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Provisional text

JUDGMENT OF THE COURT (First Chamber)

22 June 2023 (*)

(Reference for a preliminary ruling – Citizenship of the Union – Article 20 TFEU – Right to move and reside freely within the territory of the Member States – Decision of a Member State refusing residence to a third-country national parent of a minor child, who has the nationality of that Member State – Child living outside the territory of the European Union and never having resided in its territory)

In Case C-459/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands), made by decision of 10 September 2020, received at the Court on 15 September 2020, in the proceedings

X

v

Staatssecretaris van Justitie en Veiligheid,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as a Judge of the First Chamber, P.G. Xuereb, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: J. Richard de la Tour,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 February 2022,

after considering the observations submitted on behalf of:

– X, by M. van Werven and J. Werner, advocaten,

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

– the Danish Government, by M. Jespersen, J. Nymann-Lindegren and M. Søndahl Wolff, acting as Agents,

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the European Commission, by C. Ladenburger, E. Montaguti and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2022,

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 X, a Thai national, and the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') concerning the latter's rejection of X's application for a residence permit.

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

3 X legally resided in the Netherlands where she was married to A, a Dutch national. From that marriage a child was born who had Dutch nationality.

4 That child, who was 10 years old on the date on which the request for a preliminary ruling was lodged, was born in Thailand where he has been raised by his maternal grandmother, X having returned to the Netherlands after his birth. The child always lived in that third country and never travelled to the Netherlands or to any other Member State of the European Union.

5 By a decision of 22 May 2017, the Netherlands authorities revoked X's residence permit with retroactive effect from 1 June 2016, the date on which A and X in fact separated.

6 On 17 May 2018, the divorce of A and X was pronounced.

7 On 6 May 2019, the Secretary of State notified X that she would be deported to Bangkok (Thailand) on 8 May 2019.

8 On 7 May 2019, X applied to reside in the Netherlands with B, a national of that Member State. When assessing that application, the Netherlands authorities, of their own motion, determined whether the applicant in the main proceedings could obtain a derived right to reside pursuant to Article 20 TFEU in order to reside with her son in the territory of the European Union.

9 By a decision of 8 May 2019, the Secretary of State rejected that application on the ground, in particular, that X could not rely on a derived right of residence pursuant to Article 20 TFEU, as recognised by the Court of Justice in the judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354.

10 On 8 May 2019, X was deported to Bangkok.

11 By a decision of 2 July 2019, the Secretary of State rejected an objection brought by X against the decision of 8 May 2019. X then brought an appeal before the referring court in the context of which she submits that, owing to that decision refusing residence, her child, even though he is a Dutch national, is deprived of the possibility of residing in the European Union and that, consequently, that decision undermines the effectiveness of the rights that he derives from his status as a Union citizen.

12 In that regard, X emphasises that her child, for whom she has always been responsible, both legally and financially, and with whom she always maintained a loving relationship, is entirely dependent on her. She states that, since her return to Thailand, she takes day-to-day care of him. The child's maternal grandmother, because of her state of health, is no longer able to take care of him. X adds that, by a judgment of the court in Surin (Thailand) of 5 February 2020, she has been granted sole responsibility for the child's care.

13 As the child does not speak either English or Dutch, he cannot communicate with his father with whom he has had no contact since 2017. According to X, A has no emotional bond with the child and has assumed no responsibility towards him.

14 The Secretary of State submits that the decision refusing residence addressed to X does not result in her child being compelled to leave the territory of the European Union as he has resided in Thailand since his birth. In addition, X cannot automatically be found to have sole parental responsibility for the child, since the judgment of the Thai court that she relies on in that regard has not been certified. Furthermore, X has not proved that she has in fact cared for her son since her return to Thailand. There is no objective evidence that, between her and the child, there is a relationship of dependency such that the latter would be compelled to reside outside the territory of the European Union if X is refused a right of residence. It is likely that the fact that the child has been separated from his mother for almost all his life affects his attachment to her and therefore his dependence on her. In addition, the role of A in the child's life is not clear and the fact that X declared that A does not take care of the child is subjective evidence. The Secretary of State adds that X has not proved that her child wishes to come to live in the Netherlands or that it would be in the child's interests for his mother to have a residence permit for that Member State.

15 The referring court has doubts as to the applicability of the principles laid down by the Court in the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124); of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734); of 6 December 2012, O and Others (C-356/11 and C-357/11, EU:C:2012:776); and of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354), in a situation such as that in the main proceedings in which the minor child, who is a Union citizen, resides outside the territory of the European Union or has never resided in its territory.

16 The referring court states that a negative rely from the Court would mean, under Netherlands law, that a third-country national, who is the parent of a minor Union citizen, could never be granted a derived right of residence pursuant to Article 20 TFEU and could enter the Netherlands legally only if he or she lodged an application for residence based on the right to private and family life for the purposes of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. In accordance with Netherlands law, such an application requires, in principle, that the applicant has a provisional authorisation to reside as a member of the extended family. To that end, it is however necessary, among other things, for the member of the family with whom the residence is envisaged, namely 'the sponsor', to be over the age of 21. By definition, a minor child cannot satisfy that condition, which means that such an application for residence has, from the outset, no chance of succeeding.

17 In addition, the referring court has questions as to the criteria for assessment of whether there is a relationship of dependency between the Union citizen and the third-country national and as to the issue of responsibility for the child as a matter of fact in the context of the dispute in the main proceedings.

18 In those circumstances, the Rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

(b) In that regard, could a relevant factor be that, as a rule, minor Union citizens cannot independently assert their rights and have no say over their place of residence, but are dependent on their parent(s) in that respect, and that this could involve a claim being made on behalf of a minor Union citizen for the right to exercise his [or her] rights as a Union citizen, whereas that might possibly be contrary to their other interests as referred to, for example, in the [judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354)]?

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

(3) (a) In assessing whether there is a relationship of dependency as referred to in question 1 above, is the decisive factor whether or not the third-country national parent, prior to the application or prior to the decision refusing a right of residence, or prior to the time when a (national) court has to make a decision in legal proceedings brought because of that refusal, was responsible for the day-to-day care of the minor Union citizen, and whether there are others who were responsible for such care in the past and/or can (continue to) be responsible for it?

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

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

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

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as meaning that a situation in which a minor child, a Union citizen, who has the nationality of a Member State and who, since birth, has lived outside the territory of that Member State and has never resided in the territory of the European Union, precludes one of his or her parents, who is a third-country national, upon whom that child is dependent, from benefiting from the derived right of residence under that article.

20 It must be recalled, first of all, that, in accordance with the Court's settled case-law, Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which is intended to be the fundamental status of nationals of the Member States (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 41, and of 9 June 2022, *Préfet du Gers and Institut national de la statistique et des études économiques*, C-673/20, EU:C:2022:449, paragraph 49 and the case-law cited).

21 Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the FEU Treaty and the measures adopted for their implementation (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 36 and the case-law cited).

22 The Court has held that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the members of the family 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 (see, inter alia, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 42; of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 45; and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 61).

23 However, the provisions of the FEU Treaty on citizenship of the European 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 within the territory of the European Union (judgment of 7 September 2022, *Staatssecretaris van Justitie en Veiligheid (Nature of the right of residence under Article 20 TFEU),* C-624/20, EU:C:2022:639, paragraph 51 and the case-law cited).

24 In that regard, 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 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 or her of the genuine enjoyment of the substance of the rights conferred by that status (judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 51 and the case-law cited).

25 The situations referred to in the preceding paragraph of this judgment have the common feature that, although they are governed by legislation which falls, a priori, within the competence

of the Member States, namely by 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 (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 64 and the case-law cited).

26 However, it is clear from the Court's consistent case-law that a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, such a relationship of dependency that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole (judgments of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 52 and the case-law cited, and of 7 September 2022, *Staatssecretaris van Justitie en Veiligheid (Nature of the right of residence under Article 20 TFEU),* C-624/20, EU:C:2022:639, paragraph 37 and the case-law cited).

27 It is also clear from the Court's case-law that, in the same way as a refusal or loss of a right of residence in the territory of a Member State, a ban on entry into the territory of the European Union, imposed on a third-country national who is a family member of a Union citizen, could lead to depriving that citizen of the genuine enjoyment of the substance of the rights which that status confers upon him or her, where, owing to the relationship of dependency between those persons, that entry ban compels, de facto, that citizen to leave the territory of the European Union as a whole, in order to go with the member of his or her family, the third-country national who is the subject of that ban (judgment of 27 April 2023, *M.D.(Ban on entering Hungary)*, C-528/21, EU:C:2023:341, paragraph 60 and the case-law cited).

28 That being so, in a situation such as that at issue in the main proceedings, the refusal of a right of residence for a third-country national parent of a minor child who is a Union citizen cannot lead, unlike the situations at issue in the cases relating to Article 20 TFEU on which the Court has already ruled, to that child being compelled to go with his or her third-country national parent and to leave the territory of the European Union, given that, since his birth, he has lived in a third country and has never resided in the European Union.

29 However, first, while the Court noted that, in the case-law referred to in paragraph 22 of this judgment, the child concerned had always resided in the Member State of his or her nationality, that statement sought solely to emphasise that the benefit of the derived right of residence flowing from Article 20 TFEU depended not on the exercise by that child of his or her right of free movement and residence within the European Union, but on his or her citizenship of the Union, a status that he or she enjoyed irrespective of the exercise of that right, by virtue of the sole fact of possessing the nationality of a Member State.

30 Second, on the hypothesis that there is a relationship of dependency between a child citizen of the Union and his or her third-country national parent, to refuse residence to the latter in the Member State of which that child has nationality may prevent that child from residing or moving within the territory of the Union in so far as he or she would then be compelled to remain in a third country with that parent.

31 In that regard, the consequences for the child citizen of the Union of being prevented in practice from entering and residing in the Union must be regarded as analogous to those flowing from being compelled to leave the territory of the Union.

32 As stated in paragraph 23 of this judgment, the provisions of the FEU Treaty on citizenship of the Union confer on third-country nationals rights that are derived from those enjoyed by the Union citizen.

33 The right of residence granted, pursuant to Article 20 TFEU, to a third-country national in his or her capacity as a family member of a Union citizen is thus justified on the ground that such residence is necessary in order for that Union citizen to be able genuinely to enjoy the substance of the rights conferred by that status for as long as the relationship of dependency with that national persists (judgment of 7 September 2022, *Staatssecretaris van Justitie en Veiligheid (Nature of the right of residence under Article 20 TFEU)*, C-624/20, EU:C:2022:639, paragraph 41.

34 The refusal of a right of residence to a third-country national parent of a child citizen of the Union is capable of affecting the exercise of those rights by that child only in a situation where that child is to enter the territory of the Member State concerned with that parent or to be reunited with him or her and that child is to remain thereafter in that territory.

35 Conversely, in a situation where a third-country national parent of a child citizen of the Union is to reside alone in the territory of the European Union whilst that child is to remain in a third country, a decision refusing that parent the right to reside in that territory would be entirely without effect on the exercise by that child of his or her rights.

36 Therefore, a right of residence under Article 20 TFEU is not intended to be granted to a third-country national parent of a minor child who is a Union citizen in a situation in which neither the application by that parent seeking to obtain a derived right to reside nor the general context of the case makes it possible to conclude that that child, who has never resided in the Member State of which he or she has the nationality, will exercise his or her rights as a citizen of the Union by entering and residing with that parent in the territory of that Member State.

37 It is for the referring court, which alone has jurisdiction in that regard, to carry out the necessary factual assessments in order to determine not only whether, in the case in the main proceedings, there is a relationship of dependency, for the purposes of the case-law recalled in paragraph 26 of this judgment, but also whether it is established that the child concerned will enter and reside in the Netherlands with his third-country national parent.

38 Having regard to the foregoing considerations, the answer to the first question is that Article 20 TFEU must be interpreted as meaning that a situation in which a minor child, a Union citizen, who has the nationality of a Member State and who, since birth, has lived outside the territory of that Member State and has never resided in the territory of the European Union, does not preclude one of his or her parents, who is a third-country national, upon whom that child is dependent, from benefiting from the derived right of residence under that article, provided that it is established that that child will enter and reside in the territory of that Member State of which he or she has the nationality together with that parent.

The second question

39 By its second question, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as meaning that a Member State seised of an application for a derived right of residence

by a third-country national upon whom a minor child, who is a citizen of the Union and who has the nationality of that Member State, is dependent, where that child has lived since birth in that third country without ever having resided in the territory of the European Union, may reject that application on the ground that moving to that Member State – which the exercise by that child of his or her rights as a Union citizen presupposes – is not in the real or plausible interests of that child.

40 In that regard, it should be recalled, first, that it is clear from the case-law recalled in paragraphs 20 and 22 of this judgment that the right to move and reside freely within the territory of the Member States, which is conferred on every citizen of the Union, flows directly from the status of Union citizen without its exercise being subject to proof of any interest whatsoever in order to rely on its benefits.

41 The Court has also held in that respect that, under a principle of international law, which the law of the European Union cannot be found to infringe, a Member State cannot refuse its own nationals the right to enter its territory and remain there and that those nationals thus enjoy an unconditional right of residence (see, to that effect, judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 37 and the case-law cited).

42 Second, the Court has already held that a minor child can rely on his or her right of freedom of movement and residence guaranteed by EU law. The capacity of a national of a Member State to be the holder of rights guaranteed by the FEU Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally (see, to that effect, judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 20).

43 In addition, while it is true that the Court has held that it is for the competent authorities, when ruling on an application for residence pursuant to Article 20 TFEU, to take into consideration the best interests of the child concerned, that consideration is to be taken into account only with a view to assessing whether there is a relationship of dependency for the purposes of the case-law referred to in paragraph 26 of this judgment, or the consequences of a derogation from the derived right of residence provided for by that article based on considerations of public security or public order (see, to that effect, judgments of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 71, and of 5 May 2022, *Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources)*, C-451/19 and C-532/19, EU:C:2022:354, paragraph 53). The Court thus considered that those best interests could be relied on not in order to reject an application for a residence permit but, on the contrary, to preclude the adoption of a decision that compelled that child to leave the territory of the European Union.

44 Therefore, in a situation such as that at issue in the main proceedings, those competent authorities cannot, without improperly substituting themselves for those with parental responsibility for the child concerned, in the absence of measures having been adopted to provide a framework for the exercise of that responsibility, and without infringing the capacity of that child to exercise rights that he or she derives from the status conferred on him or her by Article 20 TFEU, recalled in paragraph 42 of this judgment, determine whether the movement of that child to the Member State of which he or she is a national is in the best interests of that child.

45 Having regard to the foregoing considerations, the answer to the second question is that Article 20 TFEU must be interpreted as meaning that a Member State seised of an application for a derived right of residence by a third-country national upon whom a minor child, who is a citizen of the European Union and who has the nationality of that Member State, is dependent, and that child has lived since birth in that third country without ever having resided in the territory of the

European Union, may not reject that application on the ground that moving to that Member State – which the exercise by that child of his or her rights as a Union citizen presupposes – is not in the real or plausible interests of that child.

The third question

46 By its third question, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as meaning that the following are decisive factors for determining whether a minor child who is a Union citizen is dependent on his or her third-country national parent: (i) the fact that the third-country national parent has not always assumed day-to-day care of that child, even though he or she has sole parental responsibility; and (ii) the fact that that child could, if necessary, settle in the territory of the European Union with his or her other parent, who is a Union citizen.

47 As is clear from paragraphs 26 to 28, 30, 31 and 33 of this judgment, a right of residence pursuant to Article 20 TFEU is granted to a third-country national who is family member of a Union citizen only in very specific circumstances in which there is, between that third-country national and the Union citizen, such a relationship of dependency that it would lead to the latter, in the absence of that third-country national being granted a right of residence in the territory of the European Union, being compelled to accompany him or her and leave that territory as a whole, or not to be able to enter and reside in the territory of the Member State the nationality of which he or she holds.

48 It is therefore in the light of the intensity of the relationship of dependency between the third-country national parent and his or her minor child, who is a Union citizen, that the application for a derived right of residence must be assessed, that assessment requiring all the circumstances of the case to be taken into account (see, to that effect, judgments of 10 May 2017, *Chavez-Vilchez and Others,* C-133/15, EU:C:2017:354, paragraph 71; of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 72; and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 56).

49 In that regard, the Court, for the assessment of whether there is a relationship of dependency of that nature, held that it was necessary to take account of the issue of the actual care of the child and of whether the legal, financial or emotional responsibility for that child is borne by the third-country national parent. The age of the child, his or her physical and emotional development, the extent of his or her 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 have also been held to be relevant factors (judgment of 7 September 2022, *Staatssecretaris van Justitie en Veiligheid (Nature of the right of residence under Article 20 TFEU)*, C-624/20, EU:C:2022:639, paragraph 39 and the case-law cited).

50 It also follows from the case-law of the Court 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 or her family together in EU territory, for the members of his or her family who do not have the nationality of a Member State to be able to reside with him or her in EU territory is not sufficient in itself to support the view that the Union citizen will be forced to leave the European Union if such a right is not granted (judgment of 5 May 2022, *Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources*) C-451/19 and C-532/19, EU:C:2022:354*, paragraph 57* and the case-law cited).

51 Accordingly, the existence of a family link, whether natural or legal, between the Union citizen and his or her third-country national family member, cannot be a sufficient ground to justify the grant, under Article 20 TFEU, of a derived right of residence to that family member in the territory of the Member State of which the Union citizen is a national (judgment of 5 May 2022, *Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources)*, C-451/19 and C-532/19, EU:C:2022:354*, paragraph 58* and the case-law cited).

52 In the light of all those elements, it must be emphasised, first of all, that the competent authorities must take account of the situation as it appears to be at the time when they are called upon to make a decision, as those authorities must assess the foreseeable consequences of their decision on the genuine enjoyment, by the child concerned, of the substance of the rights that he or she derives from the status that Article 20 TFEU confers on him or her. With a view to preventing that child from being deprived of the genuine enjoyment of those rights, it is necessary, moreover, for the national courts called upon to rule on an appeal against a decision of those authorities to take into account factual matters arising after that decision (see, by analogy, judgment of 17 April 2018, *B and Vomero* C-316/16 and C-424/16, EU:C:2018:256, paragraph 94 and the case-law cited).

53 Therefore, the fact that the third-country national parent has not previously assumed day-to-day care of the child concerned for a long period, and the possible resulting lack of a relationship of dependency during that period, cannot be treated as being decisive, since that fact does not make it inconceivable that, at the time when those same authorities or national courts give a ruling, that parent in fact assumes responsibility for that care.

54 In that regard it should also be recalled that the Court has held that cohabitation of the third-country national parent and the minor child who is a Union citizen is not a prerequisite for a determination that there is a relationship of dependency between them (judgment of 5 May 2022, *Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources*), C-451/19 and C-532/19, EU:C:2022:354*, paragraph 68* and the case-law cited).

55 Conversely, the sole fact that, at the time when the national court is called upon to rule on the case, the third-country national parent takes day-to-day care of the minor child who is a Union citizen, cannot suffice to deduce that there is a relationship of dependency, which is an assessment that must always be based on an examination of all of the relevant circumstances.

56 As regards, next, the fact that one of the parents of the child concerned is a citizen of the Union residing in a Member State, it must be observed that that fact is relevant for the purposes of applying Article 20 TFEU if it is established that that parent is actually able and willing to assume, sole responsibility for the day-to-day care of that child (see, to that effect, judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 71).

57 Nevertheless, that fact, assuming it is proven, is not in itself sufficient for it to be held that there is not, between the third-country national parent and the minor child, who is a Union citizen, such a relationship of dependency that the child would be compelled not to enter and reside in the territory of the European Union if a right of residence were refused to that third-country national, which is a finding that necessarily must be based on an examination of all of the relevant circumstances (see, to that effect, judgment of 5 May 2022, *Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources)*, C-451/19 and C-532/19, EU:C:2022:354, paragraph 67 and the case-law cited).

58 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 deprived of the genuine enjoyment of his or her rights as a Union citizen, 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 does not undermine the effectiveness of Article 20 TFEU (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 76).

59 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 (see, by analogy, judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 77).

60 Lastly, it is clear from the case-law cited in paragraphs 48 to 50 of this judgment that the fact that the third-country national parent has sole parental responsibility for the minor child is a relevant factor, but it is not decisive for the assessment of whether there is in fact dependency, which cannot, as is clear from paragraph 51 of this judgment, follow directly from a legal relationship between the third-country national parent and his or her minor child who is a Union citizen.

61 Having regard to the foregoing considerations, the answer to the third question is that Article 20 TFEU must be interpreted as meaning that, for the purposes of assessing whether a minor child, who is a Union citizen, is dependent on his or her third-country national parent, the Member State concerned is required to take into account all the relevant circumstances, without it being regarded as decisive either that the third-country national parent has not always assumed day-to-day care of that child but now has sole care of that child, or that the other parent, who is a Union citizen, could assume the actual day-to-day care of that child.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. **Article 20 TFEU must be interpreted as meaning that a situation in which a minor child, a Union citizen, who has the nationality of a Member State and who, since birth, has lived outside the territory of that Member State and has never resided in the territory of the European Union, does not preclude one of his or her parents, who is a third-country national, upon whom that child is dependent, from benefiting from the derived right of residence under that article, provided that it is established that that child will enter and reside in the territory of that Member State of which he or she has the nationality together with that parent.**

2. **Article 20 TFEU must be interpreted as meaning that a Member State seised of an application for a derived right of residence by a third-country national upon whom a minor**

child, who is a citizen of the European Union and who has the nationality of that Member State, is dependent, and that child has lived since birth in that third country without ever having resided in the territory of the European Union, may not reject that application on the ground that moving to that Member State – which the exercise by that child of his or her rights as a Union citizen presupposes – is not in the real or plausible interests of that child.

3. **Article 20 TFEU must be interpreted as meaning that, for the purposes of assessing whether a minor child, who is a European Union citizen, is dependent on his or her third-country national parent, the Member State concerned is required to take into account all the relevant circumstances, without it being regarded as decisive either that the third-country national parent has not always assumed day-to-day care of that child but now has sole care of that child, or that the other parent, who is a Union citizen, could assume the actual day-to-day care of that child.**

[Signatures]

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* Language of the case: Dutch.