EU only if he/she proves that the other parent is objectively unable to take care of the child, because he/she is dead or imprisoned. As an example, the referring court mentions **Ruiz Zambrano Case (C-34/09)** in which the CJU concluded that, in view of the fundamental character of Union citizenship, Article 20 of the TFEU prohibits national measures which, as a result, prevent EU citizens from enjoying, in substance and in essence, the rights deriving therefrom. It therefore asks whether the case-law of the ECJ should be so narrowly interpreted, since it has already been settled case-law that the refusal to grant a residence permit to a person, who is a national of a non-Member State, within the Member State where his or her minor child is a resident, leads to the above result. This is because the child will be forced to leave the EU territory in order to follow its guardian.

One of the peculiarities of the present situation is one of the applicants, H.C. Chavez-Vilchez, and her minor child. What is critical is that, when they were forced to leave the family home, both exercised their right to free movement, and since then the child's father has ceased to participate in the maintenance and upbringing costs. In its judgment, the Court held that the case of H.C. Chavez-Vilchez should first be considered in the light of Article 21 par.1 of the TFEU (free movement and residence of European citizens in the territory of the Member States) and Directive 2004/38 on the right of Union citizens and their family members to move and reside freely within the territory of the Member States.

As the Court has already held in **Dereci and Others Case (C-256/11)**, when a citizen of the Union falls within the concept of a right holder under Article 3 par.1 of the above Directive, his family members also fall within that concept by deriving derivative rights under their status as family members of the immediate beneficiary. Under Directive 2004/38, not all third-country nationals, but only family members within the meaning of Article 2 par.2 of the Directive, derive rights of entry and residence in a Member State from a citizen of the Union who exercised the right to freedom of movement and settled in a Member State other than that of which he is a national.

It is for the national court to determine whether the conditions laid down in that directive are fulfilled, so that Mrs. C. Chavez-Vilchez may invoke a secondary right of

residence. If those conditions are not fulfilled, then the situation in which she and her child are present must be examined in the light of Article 20 of the TFEU, as it is the case with the other applicants in the main proceedings.

Once again, the Court points out that, according to previous case-law, Article 20 of the TFEU prohibits national measures which would have the effect of depriving an EU national from the real possibility to actually exercise the rights attaching to his status as a citizen of the Union. In this case, the refusal to grant a residence permit to the mothers of minor children-EU citizens may mean an obligation for them to leave the EU territory on their own. Given the young children's age, the risk that they are going to be forced to leave the Union territory, and thus to deprive them from the real enjoyment of the rights conferred on them by Article 20 of the TFEU, is serious and extremely possible. Of course, in order to assess the magnitude of the risk in each of the cases under consideration, it is necessary, in the Court's view, to assess who is the parent who has taken the actual care of the child, if there is a link of dependence between the child and that parent and, so, the child is going to be forced to leave the territory of the Union if the right of residence of that third-country national is not recognized and, finally, what is the relationship between the parents and the children in terms of participation in the maintenance costs.

The Netherlands Government maintains 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 a significant factor in that assessment".* In support of its argument, the Netherlands Government states that only in cases where, on the basis of objective criteria, the other parent is legally or genuinely incapable of taking care of the child, there may be an obligation to grant a residence permit to the parent who is in a position to exercise parental responsibility, but is a third-country national.

On the other hand, the Court has held that the relationship between the dependence of a young child and the parent, who is responsible for the actual day-to-day care and to whom has not been recognized the right of residence within the EU, is certain and can jeopardize the effectiveness of the citizenship of the Union. Whether the other parent-EU national is really capable and willing to take up parental responsibility exclusively and whether the separation of the child from the third-country national parent would not adversely affect his/her emotional development and mental balance should assessed in

any single case taking into account the particular characteristics of each case and the child's age and always aiming to ensure the best interests of the child (Article 24 par.2 of Charter of Fundamental Rights in conjunction with Article 7 of the ECHR about the right to respect for family life).

According to the Netherlands Government, by virtue of the general rule that a person claiming a right must prove that this right is applicable in his case, the appellants in the main proceedings have the burden of proving the existence of the right of residence based on Article 20 of the TFEU and must prove that, given the objective obstacles that prevent a Union-citizen from actually taking care of the child, the latter is so dependent on the parent who is a third-country national, that any rejection to recognize the right of residence to that parent would have *de facto* resulted in obliging the child to leave the territory of the European Union.

The Court agrees with the Netherlands Government to this conclusion and accepts that a third country national is, in principle, the person who has the burden of proving that he can derive a right of residence from Article 20 of the TFEU. It adds, however, that the competent national authorities must, on the basis of the data submitted, go through the necessary investigation and be able to ascertain whether a negative decision would have the above prohibitive consequences for the child.

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