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The scope of Article 20 TFEU clarified in Chavez-Vilchez: are the fundamental rights of minor EU citizens coming of age?

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*949 Abstract

In Chavez-Vilchez *the* CJEU *decided on the circumstances under which a minor, dependent EU citizen is forced to leave the territory of the European Union, if his/her third-country national parent is refused the right to reside in a Member State.* Chavez-Vilchez *continues where the case of* Ruiz Zambrano *left certain questions open. One of the questions was how to assess under what circumstances EU minor citizens are forced to leave the EU and what aspects need to be considered in that assessment. In this analysis of* Chavez-Vilchez*, the relationship with previous case law of the* CJEU *is examined and discussed. Specific attention will be paid to the relation of dependency between the EU citizen and the third-country national parent, the inclusion of family life and the rights of the child in the assessment, as well as the relationship between* art.20 *and* art.21 TFEU.

Introduction

How can one describe the relationship between parent and child? How can one do justice to the fact that parents are not just care-givers who provide for a child's material needs, but there is a much deeper relationship in which the parents are the most important persons in the child's life, and also vice versa, that the child is the most important person in the parents' lives? It is difficult to describe this in any context—social or literary—and it is even more difficult to do justice to these complex relationships in the even more constrained vocabulary of the law.

In the Chavez-Vilchez (Chavez) case, [1] the Court of Justice (the Court) seems to have done its best with the limited means available in the specific legal context of EU citizenship. In Chavez, the Court gives the national authorities instructions to apply a more refined test in establishing whether such a relationship ***950** of dependence exists between the child and the third-country national (TCN) parent, which would justify that the latter should have a derived right of residency in the Member State of nationality of the EU child citizen.

The novelty of Chavez is that the Court has been explicitly asked how to deal with the Ruiz Zambrano line of case law in the situation of broken families. Up until Chavez it remained unclear whether a TCN parent could have a derived right to reside, even if the other—EU citizen—parent was also present. The reasoning is that a TCN parent has a derived right to reside in the EU if the child, who has the nationality of one of the Member States, were forced to leave the European Union if his/her parent did not have such a right of residency. In Chavez the Court explicitly included the right to family life and the best interests of the child—as laid down in the Charter of Fundamental Rights (Charter) in the legal assessment of art.20 TFEU. The Court interpreted art.20 TFEU with reference to the Charter, the right to family life and the rights of the child, which is a novelty in EU citizenship case law.

In March 2011, the Court held in the controversial [2] and very concise [3] Ruiz Zambrano judgment [4] that national measures may not deprive an EU citizen of the "genuine enjoyment of the substance of the rights" conferred on him by the status of being a EU citizen, even if the EU citizen at issue had not made use of his or her right to free movement. [5] This judgment has been at the centre of the academic debate ever since. [6] It raised many questions with regard to the substance, scope and limitations of art.20 TFEU, with several authors speculating about the different rights that may form the "substance" of Union citizenship. [7] However, in subsequent case law, such as McCarthy [8] and Dereci, [9] the Court significantly limited the reach of its reasoning in Ruiz Zambrano. It clarified that what was meant by a deprivation of the "genuine enjoyment of the substance of rights" was that a third-country national parent only enjoys a derived right of residence under art.20 TFEU if his or her minor child who is an EU citizen would be forced to leave the territory of the EU altogether if that parent did not receive the right of residence. [10] Although the Court thus clarified, or at least determined, its broad and vague "activation" of art.20 TFEU as an autonomous source of rights, ***951** the following questions were left open [11]: what does "dependent" mean; what is the role/position of the other parent and/or other family members; what is the "substance" of Union citizenship rights; what is the relationship between art.20 TFEU and fundamental rights; and does the derived right of residence under art.20 TFEU come with access to social benefits and work permits? And how does this interpretation of art.20 TFEU fit in with the Court's recent, restrictive, line of case law? Similar to the Ruiz Zambrano case, the present case came to the Court in national proceedings regarding social benefits. The Chavez case was brought before one of the highest courts in the Netherlands (the Dutch Central Appeals Tribunal), resulting, once more, in an opportunity for the Court to clarify its previous line of case law.

This case note is structured as follows. First it presents a summary of the factual and legal background; subsequently it discusses the Opinion of AG Szpunar and the judgment of the Court. Thereafter, the comment on the Chavez case focuses on four major issues: the scope and limitations of art.20 TFEU, the connection between art.20 TFEU and fundamental rights protection and the burden of proof, the implications for national authorities and judges, as well as the relationship between art.20 TFEU and art.21 TFEU.

Factual and legal background

Ms Chavez-Vilchez and seven other individuals, all third-country nationals, were all mothers of one or more minor children who had been acknowledged by their Dutch fathers, so that the children also had Dutch nationality. In all cases the relationship between the mother and the father had ended, and the children lived mainly or exclusively with their mothers. There were, however, factual differences between the individual cases with respect to the relationships of the parents and the children in terms of the division of custody rights and contributions to costs of support, the mothers'

situation as regards their right of residence in the EU, and the situation of the children. Further, with the exception of Ms Chavez-Vilchez and Ms Wip, the minor children of the six other individuals had never exercised their right of free movement: they had resided, since birth, in the Netherlands.

The third-country nationals in all cases had applied for social assistance and/or child benefits, which had been refused by the Dutch authorities, because they did not have a right of residence in the Netherlands. The proceedings against these refusals had been dismissed at first instance, upon which the applicants brought proceedings on appeal to the Central Appeal Tribunal. This court decided to refer questions to the Court, seeking, first, to ascertain whether the individuals concerned might, as mothers of a minor EU citizen who were responsible for the day-to-day and primary care, acquire a right of residence under art.20 TFEU in the Member State of nationality of their child. More particularly, the referring court asked, first, what importance was to be given to the fact that it is that parent on whom the child is legally, financially and emotionally dependent. In connection with that question, the referring court furthermore, secondly, asked how to judge the fact that it might be possible for the other parent, who is a national of the Member State, to in fact be able to care for the child. In its third question, the referring court asked the Court if it was for the TCN parent to make a plausible case that the other parent was unable to assume the responsibility for the care of the child.

Opinion of AG Szpunar

AG Szpunar starts his Opinion by outlining the principle of the best interests of the child, which, according to him, should be leading in the interpretation and application of EU law. He places the interests of the child at the centre of his analysis, underlining it as "the prism through which the provision of EU law must ***952** be read", [12] by relying on various sources for the rights of the child. More particularly, he refers to art.3(1) of the Treaty on the Rights of the Child (New York, 1989); art.3(3) TEU; art.24 Charter; and to the case law of the Court on arts 20 and 21 TFEU. [13]

The Advocate General argues that the mere presence of the Dutch father in the Netherlands cannot, as such, justify the refusal of a residence right for the mother. The referring court should assess in each case whether a refusal of a residence permit complies with the principle of proportionality. This must be done since there are several competing interests that have to be weighed against each other: national interests in the area of immigration, the rights of Union citizens, the best interests of the child, and rights based on national family law, such as custody rights. [14] In the Advocate General's view, the most important factor in the proportionality test to be considered is the child's degree of dependence on the third-country national parent. [15] In that regard, he argues that it is essential to assess on whom the child is legally, financially or emotionally dependent, which is a formula that the Court used in O v L. [16] Furthermore, the Advocate General argues that fundamental rights, such as the right to family life, read together with the obligation to consider the interests of the child, [17] should be considered in the review of the proportionality test.

In the context of the burden of proof, the Advocate General argues that if a party relies on art.20 TFEU, the national authorities should *ex officio* assess whether the requirements for its application are fulfilled. In addition, they should raise the issue whether the other EU citizen parent can assume the care for the child, considering the principles of proportionality and the primacy of the best interests of the child *ex officio*. He stresses that the division of the burden of proof must not lead to a loss of useful effect of the Union citizenship rights of the child. Moreover, the Advocate General concludes that to require the TCN mother to file a claim—against her own interests—to have the custody rights transferred to the other parent, in order to prove that he, in fact, cannot assume the care, would be a violation of art.20 TFEU and the general principles of law, particularly the principle of proportionality. [18]

Judgment of the Court of Justice

The Court starts its reasoning by drawing attention to the specific factual characteristics of the cases in terms of the intensity of contact with or involvement of the other parent (EU citizen), the residence status of the mothers, and the use of free movement rights by the child at issue.

Similarly to the Opinion of the Advocate General, the Court concludes that, for the period of the use of free movement rights by Ms Chavez-Vilchez and Ms Wip and their respective children, their rights should be assessed under art.21 TFEU and Directive 2004/38. However, where the Advocate General argues that there is room for direct applicability of Directive 2004/38, the Court argues that the Directive does not cover the derived rights of third-country family members in the case of return to the Member State of nationality of their child. Nevertheless, the Court states that the conditions of arts 5–7 of Directive 2004/38 should be applied by analogy. [19]

With regard to the first and second preliminary questions, the Court recalls its previous judgments, in which it ruled that art.20 TFEU prevented measures that result in the EU citizen being deprived of the effective enjoyment of his rights, i.e. if the refusal of the derived residence right for the third-country ***953** national family member actually forced the Union citizen to leave the territory of the EU altogether. [20] This applies, however, only in exceptional circumstances, if secondary legislation on the right to residence of TCNs does not apply, and if the EU citizen child has not used his free movement rights.

As regards the relevant factors for the assessment of the risk that a refusal decision forces the minor child (EU citizen) to leave the EU, contrary to the Dutch Government's argument, the Court regards the presence of the other—EU citizen—parent as "relevant" but "not in itself sufficient". [21]

The Court therefore rejects the restrictive reading of the Ruiz Zambrano judgment that was provided in the Dutch guidelines for the immigration services. According to the Dutch judgment, it can only be assumed that the Union citizen parent is unfit or unable to care for the child in the case of imprisonment, confinement to an institution, or death, or where the application by that parent for the custody of the child has been dismissed by a court. The fact that a parent with the nationality of the Member State is de facto present or de facto able to take care of the minor EU citizen in itself is not sufficient to argue that the EU minor citizen will not be forced to follow the TCN outside the EU. According to the Court, the national authorities must consider not only the question who has custody of the child, but also which parent is the primary carer of the child, and whether there is an actual relationship of legal, financial or emotional dependence between the child and the TCN parent. In the light of this assessment, the competent authorities must take into account the right to respect for family life, art.7 Charter, read in conjunction with the duty to consider the interests of the child, as stipulated by art.24 Charter. [22] In order to conclude that the child would be forced to leave the EU if the TCN parent did not have a right to residence, it is in the best interests of the child that all circumstances be considered, in particular the child's age, physical and emotional development, the extent of his or her emotional ties with both the EU parent and with the TCN parent, and also the risk for the child's equilibrium, should they be separated from the TCN parent. [23]

As regards the third preliminary question, about the burden of proof, the Court considers that, in principle, the third-country national parent who wishes to obtain a derived right of residence based on art.20 TFEU should provide evidence on the basis of which it can be assessed whether he or she fulfils the conditions to obtain such a right, especially the facts pertaining to the possible deprivation of the effective enjoyment of the Union citizenship rights of the child in the case of refusal of the right of residency. [24] However, the Court also warns that the national authorities should avoid an application of national rules on the burden of proof which undermines the effectiveness of art.20 TFEU.

The Court points out that national rules regarding the division of the burden of proof do not relieve national authorities from their duty to make the necessary inquiries, based on the evidence submitted by the TCN parent, in order to ascertain where the other parent resides and whether this parent is actually able and willing to assume sole responsibility for the

daily care for the child, and whether there is indeed such a relationship of dependency between the child and the TCN parent that the child would in practice be forced to leave the EU if the right of residence were refused.

Comment

The Chavez judgment specifies factors that need to be considered by national authorities when they assess whether an EU citizen risks being deprived of the genuine enjoyment of the substance of his or her EU citizenship rights. More particularly, the Chavez judgment illustrates this test with regard to minor children who are EU citizens, and who may (or may not) be so dependent on their TCN parent that this parent should enjoy a derived right of residence. In this comment, we focus on the value of Chavez added to the ***954** existing line of case law since Ruiz Zambrano, and we will identify questions that may need further clarification. For instance, does the Court's refined dependence assessment lay the ground for a new approach to the role of the Charter in the context of art.20 TFEU? If so, what is the relationship between the Court's interpretation of the right to family life under the Charter, and the longer, and more developed line of case law of the European Court of Human Rights (ECtHR) on these rights? And does the approach towards art.20 TFEU that is now crystallising have implications for the relationship between arts 20 and 21 TFEU?

The relationship of dependency between the EU citizen and the TCN

For the test whether the substance of the rights of a minor EU citizen are violated by a Member State, as established in Ruiz Zambrano, [25] the relation of the child's dependency to the TCN parent is crucial. According to previous case law, art.20 TFEU is violated only in exceptional circumstances—in particular, if a minor child who is an EU citizen is dependent on his or her TCN parent, but the national authorities refuse this parent the right of residence, and the child would therefore have to leave the territory of the EU in order to accompany their parent. [26] The right conferred by art.20 TFEU has therefore also been described not as the right to reside in the European Union, but as the right "not to be forced to live outside the EU". [27] The Ruiz Zambrano criterion therefore applies only in exceptional situations, in which a minor EU citizen has no other choice than to follow the TCN parent and leave the EU. The question was left open under which circumstances a minor is actually forced to leave the EU, which is a difficult assessment, since it is in essence a hypothetical question. It means that national authorities and courts have to assess the strength of the relationship between the TCN and the minor EU citizen and predict what will happen in case of expulsion of the TCN parent. In Dereci the Court held that,

"the mere fact that it might appear desirable to a national of a Member State … in order to keep his family together in the territory of the Union … it is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted." [28]

It seemed therefore that the Court had a strict approach to art.20 TFEU and did not allow room for the right to family life to be included in art.20 TFEU. In Chavez, the Court made a new turn in its case law by including family life in the assessment of whether art.20 TFEU has been violated. One of the essential elements of the assessment of art.20 TFEU is the relationship of dependency between the TCN parent and the EU minor citizen. In order to rely on art.20 TFEU there should be a particularly strong degree of dependency. In Chavez the Court refined this assessment.

In order to appreciate the Court's refinement of the dependency assessment in Chavez, it is useful to retrace the development of this criterion. In the 2004 case of Chen, [29] the Court ruled that art.21 TFEU should be interpreted in such a way that a TCN parent, on whom a minor child is dependent, may obtain a derived right of residence. The Court held that,

"it is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her *primary carer* and accordingly that the ***955** carer must be in a position to reside with the child in the host Member State for the duration of such residence." [30]

The Court therefore used the notion of "primary carer" to appreciate the relationship of dependency. In Ruiz Zambrano, and in the light of the interpretation of art.20 TFEU, the Court merely referred to the children's dependency on their TCN parent, but did not explain how that relationship of dependency was to be appreciated (Diego and Jessica Ruiz Zambrano were eight and six, respectively, at the date of the judgment, and their parents had joint custody).

In Dereci, the Court did not express itself on the actual relationship of dependence between the EU citizens and their family members, this being a matter for the national courts to establish. However, the Court, as observed above, did state that the fact that the desire to keep a Union citizen's family together,

"is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted." [31]

In O v Maahanmuuttovirasto, [32] the Court was asked about the nature of the relationship between the EU citizen and the TCN parent, and the question whether a step-parent with the nationality of a third country could have a derived right to reside based on art.20 TFEU. The Court eventually ruled that the minor EU citizens, under the circumstances of these cases, were not forced to leave the EU, because their mothers had a right to reside in another EU Member State, although it did go on to emphasise that,

"it does not follow from the Court's case-law that their application is confined to situations in which there is a blood relationship between the TCN for whom a right of residence is sought and the Union citizen." [33]

However, the Court also clarified that in the assessment of the risk of deprivation of the genuine enjoyment of Union citizenship rights, a factor to be considered was the fact that the third-country fathers or stepfathers were not persons "on whom those citizens are legally, financially or emotionally dependent". [34] Even though the Court mentioned the custody or sole custody, i.e. legal dependency, of the children several times in the judgment, there may be other forms of dependency. O v Maahanmuuttovirasto therefore was a sign that the Court would follow a non-formal approach to the Ruiz Zambrano criterion. The de facto dependency is far more important than formal relationships between the primary carer and the EU citizen.

In Chavez the Court further develops the reasoning it employed in O v Maahanmuuttovirasto. It first refers to its judgment in O v Maahanmuuttovirasto, summarising that factors of relevance were the question of who has custody of the child and whether the child is legally, financially or emotionally dependent on the third-country parent. [35] At [70], it rephrases the O v Maahanmuuttovirasto test: that it must be determined in each case which parent is the "primary carer" of the child, and whether there is, in fact, a relationship of dependency between child and TCN parent. The Court goes on to state that, as part of this assessment, account must be taken of the right to respect for family life under art.7 Charter, read in conjunction with the obligation to take into consideration the best interests of the child of art.24(2) Charter. This is an important and explicit departure from the Court's reasoning in Dereci and O v Maahanmuuttovirasto, and we will discuss this new approach below.

Subsequently, the Court provides even more detailed clarifications on the dependency test. It states that, although it is a relevant factor whether the other, EU citizen, parent is actually willing and able to ***956** assume sole responsibility for the primary day-to-day care of the child, this in itself is not sufficient to conclude that there is not a relationship of dependency with the TCN parent. [36] The final instructions of the Court on the assessment of dependency are that,

"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." [37]

In the chronological context of the Chen, Ruiz Zambrano, Dereci and O v Maahanmuuttovirasto cases, we find that the Chavez judgment presents a refinement of the test of dependency, which (at least possibly) does more justice to the protection of the best interests of the child than it had done before, [38] as it acknowledges that the dependence between child and parent may consist of elements other than just the primary care, or the legal custody arrangements, and that various other factors relating to the child's emotions and development need to be considered. It is important to note that in principle the relation of dependency remains temporary, which may change in time. [39] Does the relationship of dependence end when the EU minor citizen becomes an adult? What basis would exist for the TCN parent after that time? Directive 2003/109 [40] on long-term residents might protect the TCN's right to reside, but only if the TCN has been residing continuously and legally (on the basis of art.20 TFEU) in the Member State in question.

The relationship of dependency is therefore deepened and more broadly interpreted by the Court than it had previously ruled in Dereci. The Court made a significant move by including family life and the rights of the child in the assessment of dependency. The incorporation of the right to family life and the importance of the best interests of the child in the assessment of dependency raise important questions about the relationship between the scope of art.20 TFEU and of the Charter, on the one hand, and between the Court's interpretation of the Charter, and the role of the ECHR, the ECtHR's case law and other human rights instruments, on the other, which we explore in the following sections.

Fundamental rights linked to the status of EU citizenship

The scope of Article 20 TFEU and that of the Charter—the story of the chicken and the egg

The novelty of the Chavez judgment lies in the fact that the Court includes the rights to family life and the best interests of the child, as laid down in arts 7 and 24 of the Charter, in the examination of whether art.20 TFEU is violated by a national measure. This may mean that a new approach is developing to the ***957** role that the Charter can play in determining whether an EU citizen's situation falls within the scope of art.20 TFEU. Again, it is useful to compare the Chavez judgment with the approach taken by the Court in earlier case law on art.20 TFEU.

It should be recalled that in Ruiz Zambrano the Court mentioned neither fundamental rights nor the Charter, despite the fact that the referring court had explicitly requested guidance on the importance of the Charter, and despite the fact that AG Sharpston had spent a considerable part of her elaborately reasoned Opinion on precisely the matter of fundamental rights. She proposed to define the scope of application of the Charter by reference to the existence of a material Union competence. [41] However, the Court did not address the role of fundamental rights in Ruiz Zambrano. In subsequent cases it became clear that the mere existence of a Union competence was insufficient to bring a situation within the scope of application of the Charter. [42] Subsequent academic debate on Ruiz Zambrano and on the Court's following case law, the question of the role of fundamental rights, or lack thereof, and the implication for the scope of application of both art.20 TFEU and the Charter itself played an important role. [43]

In Dereci, as well as in O v Maahanmuuttovirasto, the Court considered the review under art.20 TFEU in the Ruiz Zambrano reasoning as separate from the potential claims for a right of residence based on the fundamental right to family life, which, according to the Court, "must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case". [44] The Court subsequently stressed that the Charter is applicable

only when Member States are implementing EU law, and that the Charter, according to art.51(2) Charter, does not extend the field of application of EU law. Accordingly, the Court argued that the national court must determine whether the situation "is covered by EU law", in which case it may review whether a refusal of the right of residence violates the right to family life under art.7 Charter, or whether the situation is not covered by EU law, in which case the national court should take the ECHR (art.8 ECHR) into account. In these cases, the Court seemed to separate the applicability of the Charter from the applicability of art.20 TFEU, and even seemed to view a fundamental rights claim as a different "*voie de recours*" for claimants. Furthermore, the Court emphasised the fact that art.7 Charter should correspond with art.8(1) ECHR and the interpretation given to that provision in the ECtHR's case law. [45] By contrast, the Court takes a very different approach in the Chavez judgment, by asserting that "as part of" the assessment of dependency,

"account must be taken of the right to respect for family life under Art. 7 Charter read in the light of the obligation to take the best interests of the child into consideration under Art. 24 Charter",

without referring to the ECHR or any of the ECtHR's judgments on the right to family life, or to other human rights instruments (a point that we shall discuss in more detail in the next section). [46] Moreover, the ***958** Court failed to engage with its own earlier case law on this point, and did not explain the reasons for departing from the earlier approach. [47]

This new approach—and the lack of explanation—are remarkable, since art.51(1) of the Charter states that the Charter shall only apply to Member States whenever they "implement EU law". Although there have been debates about the meaning of these terms, we know from the explanations accompanying the Charter that the Charter is binding on Member States whenever they act in a situation that falls within the scope of application of EU law. [48] This is essentially the case when Member States implement or otherwise apply EU law, or when Member States derogate from it. [49] In free movement case law, for instance, EU law applies (for the purposes of determining the applicability of the Charter) if EU Member States rely on one of the justifications to restrict one of the freedoms. Formally, one may argue that in that situation the scope of application is triggered, because the case falls within the *material* scope of one of the free movement provisions, and there has been a prima facie restriction. Therefore, the national measure falls under the prohibition to restrict free movement, i.e. within the scope of EU law. Only after establishing that there is such a prima facie restriction of one of the freedoms do justifications come into play, and in the light of the assessment of the justifications, the Charter may play a role. [50]

Such was also the Court's approach in Rendón Marin. Here, the Court stated that the right to respect for family life and the best interests of the child had to be taken into account, [51] but this concerned the assessment of the justification of the restriction in the context of art.20 TFEU. Consequently, since a prima facie restriction had already been identified, the situation fell within the scope of EU law. [52]

In the Chavez judgment, however, the EU Charter is used to fill in and interpret the prohibition in itself, since art.20 TFEU has a rather undetermined material scope. The question is: What came first? Was it the violation of art.20 TFEU and therefore the situation could be assessed in the light of the EU Charter? This would mean that the protection of the child's right or the right to family life depends on the Charter's scope of application. Or, as it seems from the Court's approach in Chavez, does a violation of a Charter right—the right to family life read in conjunction with the obligation to respect the child's best ***959** interests—cause a violation of art.20 TFEU in itself? [53] This may be problematic, since the "activation" of art.20 TFEU as an autonomous source of rights since the Ruiz Zambrano judgment constituted a departure from the "purely internal situation" rule. In principle, any national of a Member State falls within the personal scope of art.20 TFEU, without needing to have used his or her EU rights. In the light of the limits placed on the application of the EU Charter in art.51, the Court made a remarkable move, one that can be criticised from the perspective of legal certainty and quality of judicial reasoning. [54] The language used by the Court at [70] is ambiguous:

What does it mean to take a fundamental right "into account", and does this not circumvent the interpretation that it previously gave to art.51(1) Charter?

One interpretation of the Court's argumentation in Chavez could be that the Court did not intend to bring the Chavez case within the scope of application of the Charter and thereby make the Charter part of the more general category of the "substance of rights", but rather that it advocated a "Charter-compliant" interpretation of the particular assessment of dependency in light of the derived right of residence for third-country national parents under art.20 TFEU. [55] Such a Charter-compliant interpretation of EU citizenship was something that AG Sharpston suggested in O v Minister voor Immigratie, Integratie en Asiel. [56] Although such a Charter-compliant interpretation of EU law is increasingly frequent, [57] it might also be criticised if the consistent interpretation goes as far as to circumvent the limitation of art.51(1) Charter. Unfortunately, the Court does not make explicit what its approach in Chavez means with regard to art.51(1) Charter, nor does it explain why it did not take such an approach in earlier cases.

Derivative residency rights for TCN parents—role for proportionality?

In light of the foregoing, it is interesting to note that the Advocate General in Chavez took the more traditional approach as developed in internal market case law: by assessing whether the prima facie interference with art.20 TFEU, which brings the case within the scope of application of EU law (and therefore of the Charter), was justified by objective reasons and whether it was proportionate. The proportionality review, he argued, should focus in particular on the extent of the dependence between the TCN parent and the child, and should consider fundamental rights, such as the right to family life of art.7 of the Charter, read together with the obligation to consider the interests of the child, as laid down in art.24(2) of the Charter. This was also the Court's own approach in Rendon Marin.

However, in Chavez the Court does not mention the principle of proportionality at all, but seems to take the assessment of the extent of the dependence between the third-country national parent and the child as part of the question whether the child would be deprived of the genuine enjoyment of her or his EU citizenship rights at all. One may argue that this test has a proportionality check built into its terms: that the Union citizen must be deprived not just of any general enjoyment of any rights, but of the "genuine" ***960** enjoyment of the "substance" of EU citizenship rights. However, it is far from clear whether the "Zambrano formula" must be read in this way, or if there is a separate, additional role to play for the proportionality principle.

The Advocate General's approach is more systematic—since it is firmly built on the traditional approach of restrictions of the fundamental freedoms of the internal market [58] —and clear, which from a "quality of legal reasoning" perspective could be preferable. [59] The "scheme" of the argument to be followed would be: is there a prima facie restriction of art.20 TFEU? If so, it needs to be objectively justified and proportionate. The "prima facie restriction", i.e. the existence of a risk that an EU minor child would have to follow his or her TCN parent outside the EU, crosses the hurdle of the scope of application of EU law for the application of the Charter. This clears the way to state that, within the proportionality review, account must be taken of fundamental rights. However, one could also argue that this approach to art.20 TFEU opens the floodgates for a reliance on the Charter, since, on the one hand, the personal scope of art.20 TFEU covers all Member State nationals and the material scope of art.20 TFEU is determined in a slow, case-by-case manner in the case law of the Court; and, on the other hand, all Charter rights could theoretically be part of the proportionality review. Then again, it is clear from the line of case law since Ruiz Zambrano that the application of art.20 TFEU as an autonomous source of rights is limited to extreme cases, so the actual risk of such a "snowball scenario" may be limited in practice.

There is also another interesting side to the substantive guidance that the Court gives to the national authorities for the dependency review. It is common knowledge that neither EU citizenship rights under art.20 TFEU, nor the right to family life, are absolute rights, which means that Member States enjoy a certain degree of discretion to balance these rights

against the objective interests of society. In Chavez the Court identified numerous factors that the national authorities must take into account from the perspective of the right to family life and the child's best interests, and, furthermore, that the national authorities must make "all necessary inquiries" to determine the dependence. However, the Court did not pay any attention at all to the other side of this balancing exercise, namely the interests of the State. In a way, the Court "front-loaded" the dependency test with the right to family life and the obligation to consider the child's best interests. Should this test not be more balanced with the other rights and interests that may be involved in the decision to grant rights of residency to TCN, and would a reference to the ECHR or other instruments have provided inspiration for this balancing? These two points are discussed in the following section.

Fundamental rights "as part of" the dependency assessment—adequate protection of the rights of the child (and parents) (and Member States)?

The depth and complexity of a child's relationship with his or her parents is difficult to dissect and label legally. The Court can be applauded for making an effort to include the right to family life and the child's best interests in its refinement of its previous line of case law on the factors that need to be considered by national authorities. The fact that the Court insisted on a fair burden of proof, as discussed below in more detail, also protecting the EU citizens against a very restrictive regime, may be welcomed. The outcome for the litigants at issue is that the TCN parents were able to stay in the Netherlands, which presumably is a good thing for these EU minor children.

However, taking a long-term and systematic view on both the development of the substance of EU citizenship rights, and the coherence of fundamental rights protection in the EU, how are we to judge this ***961** recent performance of the Court? A first point of criticism has been addressed above, namely the newly established relationship between the determination of the scope of application of art.20 TFEU and the Charter. We will now address three further questions, which we will try to distinguish for clarity's sake, but which are actually intertwined.

The Chavez judgment is an example of a case in which the Court interprets fundamental rights laid down in the Charter without referring to or drawing inspiration from pre-existing interpretations of similar rights in other international human rights instruments such as the ECHR, or the United Nations Convention on the Rights of the Child 1989 (UNCRC), which is the most important international instrument for the protection of the rights of the child. [60] Although this "Charter-centric" approach is becoming increasingly common [61] and, admittedly, art.24 Charter is, according to the Explanations relating to the Charter, based on several provisions of the UNCRC, [62] the Court has also been criticised for the lack of references to the ECHR or other relevant sources of human rights law, and for its perceived inconsistency and arbitrariness in when it does, or does not, make such references. [63] It is therefore an important question whether the Court can indeed be reproached for being imbalanced, inconsistent or seemingly arbitrary in referring, or not, to the ECHR or other sources of human rights law. Secondly, we address the question whether an adequate protection of all the rights involved has been realised, and whether such references to the ECHR or other human rights instruments would have made a substantive difference. Lastly, we ask whether this Charter-centric approach can be explained in light of the autonomy of EU law.

Silence on ECHR/other international instruments

How are we to judge the Court's deafening silence on the ECtHR's case law and other relevant human rights instruments? In the academic literature, there has been ample discussion of the Court's developing role as a human rights court. [64] In a convincing plea for the Court to make more, not fewer, references to other human rights instruments and bodies, such as the ECtHR, Gráinne de Búrca argued that recourse to such instruments and to the decisions of other human rights bodies would remedy the Court's relative lack of experience and expertise in adjudication questions pertaining to fundamental rights protection. Another of her arguments is that referring to and engaging ***962** with such other

sources of fundamental rights protection would increase the coherence and consistency—the fairness—of fundamental rights protection globally, which is preferred over a local, particular development of fundamental rights protection. De Búrca furthermore points out that the principle of transparency and the obligation to state reasons for its decisions are central to the legitimacy of the Court's case law. [65] It goes beyond the scope of the present article to engage fully with De Búrca's arguments, but we can observe here that Nic Shuibhne advanced a somewhat similar argument. Writing about the "internal" consistency of the Court's own case law on EU citizenship and fundamental rights (and not per se about the practice of referring to other sources of fundamental rights), she pleads for the Court to be consistent in its approach to fundamental rights questions. The Court,

"must endeavour to weave its case law logically together or, if there are good reasons to push the law in a different direction, articulate its reasoning as clearly and explicitly as possible." [66]

Furthermore, earlier in this Law Review, in an editorial commenting on the Ruiz Zambrano judgment, she argued as follows:

"Or, if it [the Court] is truly serious about pushing the constitutional reach of EU law this far, then be open about it, be thorough, be direct, and persuade us as to why this must be the outcome … The Court is trying to do good things in individual cases; but it cannot continue to ignore the systemic legitimacy—and credibility—consequences of this choice." [67]

Accordingly, we conclude that the minimum standard of quality that we can hold the Court to on this matter is that of internal consistency: the way it weaves together its own previous strands of case law and the new questions presented by a new preliminary reference procedure. Over and above this internal consistency, we agree with De Búrca that the legitimacy of the Court's approach to fundamental rights protection is enhanced if it openly demonstrates that it draws lessons from, and engages with, other sources of fundamental rights, national or international. We think this is important not only if these other sources support the Court's approach, but also if they diverge. Such differences need to be addressed in an informed and careful way.

In this light, it is difficult to understand why, in the Chavez judgment, the Court only refers to the Charter, and is silent on the ECHR or other human rights instruments. It is, to say the least, inconsistent with the Court's own previous case law: we saw in the previous section of this article that in Dereci and O v Maahanmuuttovirasto the Court explicitly separated the option of relying upon art.20 TFEU for a derived right of residence from a claim for a right of residence based upon the fundamental right to respect for family life under art.8 ECHR. Furthermore, in the CS case, the Court did refer to the ECtHR's judgment in Jeunesse about art.8 ECHR, [68] and there are numerous recent examples, in other areas of EU law, in which the Court still extensively refers to the ECtHR's case law. [69]

Moreover, although there is a significant overlap between the ECtHR's general approach to the right to family life and the Court's approach in Chavez, there are also substantive differences that should have been addressed (as we will see in the next section). [70] These diverging approaches are particularly interesting ***963** since they call into question the aim of correspondence between the Charter and the ECHR, which is clearly laid down in art.52(3) Charter, and which the Court even emphasised in its judgment in Dereci. [71]

Substance of the "substance of rights", and whose rights—has there been adequate protection and would recourse to other instruments/bodies have made a difference?

We have criticised the Court's omission of references to the ECtHR's case law on the right to family life and the child's best interests from a purely formal, systematic consistency point of view—but what are the substantive differences and

commonalities between the Court's and the ECtHR's approaches, and would it have made a difference if the ECJ had referred to the ECtHR's case law in Chavez? And has an adequate level of fundamental rights protection been achieved?

If we compare the Court's line of case law with the Court's approach in the Chavez judgment, we can see that there are several similarities between the Court's and the ECtHR's approaches. We note that both the ECtHR and the Court consider the child's dependency on his or her parent(s), which parent is the primary carer, and also the age of the child. [72] Although the Court does not explicitly mention the child's right to be in direct and regular contact with both parents, unlike the ECtHR, [73] this right actually supports—and may have informed—the Court's position in Chavez that the presence of the other—EU citizen—parent on the territory of the home Member State is not in itself sufficient to conclude that the rights of the EU citizen minor child are not infringed if the third-country national parent is forced to leave the EU. [74]

A factor that the ECtHR does, but the Court in Chavez does not, take into account, is the question of how rooted the child is in the home EU Member State, and the connection, if any, with the country of origin of the TCN parent. [75] The omission by the Court of the factor of integration in the home Member State may be explained by the fact that the children all had this Member State's nationality, making an argument about their "real link" or "degree of integration" obviously unnecessary.

Overall, the focal point in the ECtHR's assessment in cases of family rights and family reunification is the integrity of the family unit. Separation of a child from his or her parent is only acceptable in exceptional circumstances and can only be justified in the light of the child's interests and aimed at the protection of the child against imminent harm. [76] However, this approach has led to judgments in which the ECtHR did not find a violation of art.8 ECHR to exist, since family life could be continued in the parent's country of origin. Also, in the approach of the ECtHR, Member States traditionally enjoy a certain "margin of appreciation" in their restrictions of fundamental rights.

However, unlike the ECtHR and its "margin of appreciation" approach, the Court in Chavez paid little attention to the interests that a Member State may have, for instance in shaping immigration policy and preventing abuse of rights. [77] This raises the question whether the Court's approach is balanced enough. Member States may have legitimate concerns for their immigration policies, and the question is left open whether, and if so, how, these concerns can be weighed against the rights of the EU minor child—especially ***964** given the absence of an explicit and structured proportionality review in the Court's approach, as mentioned above. However, on this point, children's rights advocates have actually criticised the ECtHR for leaving this "margin of appreciation" since this approach only ensures a minimum level of protection, and falls "well short of actively promoting the rights of children". [78] These opposing views raise the question of the actual level of fundamental rights protection that the Court offered: was it adequate?

Although, as stated in the introduction, the net result of the Chavez cases was that the TCN parents could derive a right of residence in the Netherlands from their children's EU citizenship rights under art.20 TFEU, the Court's approach to the right to family life and the child's rights in Chavez can be criticised for being too strongly centred around the perspective of the adults involved, disregarding the right of the child itself to be heard. This is because under the Charter, but also under the UNCRC, account should be taken not just of the perspective of the parents, but also of that of the child. [79] In this regard, it is interesting to note that the Court explicitly states that art.24(2) Charter has to be taken into consideration (the principle that the child's best interests must be "a primary consideration"), but that it does not refer to art.24(1), which reads:

"Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. *Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity* [emphasis added PP/HvE]".

The tendency to take into account only the parents' perspective, and not the child's, is also something that the ECtHR has been reproached for. It is argued that truly protecting the right to family life and the child's best interests also requires that children are "visible" as subjects of rights, and that they have a voice in the proceedings. [80] Such visibility and recognition as legal subjects has still not been achieved.

Another point of criticism, or at least of questions that are left open for another round of preliminary references that will undoubtedly follow sooner or later, is the fact that so far the way in which the Court speaks about the relationship between the child and his or her parents presumes a gendered binary situation, meaning that either one parent has the primary care, or the other. [81] Admittedly, the newly refined test seems to leave room for a situation in which the primary carer is the EU citizen parent, but where there is nevertheless such a relationship of dependence with the third-country national parent so as to make a refusal of a right of residence an infringement of art.20 TFEU. However, like the question about the role of art.24(1) Charter, a similar question can be raised about art.24(3) Charter, which reads:

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

This provision thus contains a real right, rather than the slightly weaker obligations to take into consideration the views of the child and its best interests. [82] It is unclear why the Court only referred to art.24(2) Charter, and not to the other two paragraphs of that provision, which also contained relevant rights of the child that could have made the Court's reasoning more thorough and truly inclusive. ***965** [83]

Explaining the Court's approach—autonomy of EU citizenship law?

In the foregoing we observed a curious silence of the Court on the corresponding rights about family life in the ECHR and on the ECtHR's relevant case law or other instruments such as the UNCRC. Furthermore, although there was some substantive overlap, there were also several significant differences between approaches of these two courts. Also, we noted that there are still considerable flaws or blind spots in the Court's approach to children's rights.

It could be argued that the Court's Charter-centric approach in Chavez is an example of the "specific characteristics" and the "autonomy" of the EU legal order, in the light of which fundamental rights must be interpreted, as the Court asserted in Opinion 2/13. [84] If the Court had followed the line of reasoning developed in the case law of the ECtHR, it would have had to balance the integrity of the family unit with the margin of appreciation left to Member States. In the light of this balancing exercise, the ECtHR's usual criterion is whether there are "insurmountable obstacles" to enjoying family life elsewhere, thereby accepting the move of the family from the home State—and therefore outside the EU—as long as the family unit remains intact. However, the crux of the Ruiz Zambrano line of case law, of which the Chavez case is the most recent elaboration, lies exactly in the specific characteristics of EU citizenship rights: the right to stay in the EU takes centre stage, not fundamental rights—the right to family life—as such. This special nature of EU citizenship rights may explain why the Court has been reluctant to refer to the ECtHR's case law in the Chavez judgment, since its own reasoning necessarily has such a different focal point. Where cases before the ECtHR focus on violations of fundamental rights, the key element in Chavez was the scope of the status of EU citizenship and the substance of the rights granted to EU citizens, which only in a secondary, derived manner affected their right to family life. This means that these cases are different legal pathways, and different legal narratives. In the context of art.20 TFEU the question is whether EU citizenship becomes ineffective, which is a point of departure that is different from starting an assessment with fundamental rights as a focal point. This difference is also important for the possibilities of performing a proportionality review. It could be argued that the threshold of ineffectiveness of EU citizenship rights (deprivation of the genuine enjoyment of the substance of rights) is more difficult to reach than the question whether the right to family life is

restricted. However, once this ineffectiveness is accepted as plausible, which will only apply—as the Court has repeatedly stressed—in exceptional cases, there is no room for a true balancing exercise with other rights and interests advanced as justifications for a restriction, such as the interests of the Member States. In Chavez, the Court applied neither a margin of appreciation in the style of the ECtHR, nor the classic proportionality review as suggested by AG Szpunar.

All in all, the Court's failure to properly engage with its own case law and with that of the ECtHR makes assessing the Chavez judgment on the point of fundamental rights protection, and notably for its consequences for the development of EU citizenship and fundamental rights cases, a bit of a tea-leaf reading exercise. Given the importance of the Court as a quasi-constitutional court, the flaws in the Court's reasoning are to be lamented, despite the obvious positive outcome for Ms Chavez-Vilchez et al.

The burden of proof—good luck national authorities and judges!

In Chavez, the substantive protection that the Court offers to the rights of minor EU children and their TCN parent(s) under art.20 TFEU also received considerable refinement at a procedural level. It is a general rule of law that a party who seeks to rely on certain rights must establish that those rights apply ***966** to their situation.[85] Furthermore, it is standard EU case law that in absence of EU rules on the procedures pertaining to claims based on EU law, it is for the national legal systems to establish procedural rules. Of course, this applies provided that these respect the principles of effectiveness and equivalence, which require that rules that govern a dispute with an EU law dimension may not be less favourable than those governing similar domestic disputes, and that the exercise of rights conferred by the Union legal order may not be rendered virtually impossible or excessively difficult.[86]

The assessment of the existence of a derived right of residence under art.20 TFEU is exactly such an issue for which there are no European procedural rules, so that, in principle, the national procedural rules apply. However, it may come as no surprise that the Court concluded in Chavez that the particularly onerous burden and standard of proof resting on the third-country nationals under the Dutch interpretation of the Ruiz Zambrano doctrine hampered the effectiveness of the Union citizenship rights at issue.

The Court gave not only a rather detailed instruction to national courts and authorities on which factors to consider when assessing the relationship of dependence between the child and the third-country national parent, but it considerably lessened the burden of proof for that parent and introduced a rather far-reaching duty for national authorities to examine whether a claim based on art.20 TFEU must be upheld. On this point, the Court did not follow the Advocate General, who went even further by arguing for an *ex officio* duty to investigate whether the other parent is able and willing to assume the care. In the Court's approach of the matter, the third-country national parent still has a duty to provide evidence, but this concerns first and foremost information that she or he had reasonable access to: evidence of her/his own situation, the situation of the child, and of her/his own relation with the child. Based on this evidence, the national authorities must make the "necessary inquiries" about the other parent's whereabouts, but also whether he is not only factually able, but also willing to assume the daily care for the child. The duty to make the "necessary inquiries" also extends to the assessment of the relationship of dependence.

While this correction of the strict Dutch practice is to be welcomed, it leaves further uncertainty about how much and what kind of evidence is sufficient, what constitutes these "necessary inquiries" to be made by the national authorities, and when these inquiries have been sufficient. It is important to note in this respect that art.20 TFEU was invoked in this case in the context of access to social benefits (child allowance). Since in the Netherlands the right to reside is a precondition for certain social benefits, questions on art.20 TFEU are relevant in this area. In the Netherlands, the different types of social benefits are awarded by different bodies, for instance, some by municipalities, some by the SVB (Social Security Bank, which covers social rights, such as child allowances), which do not always have the same resources for making inquiries. Furthermore, it is quite complex in itself to take into account the factual ability, let alone the willingness of

both parents to assume the care. However, it also raises a range of further questions about the opportunities for the other parent, and—as discussed above—for the child to be heard, including the question if fundamental rights, such as the right to a fair trial and the right to an effective remedy as laid down in art.47 Charter, also play a role in that assessment. Moreover, art.21 TFEU has a clear legal framework, as Directive 2004/38 lays down the specific conditions and restrictions for residency rights. Directive 2004/38, however, only applies to EU citizens who have exercised their free movement rights. Article 20 TFEU has no such specific legal framework, which means that it is unclear for national authorities under what circumstances art.20 TFEU might be restricted for reasons of public interest or whether art.35 of Directive on fraud can be applied in analogy to art.20 TFEU. ***967**

In reaction to the Chavez judgment, the current practice of the Dutch authorities is currently very lenient regarding all applications. [87] This has led to a dramatic increase in the number of applications, but also in an increase of cases in which there is a reasonable suspicion of abuse, i.e. where Dutch men seem to acknowledge the paternity of unborn children of third-country women (who are often under age), in order for the child to have the Dutch nationality and to create a "route" to the Netherlands for the mothers. [88]

These practical problems, i.e. a national, restrictive, interpretation and an onerous allocation of the burden of proof, form important obstacles for the realization of Union citizenship rights. What is more, the differences in national applications of the Ruiz Zambrano doctrine considerably threaten the uniformity of EU citizenship law. [89]

The relationship between Articles 20 and 21 TFEU

Chavez poses, finally, interesting questions on the relation between art.21 TFEU and art.20 TFEU. Although both provisions have a specific scope and scope of application, we see convergence, and at the same time some significant differences between these provisions that are noteworthy. Whereas the free movement rights have been developed as the fundamental freedoms of the internal market and not only include the right to reside in another Member States but also apply to those EU nationals who after free movement come back to their own Member States, the scope of art.20 TFEU is very limited. The right to free movement as granted by art.21 TFEU is further described in more detail in Directive 2004/38. This Directive only applies to Union citizens who move to or reside in Member States other than that of which they are a national, and to their family members who accompany or join them (art.3(1)). [90]

Placed in the broader context of the development of EU citizenship, it is interesting to note that the Court interprets art.20 TFEU as a residual basis of rights in situations in which art.21 TFEU does not apply. In Chavez the Court confirms its ruling in Rendón Marín that art.21 TFEU has to be examined first, after which art.20 TFEU might be assessed. There is a hierarchy between these provisions, which is also visible in the case law on economically active and economically inactive persons: first the Court assesses whether art.45 TFEU is applicable, and only in the situation that a person is not economically active is art.21 TFEU assessed. Now art.20 TFEU is regarded as the extraordinary safety net for EU citizens, even beyond art.21 TFEU. The case of Alokpa [91] is of particular interest in analysing the relation between arts 20 TFEU and 21 TFEU, since that case concerned a TCN mother with two French national children residing in Luxembourg, while the French father was not involved in the care of the children. Luxembourg refused their right of residence. According to the Court, the national court should verify whether the children comply with the conditions for residence in the host Member State (having sufficient resources and a comprehensive healthcare insurance). [92] If this is not the case, Luxembourg has the right to refuse residence under art.21 TFEU. However, the Court adds, in that situation art.20 TFEU could be invoked ***968** by the family, in the extraordinary circumstances of the case. What is significant in the Alokpa ruling is that the Court left open the option to invoke art.20 TFEU with regard to a *host* Member State, and therefore did not confine art.20 TFEU to the Member State of nationality. The fact that the Court left it up to the national court to examine whether the residence in Luxembourg would be the only option for the family to stay within the EU territory can rightly be called "a missed opportunity". [93] What is clear, however, is that the first step is to examine

whether there is an option to reside in the Member State of nationality, and if that is not the case, art.20 TFEU can be invoked to have a right to reside in a host Member State, even if the conditions for free movement are not complied with.

Even though arts 21 and 20 TFEU, as assessed above, are different routes, there is also some convergence between these provisions in the Court's case law. For instance, the Court's case law seems to converge on the application of expulsion grounds. The Court ruled in Rendón Marín with regard to expulsion grounds that,

"it must be held that, where refusal of the right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, such refusal would be consistent with EU law." [94]

Hence, even though art.20 TFEU has no derogation grounds, the Court has interpreted the grounds for refusal of a derived right to reside in analogy with the Directive expulsion grounds (art.27 of Directive 2004/38). Moreover, this interpretation is also in line with the expulsion grounds as formulated in Directive 2003/109, on the rights for long-term resident TCNs (art.12). This parallel reasoning may entail no problem if one's perspective is that of coherence and equality. On a more critical note, however, it should be observed that art.21 TFEU clearly grants the EU legislature the competence to legislate, of which Directive 2004/38 is the result. However, art.20 TFEU does not have such a specific legislative competence. [95] The fact that there is no specific underlying legal framework under art.20 TFEU poses significant issues, regarding the application of the other conditions of Directive 2004/38, especially because the Court seeks analogical application of the Directive in art.20 TFEU situations.

By contrast, there is a considerable difference between the Court's approach to art.21 TFEU and art.20 TFEU on a series of different points.

An inconsistency seems to be developing in the relation between art.21 and secondary legislation based on this article, on the one hand, and art.20 TFEU on the other. In cases concerning the derived rights of TCNs, the Court has the following approach: first, check whether any rights can be claimed based on secondary legislation (through art.21 TFEU); secondly, check—separately—whether art.21 TFEU can be relied on; and finally (and if the answer is in the negative), check whether there are exceptional circumstances that merit a claim based under art.20 TFEU. Such a layered approach stands in stark contrast with the recent, very strict approach of migrant EU citizens' claims to equal treatment regarding social benefits under Directive 2004/38, according to which an EU citizen only has a right to equal treatment if he/she is lawfully resident in light of the Directive. There is no residual check under art.21 TFEU, or under art.20 TFEU.

Furthermore, as described above, in Chavez both AG Szpunar and the Court (although following slightly different lines of reasoning) applied a highly specific and individualised assessment of the relationship of dependency. AG Szpunar did this in light of the principle of proportionality, but the Court did not explicitly ***969** call it that. This detailed, individualised approach is vastly different from the recent approach taken by the Court in the line of Dano, Alimanovic, Garcia Nieto and Commission v UK, in which the Court accepted that a generic proportionality test was "built into" Directive 2004/38 and where it concluded that there was no need for an individual assessment. [96] Does this mean that the different Treaty provisions on EU citizenship have different proportionality regimes? Moreover, the same question may be asked about the application of the Charter. In the Dano case, the Court took a formalistic, restrictive view on the Charter's scope of application, arguing that since the disputed conditions for creating a right to benefits were based in German law, and that those conditions do not result from a concrete Directive or Regulation, they did not involve "implementing EU law". [97] This is, again, very different from the Court's broad application of the Charter in Chavez. One could say that with Chavez, the Court confirms the Ruiz Zambrano doctrine and thereby defended the "genuine enjoyment of the substance of EU citizenship rights" under art.20 TFEU, but in the Dano/Alimanovic/Garcia

Nieto/Commission v UK line of case law it restricts the actual "substance" of these substantive rights, i.e. the right to equal treatment. [98]

Conclusion

The most important element of Chavez is the unprecedented connection between art.20 TFEU and the Charter—but what was the Court's intention, when creating this connection? It may be argued that the Court headed for a Charter-consistent interpretation of art.20 TFEU. However, from a critical angle, Chavez could be read as a circumvention of art.51(1) Charter.

On the substance, the Court may be praised for not being too formalistic, since it could have argued that fundamental rights are no part of the assessment of EU citizenship residency rights. It clearly chose to enhance the protection of children's rights, for which the Court can be applauded. By making an explicit connection between EU citizenship and the Charter, one could say that the Court has yet taken another step in moving EU citizenship "beyond its economic and transnational roots towards a supranational and political status". [99] However, the Court could have done a much better job in its legal reasoning and in explaining its choice to include fundamental rights in the test of art.20 TFEU. Moreover, it may be argued that the Court was not sufficiently consistent, thorough and inclusive in its substantive elaboration of these rights, choosing to do so without referring to other fundamental rights instruments or courts, such as the ECtHR. The elaboration of the scope and substance of EU citizenship rights and that of fundamental rights are matters of constitutional significance in the EU legal order. The importance of these issues demands a clear, consistent and convincing legal argumentation. [100] The fact that legal commentators need to speculate so extensively about what the Court meant, is a sign that there may be a problem in the quality of the Court's reasoning. ***970** [101]

The judgment in Chavez also raises questions about the coherence—and therefore the quality—of the Court's case law on the "catalogue" of EU citizenship rights as a whole. [102] The relationship between art.21 and art.20 TFEU is becoming increasingly muddied: there is a tendency of analogous interpretation of art.20 TFEU in line with art.21 TFEU on the issue of expulsion grounds, which in itself seems logically and systemically sound, from an equality perspective. However, the question may be posed whether the Court, by slowly and subtly extending the scope of application of art.20 TFEU, circumvents the attribution/division of competences envisaged in art.21 TFEU. It needs to be recalled that art.21 TFEU grants the EU specific legislative powers, which it has used, and in which political discussions and legislative procedures have their due roles. Such a competence, however, is not foreseen in art.20 TFEU.

The judgment leaves further important questions unanswered, such as what the relation is with social benefits and the derived right to reside for TCNs. How does this case law relate to potential requests for social benefits by EU citizens based on art.20 TFEU? In Ruiz Zambrano the national proceedings started with the establishment by the national authorities that Ruiz Zambrano worked without a work permit. Observing this, the Court held in its judgment that such a work permit should not have been refused in his specific circumstances, posing the question whether art.20 TFEU would be interpreted as including a right to social benefits, or at least a possibility to fulfil the condition of having sufficient resources. [103] In the case of Chavez, the question of whether there would be a derived right to reside under art.20 TFEU arose from the question whether the families concerned had a right to social benefits (child allowance). Hence, even though the scope of art.20 TFEU has been clarified and dressed up with a Charter-compliant—or even further-reaching—interpretation, the question of the relation between art.20 TFEU, social benefits and the requirement not to become a burden on state finances (in the case law on art.21 TFEU) is still left unanswered. In the future, the Court may need to reconcile its "fundamental rights friendly" interpretation of art.20 TFEU and its recent restrictive line on the right to access to social benefits under Directive 2004/38.

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Footnotes

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2 PhD candidate in EU law. The authors would like to thank the anonymous peer reviewers, as well as Barbara Safradin, Michael Hübner and Salvo Nicolosi for their helpful comments and suggestions. Heartfelt thanks are due to Matija Kaji# for her excellent research assistance. The substantive part of the research for this article was concluded in April 2018, and therefore does not include the more recent decision in KA v Belgium (C-82/16) EU:C:2018:308; [2018] 3 C.M.L.R. 28. However, the authors found the KA judgment to confirm the line chosen by the ECJ in the Chavez-Vilchez judgment.

1 Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank (C-133/15) EU:C:2017:354; [2017] 3 C.M.L.R. 35.

2 For a critical comment, see for instance K. Hailbronner and D. Thym, "Annotation of Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi" (2011) 48 C.M.L. Rev. 1253. For a more optimistic outlook on Zambrano, see *L. Azoulai, "A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration", European University Institute (2011)*; and D. Kochenov, "A Real European Citizenship: a New Jurisdiction Test: a Novel Chapter in the Development of the Union in Europe" (2011) 18 Columbia Journal of European Law 55. See, for an overview of media coverage, I. Solanke, "Using the Citizen to Bring the Refugee In: Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)" (2012) 75 M.L.R. 101, 108–110.

3 See for instance, N. Nic Shuibhne, "Seven Questions for Seven Paragraphs" (2011) 36 E.L. Rev. 161. In this short commentary, Nic Shuibhne raises a brief point about the quality of the ECJ's reasoning, which she elaborates on a related issue of EU citizenship case law in "'What I Tell You Three Times is True': Lawful Residence and Equal Treatment after Dano" (2016) 23 Maastricht Journal 908.

4 Ruiz Zambrano v Office national de l'emploi (C-34/09) EU:C:2011:124; [2011] 2 C.M.L.R. 46.

5 Ruiz Zambrano (C-34/09) EU:C:2011:124 at [42].

6 P.J. Neuvonen, "EU Citizenship and its 'Very Specific' Essence: Rendón Marin and CS" (2017) 54 C.M.L. Rev. 1201; A. Tryfonidou, "Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci Trilogy" (2012) 18 European Public Law 493; N. Nic Shuibhne, "(Some of) The Kids Are All Right" (2012) 49 C.M.L. Rev. 349, 379; A. Wiesbrock, "Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case" (2011) 36 E.L. Rev. 861.

7 See for instance, H. van Eijken and S.A. de Vries, "A New Route into the Promised Land? Being an EU Citizen after Ruiz Zambrano" (2011) 36 E.L. Rev. 713; Hailbronner and Thym, "Annotation of Case C-34/09 Ruiz Zambrano" (2011) 48 C.M.L. Rev. 1253, 1256–1257.

8 R. (on the application of McCarthy) v Secretary of State for the Home Department (C-434/09) EU:C:2011:277; [2015] 2 C.M.L.R. 13.

9 Dereci v Bundesministerium für Inneres (C-256/11) EU:C:2011:734; [2012] 1 C.M.L.R. 45.

10 Dereci (C-256/11) EU:C:2011:734 at [66].

11 Other authors have summarised and discussed this line of cases more extensively, see for instance Nic Shuibhne, "(Some of) the Kids are Alright" (2012) 49 C.M.L. Rev. 349, or D. Kochenov and R. Plender, "EU Citizenship: from an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text" (2012) 37 E.L. Rev. 369.

12 Opinion of AG Szpunar in Chavez-Vilchez v Raad van Bestuur van de Sociale Verzekeringsbank (C-133/15) EU:C:2016:659 at [45].

13 Opinion of AG Szpunar in Chavez (C-133/15) EU:C:2016:659 at [43]–[46].

14 Opinion of AG Szpunar in Chavez (C-133/15) EU:C:2016:659 at [96].

15 Opinion of AG Szpunar in Chavez (C-133/15) at [97].

16 O v Maahanmuuttovirasto (C-356/11) EU:C:2012:776; [2013] 2 W.L.R. 1093.

17 Opinion of AG Szpunar in Chavez (C-133/15) at [100]; CFR arts 7 and 24.
18 Opinion of AG Szpunar in Chavez (C-133/15) at [112].
19 Chavez (C-133/15) EU:C:2017:354 at [49]–[56].
20 Chavez (C-133/15) at [60]–[63].
21 Chavez (C-133/15) EU:C:2017:354 at [71].
22 Chavez (C-133/15) at [66]–[70]; CFR arts 7 and 24.
23 Chavez (C-133/15) at [71]–[72].
24 Chavez (C-133/15) at [75]–[76].
25 Ruiz Zambrano (C-34/09) EU:C:2011:124 at [42].
26 Dereci (C-256/11) EU:C:2011:734 at [66].
27 N. Nic Shuibhne, "Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011" (2012) 49 C.M.L. Rev. 349.
28 Dereci (C-256/11) EU:C:2011:734 at [68].
29 Chen v Secretary of State for the Home Department (C-200/02) EU:C:2004:639; [2004] 3 C.M.L.R. 48 at [49]–[56].
30 Chen (C-200/02) EU:C:2004:639 at [45].
31 Dereci (C-256/11) EU:C:2011:734 at [68]; O v Maahanmuuttovirasto (C-356/11) EU:C:2012:776 at [51].
32 O v Maahanmuuttovirasto (C-356/11) EU:C:2012:776.
33 O v Maahanmuuttovirasto (C-356/11) at [55].
34 O v Maahanmuuttovirasto (C-356/11) at [56].
35 Chavez (C-133/15) EU:C:2017:354 at [68].
36 It is interesting to note that the English translation uses the terms "primary day-to-day care", while the Dutch version uses "dagelijkse daadwerkelijke zorg"; the German, "tägliche und tatsächliche Sorge"; the French, "la charge quotidienne et effective"; the Italian "l'onere quotidiano ed effettivo"; and the Spanish, "el cuidado diario y efectivo". We note that there seem to be minor differences between these translations, as all translations except for the Dutch and English make a distinction between the factors "daily/day-to-day" and "effective/actual", while the Dutch and English versions combine these two factors. This raises the question whether there is a distinction between the day-to-day care that is effective or actual and the day-to-day care that is not. Moreover, the English version uses the curiously hierarchical distinction of "primary", which raises the question whether there can be "secondary" day-to-day care.
37 Chavez (C-133/15) EU:C:2017:354 at [71].
38 See for instance M. Klaassen and P. Rodrigues, "The Best Interests of the Child in EU Family Reunification Law: a Plea for More Guidance on the Role of Art. 24(2) Charter" (2017) 19 European Journal of Migration and Law 191.
39 On this point see also F. Staiano, "Derivative Residence Rights for Parents of Union Citizen Children under Art. 20 TFEU: Chavez-Vilchez" (2018) 55 C.M.L. Rev. 225, 232.
40 Council Directive 2003/109 on the status of third-country nationals who are long-term residents [2003] OJ L16.
41 Opinion of AG Sharpston in Ruiz Zambrano EU:C:2010:560 at [54]–[66], [81]–[84] and [151]–[177]. See, for a discussion of her proposal in light of other case law on the scope of application of the Charter, M. Dougan, "Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law" (2015) 52 C.M.L. Rev. 1226.
42 The Court's judgment in Aklagaren v Fransson (C-617/10) EU:C:2013:105; [2013] 2 C.M.L.R. 46 seems to offer a broader interpretation, while the Grand Chamber decision in Dano v Jobcenter Leipzig (C-333/13) EU:C:2014:2358; [2015] 1 C.M.L.R. 48 at [85]–[92] again offers a more restrictive reading of art.51(2) Charter.
43 Hailbronner and Thym, "Annotation of Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi" (2011) 48 C.M.L. Rev. 1253, 1253–1270; *L. Azoulai, "A Comment on the Ruiz Zambrano Judgment" (2011)*; D. Kochenov, "A Real European Citizenship" (2011) 18 Columbia Journal of European Law 55; I. Solanke, "Using the Citizen to Bring the Refugee In" (2012) 75 M.L.R. 101, 108–110. N. Nic Shuibhne, "Seven Questions for Seven Paragraphs" (2011) 36 E.L. Rev. 161. Van Eijken and De Vries, "A New Route into the Promised Land?" (2011) 36 E.L. Rev. 704.
44 Dereci (C-256/11) EU:C:2011:734 at [69]; O v Maahanmuuttovirasto (C-356/11) EU:C:2012:776 at [59].

45 Dereci (C-256/11) EU:C:2011:734 at [70].

46 Chavez (C-133/15) EU:C:2017:354 at [70].

47 The Court can be—and has been—reproached for such a flawed and inconsistent argumentation before. See on the unexplained differences between the Ruiz Zambrano, McCarthy and Dereci judgments: Nic Shuibhne, "Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department" (2012) 49 C.M.L. Rev. 349. See also her criticism of the Court's quality of reasoning in the recently developed line of cases since Dano: Nic Shuibhne, "'What I Tell You Three Times is True'" (2016) 23 Maastricht Journal 908.

48 See the Explanations relating to the Charter of Fundamental Rights, OJ [2007] C303/17. See also Aklagaren v Fransson (C-617/10) EU:C:2013:105.

49 For the first situation, it is common to refer to the Court's approach in Wachauf v Germany (5/88) EU:C:1989:321; [1991] 1 C.M.L.R. 328 and Proceedings Brought by Karlsson (C-292/97) EU:C:2000:202 as "locus classicus", while for the second situation the comparison is made to the Court's approach in ERT v DEP (C-260/89) EU:C:1991:254; [1994] 4 C.M.L.R. 540. See K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 European Constitutional Law Review 375, particularly 378 and 385. See also the explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17. For critical commentary on the interpretation of the scope of the Charter, see, among many others, J. Snell, "Fundamental Rights Review of National Measures: Nothing New under the Charter?" (2015) 21 European Public Law 285; T. von Danwitz and K. Paraschas, "A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights" (2012) 35 Fordham Int'l L.J. 1406; B. van Bockel and P. Wattel, "New Wine into Old Wineskins" (2013) 38 E.L. Rev. 866; E. Hancox, "The Meaning of 'Implementing'" (2013) 50 C.M.L. Rev. 1430; M. Dougan, "Judicial Review of Member State Action under the General Principles and the Charter: defining the 'Scope of Union Law'" (2015) 52 C.M.L. Rev. 1201.

50 See for instance the Court's judgment in Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag (C-368/95) EU:C:1997:325; [1997] 3 C.M.L.R. 1329 at [24]; and Proceedings brought by Pfleger (C-390/12) EU:C:2014:281; [2014] 3 C.M.L.R. 47.

51 Rendón Marín v Administración del Estado (C-165/14) EU:C:2016:675; [2017] 1 C.M.L.R. 29 at [81].

52 *J. Langer, "EU Citizenship: from the Cross-border Link to the Genuine Enjoyment-test—understanding the 'stone-by-stone' approach of the Court of Justice" in J. van der Harst, G. Hoogers, and G. Voermans (eds), European Citizenship in Perspective (Cheltenham: Edward Elgar, 2018), p.82 at p.98*.

53 See also the discussion of this possibility by M. van den Brink, "EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?"(2012) 39 Legal Issues of Economic Integration 273, 280.

54 See, on the quality of judicial reasoning, Nic Shuibhne, "'What I Tell You Three Times is True'" (2016) 23 Maastricht Journal 908, where she criticises the ECJ's recent line of case law in Dano, Alimanovic, Garcia Nieto and Commission v UK for, among other argumentative weaknesses, not dealing directly with its own previous case law and not explaining the reasons for changing its approach regarding the rights of EU citizens to social benefits in their host Member State (at 923).

55 AG Wathelet in his Opinion in the case NA (C-115/15) EU:C:2016:259 holds, quite firmly, that "the inclusion of Art. 7 of the Charter in the national court's reflection on the application of Art. 20 TFEU is not such as to have the effect of extending the scope of EU law in a manner that would be contrary to Art. 51(2) of the Charter": see [125]–[126]. However, this is a mere statement, rather than a substantiated argument.

56 In that light, see also Opinion of Sharpston in O v Minister voor Immigratie, Integratie en Asiel (C-456/12) EU:C:2013:837; [2014] 3 C.M.L.R. 17 at [62]–[63].

57 *M. Andenas, T. Bekkedal and L. Pantaleo, The Reach of Free Movement (The Hague: T.M.C. Asser Press, 2017), p.245*.

58 See ERT v DEP (C-260/89) EU:C:1991:254 at [42]; see also Eugen Schmidberger Internationale Transporte Planzuge v Austria (C-112/00) EU:C:2003:333; [2003] 2 C.M.L.R. 34; and D. Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe" (2013) 50 C.M.L. Rev. 1267, 1297.

59 Nic Shuibhne, "'What I Tell You Three Times is True'" (2016) 23 Maastricht Journal 908.

60 The Court referred to the UNCRC in its judgment in European Parliament v Council of the European Union (C-540/03) EU:C:2006:429; [2006] 3 C.M.L.R. 28 at [37] and [57].

61 *F. Ferraro and J. Carmona, "Fundamental Rights in the European Union: The Role of the Charter after the Lisbon Treaty", European Parliamentary Research Service, PE 554.168 (2015), p.14*. See also *M. Breuer, "Impact of the Council of Europe on National Legal Systems", in S. Schmal and M. Breuer, The Council of Europe: its Law and Policies (Oxford: Oxford University Press, 2017), para.36.87*.

62 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17. See also Klaassen and Rodrigues, "The Best Interests of the Child in EU Family Reunification Law" (2017) 19 European Journal of Migration and Law 191, 195.

63 See for instance the critical views of G. de Búrca, "After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?" (2013) 20 Maastricht Journal of European and Comparative Law 173.

64 For an example of this rich academic debate, see for instance J. Coppel and A. O'Neil, "The European Court of Justice: Taking Rights Seriously?" (1992) 12 Legal Studies 227, 245; J.H.H. Weiler and N. Lockhart, "Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence (Pts. 1 &2)" (1995) 32 C.M.L. Rev. 579; J.A. Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights" (2007) 34 Legal Issues of Economic Integration 30; *L. Scheeck, "Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks", Garnet Working Paper 23/07* available at https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/2307.pdf [Accessed 6 November 2018]; *S. Carrera, M. de Somer and B. Petkova, "The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice", CEPS, Justice and Home Affairs Liberty and Security in Europe Papers No.49 (2012)*; G. de Búrca, "After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?" (2013) 20 Maastricht Journal of European and Comparative Law 168; *S.A. de Vries et al. (eds), The Protection of Fundamental Rights in the EU after Lisbon (Oxford/Portland, OR: Hart Publishing, 2013)*.

65 See for an elaboration of these (and other) arguments: G. de Búrca, "After the EU Charter of Fundamental Rights" (2013) 20 Maastricht Journal of European and Comparative Law 168.

66 Nic Shuibhne, "(Some of) the Kids are All Right" (2012) 49 C.M.L. Rev. 349, 378.

67 Nic Shuibhne, "Seven Questions for Seven Paragraphs" (2011) 36 E.L. Rev. 161, 162.

68 Secretary of State for the Home Department v CS (C-304/14) EU:C:2016:674; [2017] 1 C.M.L.R. 31 at [49].

69 See for a more recent example of the ECJ referring to case law of the ECtHR, CK v Slovenia (C-578/16 PPU) EU:C:2017:127; [2017] 3 C.M.L.R. 10 at [68] and [78]–[79].

70 Drywood would perhaps go as far as calling the Court's approach "child's play": see E. Drywood, "Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32 E.L. Rev. 404.

71 Dereci (C-256/11) EU:C:2011:734 at [70].

72 Jeunesse v The Netherlands (12738/10) ECHR:2014:1003JUD001273810 at [119]–[120].

73 See also Muraldeli (72780/12) 9 April 2015 EctHR at [76]; Jeunesse (12738/10) 3 October 2014 ECtHR at [117]; Berisha (948/12) 30 July 2013 ECtHR at [60]; Avelo Aponte/Nederland (28770/05) 3 November 2011 ECtHR at [60].

74 Chavez (C-133/15) EU:C:2017:354 at [71].

75 Jeunesse v The Netherlands (12738/10) ECHR:2014:1003JUD001273810 at [119].

76 Pontes (19554/09) 10 April 2012 ECtHR at [71]; and Paradiso and Campanelli (25358/12) 27 January 2015 ECtHR. In the Moser case, the ECtHR deemed the argument that the parent lacked financial resources and residence rights, even if there were signs of neglect in the care of the child, insufficient to justify the separation of parent and child. A State must first offer support in the care for the child, before it is justified to proceed to such a separation: Moser (12643/02) 21 September 2006 ECtHR at [68]–[73].

77 Arvelo Aponte v The Netherlands (28770/05) ECHR:2011:1103JUD002877005 at [55]; Useinov v The Netherlands (61292/00) ECHR:2006:0411DEC006129200 at [8].

78 Drywood, "Giving with One Hand, Taking with the Other" (2007) 32 E.L. Rev. 404.

79 UNCRC art.9(2) and 12.

80 See for instance the criticism expressed by Drywood, "Giving with One Hand, Taking with the Other" (2007) 32 E.L. Rev. 404, 404–405; *C. McGlynn, Families and the European Union (Cambridge: Cambridge University Press, 2006), p.76*.

81 See on the issue of the Court's "gendered" discourse in Chavez: F. Staiano, "Derivative Residence Rights for Parents of Union Citizen Children under Art. 20 TFEU: Chavez-Vilchez" (2018) 55 C.M.L. Rev. 225, 238.

82 See also the Explanations to the Charter of Fundamental Rights (C 303/17) [2007] OJ C303.

83 See on this point, Staiano, "Derivative Residence Rights for Parents of Union Citizen Children under Art. 20 TFEU" (2018) 55 C.M.L. Rev. 225, 234.

84 See Opinion 2/13 of the Court EU:C:2014:2454 at [170]–[172].

85 Confirmed by the Court of Justice as a general rule of EU law in Alarape v Secretary of State for the Home Department (C-529/11) EU:C:2013:290; [2013] 3 C.M.L.R. 38; and Reyes v Migrationsverket (C-423/12) EU:C:2014:16; [2014] 2 C.M.L.R. 39.

86 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (33/76) EU:C:1976:188; [1977] 1 C.M.L.R. 533; and Comet BV v Produktschap voor Siergewassen (45-76) EU:C:1976:191.

87 See https://www.rijksoverheid.nl/documenten/kamerstukken/2017/07/14/kamerbrief-over-arrest-chavez-vilchez [Accessed 18 October 2018].

88 See for instance the case District Court Gelderland, NL:RBGEL:2017:4005.

89 *H. van Eijken and P. Phoa, Exploring obstacles in exercising core European Union citizenship rights, BEU citizen report D (2016)*. The national reports for Deliverable 7.3 were written by H. de Waele, M.T. Solis Santos Silvia Adamo, M.-P. Granger, O. Salát, J.A. González Vega, D. de Pietri, R.I. Rodríguez Magdaleno and H. van Eijken. The national reports provide for more detailed information on the exercise of core EU citizenship rights in the particular countries, and the General Report used the information of the country reports to make a comparative analysis of important developments and state of affair in the countries.

90 McCarthy (C-434/09) EU:C:2011:277 [2011]; Rendón Marín (C-165/14) EU:C:2016:675; O v Maahanmuuttovirasto (C-356/11) EU:C:2012:776.

91 Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration (C-86/12) EU:C:2013:645.

92 Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, residents [2004] OJ L158/77 art.7(1)b.

93 Chiara Raucea, "European Citizenship and the Right to Reside: 'No One on the Outside has a Right to be Inside?'" (2016) 22 E.L.J. 481.

94 Rendón Marín (C-165/14) EU:C:2016:675 at [84].

95 The EU legislature may (by unanimity) adopt legislation regarding the rights listed in art.20(2) TFEU (art.25 TFEU). However, formally the case law in Ruiz Zambrano/Chavez is based on art.20(1) TFEU.

96 P.J. Neuvonen, "EU citizenship and its 'Very Specific' Essence: Rendón Marin and CS" (2017) 54 C.M.L. Rev. 1217. See also Shuibhne, "Seven Questions for Seven Paragraphs" (2011) 36 E.L. Rev. 161, 161–162.

97 Dano (C-333/13) EU:C:2014:2358 at [85]–[92], S.A. de Vries, "Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: the Quest for a more 'Holistic Approach," (2016) 32 International Journal of Comparative Labour Law and Industrial Relations 207.

98 See Neuvonen, "EU Citizenship and its 'Very Specific' Essence" (2017) 54 C.M.L. Rev. 1201, 1219, and (the very critical case note) C. O'Brien, "A Court of Justice: The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom" (2017) 54 C.M.L. Rev 209.

99 See S. Coutts, "Delvigne: a Multi-levelled Political Citizenship" (2017) 42 E.L. Rev. 881.

100 See M. Dougan, "Judicial Review of Member State Action under the General Principles and the Charter: Defining the 'Scope of Union Law'" (2015) 52 C.M.L. Rev. 1204. See also Shuibhne, "'What I Tell You Three Times is True'" (2016) 23 Maastricht Journal 908.

101 See also Shuibhne, "(Some of) the Kids are All Right" (2012) 49 C.M.L. Rev. 349, 379.

102 See also Coutts, "*Delvigne*: a Multi-levelled Political Citizenship" (2017) 42 E.L. Rev. 881, 878–879.

103 See on this point the Opinion in Alokpa v Ministre du Travail (C-86/12) EU:C:2013:645 at [28]–[30].

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