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Reviewing the application of *Chavez-Vilchez* in the Netherlands

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1. Introduction

In 2011, the Court of Justice of the European Union (henceforth: CJEU) issued a judgment in the case of *Ruiz Zambrano*. It ruled that Article 20 of the Treaty on the Functioning of the European Union (henceforth: TFEU) must be interpreted as conferring a third-country national (henceforth: TCN) parent of a European Union citizen (henceforth: EU citizen) minor child[1], who is dependent on that TCN parent, a right of residence in the Member State in which the child is a national and resides.[2] This judgment was translated into Dutch policy, which provides that the child should be dependent on and living with the TCN parent. In addition, that policy considered that there is no dependency relationship if the child has another parent, who is lawfully residing in the Netherlands and able to take on the care of the child.[3] This policy was, however, criticised[4] at the national level with the result that a Dutch court submitted preliminary questions to the CJEU, asking for a further interpretation of the *Ruiz Zambrano* criterion.[5]

In its 2017 *Chavez-Vilchez* ruling[6], the CJEU reaffirmed the doctrine of *Ruiz Zambrano* and expressly acknowledged that the willingness and availability of the child's other parent to take on care duties are not sufficient to rule out the existence of dependency between the child and the TCN parent. This judgment was subsequently translated into Dutch policy, which provided that the dependency relationship between a Dutch child and a TCN was assumed, if the TCN parent fulfilled their care and education obligations, regardless of their scope and frequency.[7] In 2018, this policy was once again amended. The current policy states that the TCN parent of a Dutch child needs to demonstrate that they carry out primary care tasks.[8] The government maintained that this amendment brings previous policy in line with the *Chavez-Vilchez* judgment. However, critical voices from the field argued that the way in which the Dutch policy has been applied in practice is not in conformity with the CJEU's jurisprudence, in particular not with the *Chavez-Vilchez* judgment.

[1] In this expert opinion, the term 'child' refers to a minor child unless indicated otherwise.

[2] CJEU Case C-34/09 *Ruiz Zambrano* [2011], ECLI:EU:C:2011:124.

[3] Section B10/2.2 of the Aliens Circular (*Vreemdelingencirculaire*). See also CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, paras 10 and 11.

[4] See in particular, T Weterings, 'Uitspraak van de maand: HvJEU van 6 december 2012, C-356/11 en C-357/11 (*O. en S. en L.*, ve12002415)', *Asiel &Migrantenrecht* (2013) pp 30-31 and T Weterings, 'Uitspraak van de Maand: *Alokpa e.a.*, *Ruiz Zambrano* nu eindelijk verduidelijkt?', *Asiel &Migrantenrecht* (2013) p 401.

[5] Centrale Raad van Beroep 16 March 2015, ECLI:NL:CRVB:2015:665.

[6] CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354.

[7] Besluit van de Staatsecretaris van Veiligheid en Justitie van 15 september 2017, nummer WBV 2017/9, houdende wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* nr. 53847, 29 September 2017 (henceforth: WBV 2017/9).

[8] Besluit van de Staatsecretaris van Justitie en Veiligheid van 21 juni 2018, nummer WBV 2018/4, houdende wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* nr. 36067, 29 June 2018 (henceforth: WBV 2018/4).

1.1. Research questions

This expert opinion aims to answer the following main research question:

> Is the current Dutch policy and its application in practice relating to TCN parents of an EU citizen child in conformity with the jurisprudence of the CJEU, in particular the *Chavez-Vilchez* judgment?

Four sub-questions will be answered in order to resolve the main research question:

1. How should the dependency assessment take place according to the *Chavez-Vilchez* judgment and other case law of the CJEU?
2. How has the dependency assessment based on the *Chavez-Vilchez* judgment been translated into Dutch policy and to what extent is this in line with that judgment?
3. How is the dependency assessment applied in practice and to what extent is this in line with the CJEU case law?
4. What is the practice concerning the assessment of dependency in other EU Member States?

1.2. Methodology

To answer the research questions, this expert opinion adopted a legal normative approach. It draws on the CJEU's case law, Dutch policy, decisions of the Dutch Immigration Service (henceforth: IND) and Dutch case law. All judgments of Dutch courts discussed in this expert opinion date from after the introduction of the stricter 2018 policy guidelines. In total, two judgments of the Administrative Jurisdiction Division of the Council of State, the highest administrative court of the Netherlands in migration cases (henceforth: Council of State) and 19 District Court judgments were included in this research.

The IND decisions were provided by *Prakken d'Oliveira Human Rights Lawyers*, a law firm in Amsterdam. The decisions examined are not representative for all cases concerning the right to residence of TCN parents of EU citizen children. However, they do give indications as to the argumentation used by the Dutch IND to refuse to grant a right to residence to such TCN parents. More information on this set of cases and a complete description of their facts and characteristics can be found in Annex 1 of this expert opinion. This expert opinion will refer to these cases according to their number and the explanations developed in Annex 1.

The expert opinion focuses on three key elements of the dependency assessment as established by the CJEU in the *Chavez-Vilchez* judgment:

1. primary care;
2. best interest of the child; and
3. the burden of proof.

In addition, this expert opinion draws on practices in the United Kingdom and Spain to present a comparative analysis of the implementation of the *Chavez-Vilchez* judgment. The United Kingdom is the only (former) Member State, next to the Netherlands, that had to adapt its policy to comply with *Chavez-Vilchez*. While the United Kingdom and the Netherlands both represent a restrictive interpretation of *Chavez-Vilchez*, Spain is included as representing a more liberal approach. It emerges from the research carried out for the purpose of this expert opinion that the national laws of Germany, France and Belgium, were already in line with the *Chavez-Vilchez* judgment.[9] It is argued on the basis of this diverging legislation, policy and practice in the Member State that the Dutch national courts should refer preliminary questions to the CJEU in EU Member states. The researchers have contacted law firms and immigration officers from the mentioned Member States to gain information on the legal framework and practices in these Member States. This expert opinion will refer to these findings when relevant, but additional information can be consulted in Annex II of this expert opinion.

1.3 Structure

This expert opinion will proceed as follows. First, the relevant legal framework arising from the *Chavez-Vilchez* judgment will be presented (Chapter 2). Then, the current Dutch policy concerning the right of residence of TCN parents with Dutch children under Article 20 TFEU will be outlined (Chapter 3). The following chapters will discuss the three different aspects of the assessment under Article 20 TFEU mentioned in section 1.2: the requirement of 'primary care' (Chapter 4), the bests interests of the child (Chapter 5) and the burden of proof (Chapter 6). Each chapter will first examine how the relevant considerations of the CJEU in *Chavez-Vilchez* have been translated into current Dutch policy and how this policy is applied in practice. Subsequently, the chapter will discuss relevant case law of the CJEU and the practice in other EU Member States. Finally, it will draw conclusions as to the conformity of (the application of) Dutch policy with Article 20 TFEU. The concluding chapter summarises the findings and answers the central research question. Moreover, it proposes questions for preliminary ruling, which the national courts could refer to the CJEU (Chapter 7).

[9] HK van der Linden and AFD de Wilde, 'Chavez-Vilchez heeft alleen gevolgen voor Nederland en Verenigd Koninkrijk', *Asiel & Migrantenrecht* (2020) pp 226-228.

2. The *Chavez-Vilchez* judgment

This chapter will discuss the criteria following from the CJEU's judgment in *Chavez-Vilchez* and set out the framework against which Dutch policy and practice will be tested.[10] The *Chavez-Vilchez* case concerned the provision of social assistance and child benefits requested by TCN mothers of Dutch children. All the TCN mothers concerned undertook primary care duties of Dutch children and were separated from the Dutch father. Their applications for child benefits and social assistance were rejected because they did not have a right of residence.[11]

In its judgment, the CJEU first reaffirmed its previous case law, including *Ruiz Zambrano*, and reiterated that any deprivation of the genuine enjoyment of the substance of the rights conferred to EU citizens is prohibited.[12] The Court then recalled that for the purpose of dependency assessment, it is relevant to determine 'who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent'. [13] The CJEU then stated that it is important to determine 'which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent'.[14] In this context, the CJEU paid attention to three aspects: primary care (discussed in section 2.1) ; the best interests of the child (discussed in section 2.2.); and the burden of proof (discussed in section 2.3).

2.1. Providing primary care

The CJEU clarified that in the assessment of the dependency relationship

> the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national.[15]

This means that the fact that the TCN parent is the secondary carer (because the EU citizen parent is the primary carer) is relevant, but it is not in itself sufficient to conclude that there is a lack of dependency. As will be explained below, the assessment of the child's best interests should still be conducted, even if the TCN parent is not the primary carer.

[10] CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, para 41.
[11] Ibid, para 29.
[12] Ibid, para 61.
[13] Ibid, para 68.
[14] Ibid, para 70.
[15] Ibid, paras 71-72.

2.2. The best interests of the child

In *Chavez-Vilchez*, the CJEU made an express declaration that in assessing the relationship of dependency between a child and a TCN parent, competent authorities must consider the right to respect for family life as stated in Article 7 of the Charter of Fundamental Rights of the European Union (henceforth: the Charter) and the best interests of the child recognised in Article 24(2) of the Charter.[16] The CJEU then stressed that a best interests assessment must take into account 'all the specific circumstances', referring to four specific circumstances:

1. The age of the child;
2. The child's physical and emotional development;
3. The extent of his emotional ties both to the EU citizen parent and to the TCN parent; and
4. The risks which separation from the latter might entail for that child's equilibrium.[17]

2.3. The burden of proof

In *Chavez-Vilchez*, the CJEU explained that it is the TCN parent who must provide evidence 'on the basis of which it can be assessed whether the conditions governing the application of that article are satisfied'.[18] The CJEU then stressed that the burden of proof cannot undermine the effectiveness of Article 20 TFEU. [19] Therefore, the authorities of the Member States are also obliged, in the CJEU's view, to undertake the necessary inquiries on the basis of the evidence presented to determine whether there is a relationship of dependency between the TCN and the child:

> the application of such national legislation on the burden of proof does not relieve the authorities of the Member State concerned of the obligation to undertake, on the basis of the evidence provided by the third-country national, the necessary inquiries to determine where the parent who is a national of that Member State resides and to examine, first, whether that parent is, or is not, actually able and willing to assume sole responsibility for the primary day-to-day care of the child, and, second, whether there is, or is not, such a relationship of dependency between the child and the third-country national parent that a decision to refuse the right of residence to the latter would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole.' [20]

[16] Ibid, para 70.
[17] Ibid, paras 71-72.
[18] Ibid, para 75.
[19] Ibid, para 76.
[20] Ibid, paras 77-78.

3. Implementation of *Chavez-Vilchez* in Dutch policy and practice

In 2017, immediately after the *Chavez-Vilchez* judgment, the Netherlands amended its policy concerning TCN parents of EU citizen children. With regard to primary care, the amended policy expressly stated that a relationship of dependency was in any case assumed, if the TCN parent fulfilled primary care and educational obligations towards their EU citizen child, regardless of its scope and frequency. The policy transposed the relevant criteria concerning the child's best interests as stated in the *Chavez-Vilchez* judgment. With respect to the burden of proof, the amended policy did not introduce any guidelines.[21]

The new policy resulted in an increase of applications submitted on the basis of the *Chavez-Vilchez* judgment as well as acceptance rates.[22] This triggered parliamentary questions.[23] Moreover, the IND conducted a quantitative study that confirmed the increase of applications and acceptance rates.[24] In 2018, a few months before the publication of the IND study report, the policy regarding TCN parents was amended once again. [25] The new policy rules are stricter than the original policy rules introduced in 2017.[26]

According to the current policy, TCN parents applying for a residence permit in order to stay with their Dutch child on the basis of Article 20 TFEU must comply with the following cumulative requirements:

a. They must make their identity and nationality plausible by presenting a valid travel document or identity card. If the foreign national cannot comply with this requirement, they must unambiguously prove their identity and nationality by other means;
b. They must have a child (below the age of 18) of Dutch nationality;
c. They must carry out primary care tasks for the child, alone or jointly with the other parent; and
d. There must be such a dependency relationship between the TCN parent and the child that the child would be forced to leave the territory of the EU if the TCN was refused a right of residence. [27]

These requirements are cumulative. This means that, if one is not complied with, the IND will not assess the dependency between the EU citizen child and the TCN parent, resulting in the rejection of the application.

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[21] Section B10/2.2 WBV 2017/9.
[22] *Kamerstukken II* 2017/18 19 637, nr. 2365.
[23] *Kamerstukken II* 2017/18 Aanhangsel van de Handelingen nr. 2684.
[24] J Liu, T Maasland and D de Wilde, *Analyse Chavez-Vilchez*, Ministerie van Justitie en Veiligheid, Immigratie- en Naturalisatiedienst, Directie Strategie en Uitvoeringsanalyse (30 November 2018) available at <https://ind.nl/Documents/Analyse%20Chavez-Vilchez.pdf>[accessed 11 November 2020].
[25] Section B10 /2.2 WBV 2018/4.
[26] District Court (*Rechtbank*) Den Haag 22 November 2019, ECLI:NL:RBDHA:2019:12897.
[27] Section B10/2.2 WBV 2018/4.

In the following chapters, we will specifically address each of the three key elements under study presented in the previous chapter: primary care (Chapter 4); the best interests of the child (Chapter 5); and the burden of proof (Chapter 6). Each chapter will first examine how the relevant considerations of the CJEU in *Chavez-Vilchez* have been translated into current Dutch policy and how this policy is applied in practice. Subsequently, the chapter will discuss other relevant case law of the CJEU and the practice in other EU Member States. Finally, it will draw conclusions as to the conformity of (the application of) Dutch policy with Article 20 TFEU.

4. Primary care

This chapter will address the requirement in Dutch policy that the TCN parent provides primary care to the EU citizen child and assess whether this requirement is in conformity with Article 20 TFEU.

4.1 Dutch policy

Dutch policy requires that the TCN parent demonstrates that they are the primary carer of their EU citizen child.[28] It highlights that care tasks should be more than 'marginal'. Care tasks with a 'marginal' character can only be considered as being 'primary', if the TCN parent is not responsible for the division of care tasks. It concerns for example, the situation in which the Dutch parent frustrates the contact between the child and the TCN parent. In this context, Dutch policy mentions that, according to the CJEU, 'it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent'.

In 2018, Dutch policy introduced a clear distinction between the question 'whether there is dependency', on the one hand, and the question of 'who is the primary carer', on the other hand. It mentions that it cannot be deduced from the *Chavez-Vilchez* judgment that there is a risk for the child to leave the EU, if the TCN parent undertakes care and/or education tasks of a merely 'marginal' character. According to the Dutch Government, this brings the previous policy in line with the *Chavez-Vilchez* judgment.[29]

In a recent judgment, the Council of State ruled that the approach in the current policy rules is in line with the *Chavez-Vilchez* judgment and the CJEU's case law.[30] It considered that the requirement that care tasks need to have a certain weight, does justice to consideration 63 of *Chavez-Vilchez*, which mentions that the criterion in question is of a very special nature. According to the Council of State, an EU citizen child does not risk to be factually forced to leave the territory of the EU, if a TCN parent carries out care tasks of a marginal nature or just interacts with the child.[31]

[28] Section 2.2 under c WBV 2018/4.
[29] Section 2.2 under c WBV 2018/4.
[30] Council of State 20 May 2020, ECLI:NL:RVS:2020:1235.
[31] Ibid, para 63.

4.2 Application in practice

Case law and the IND decisions show that considerable attention is paid to the requirement of 'having the role of primary carer'.[32] In the decisions examined for the purpose of this expert opinion, the IND starts by arguing that care tasks of the TCN are marginal and then maintains that since the EU citizen parent is the primary carer, there is no dependency between the TCN and the child.[33] At times, it is considered relevant that the TCN parent does not have custody or that the parents' relationship has existed 'too briefly'.[34]

In the same vein, some case law tends to lean towards an understanding of a relationship between parent and child which extends 'beyond normal dependency'. For instance, in a situation where regular care was provided by the TCN parent during several evenings per week and every weekend, the IND concluded that the child was not dependent enough on this parent to grant him a derived residence right.[35] In another case, the court held that the dependency should be 'more than normal'.[36]

Cohabitation

When assessing the division of care tasks, the IND grants decisive weight to the fact that the TCN parent and their EU citizen child do not live together. If the TCN parent has been living separately from the child for a period of time, the IND assumes and considers that the parent does not carry out more than marginal caretaking tasks.

In one of the examined IND decisions,[37] the case concerned a 15-year-old child, who lived in a specialized centre due to his disability. The child's Dutch father was deceased and the TCN mother could only visit the child once per month. The IND mentioned that the TCN mother did not live with the child and that she did not have custody of the child. Because the contact between her and the child was limited to one visit per month and weekly telephone contacts, the IND found that there was no dependency between the child and the mother.

However, case law also shows that in some instances it is assumed that there is dependency between parent and child, even though they do not live together and the parent does not see the child daily. In one such case, it was held that court orders concerning a TCN parent's visitation rights are sufficient to show dependency, even if such parent does not see their child on a daily basis.[38] In another case, a TCN father presented a court order stating that he visited his children once a week, and spent one hour a week alone with his daughter. Apart from that, he brought his son to swimming lessons and had weekly phone calls with him. In a letter sent to the parent, the IND stated that these visitation rights were enough to be

[32] Council of State 15 July 2019, ECLI:NL:RVS:2019:2409 and District Court Den Haag 20 April 2020, ECLI:NL:RBDHA:2020:3686, District Court Den Haag 9 April 2020, ECLI:NL:RBDHA:2020:3362.
[33] See Annex 1 of this expert opinion, cases 2-5.
[34] District Court Den Haag 28 August 2020, ECLI:NL:RBDHA:2020:8811.
[35] District Court Den Haag zp Middelburg 16 April 2019, ECLI:NL:RBDHA:2019:3845.
[36] District Court Den Haag 29 May 2019, ECLI:NL:RBDHA:2019:5579.
[37] See Annex 1 of this expert opinion, case 3.
[38] District Court Den Haag zp Middelburg, 27 June 2019, ECLI:NL:RBDHA:2019:6516.

considered more than marginal. The court ruled that it was for the IND to verify whether these rights were actually exercised. [39]

The TCN's parent's stay abroad

One of the elements used by the IND to qualify care tasks as marginal is the fact that the TCN parent lived or lives separately from the child, because they stayed abroad. The reasoning here is that, since the other parent was the primary carer during the separation period, the TCN parent (has) had marginal care tasks. The tasks conducted after (re)entry of the TCN parent to the Netherlands are often viewed as recent and marginal, especially if this parent did not live with the child or only recently started to live with the child.

In one of the examined decisions, the TCN father had been separated from his children for a period of six years, because he was living in Surinam. The IND concluded that it was unlikely that the children would have to leave the EU with the TCN, if the residence of the father was denied.[40]

A recent case on this matter was decided by the District Court of The Hague.[41] It involved a TCN father, who had been living in Morocco and had been married to a Dutch citizen from 2010-2016, with whom he had a child. He saw his child whenever they came to Morocco for a holiday. After the couple's divorce, the TCN father came to the Netherlands to apply for a derived residence right on the basis of Article 20 TFEU and started living with his child and ex-wife. He submitted some documents substantiating his claim, including statements from the mother claiming that he helped her take care of their child and an extract from the Personal Records Database indicating that his registered address was the same as his ex-wife's and their child's. The IND ruled that the father failed to demonstrate that he carried out more than marginal care and upbringing tasks for the child, which resulted in the denial of the derived residence right. On appeal, the district court confirmed the IND's decision, stating that there was no such degree of dependency that would endanger the child's mental equilibrium or development, if the TCN father was refused a right to residence.

Similarly, in one of the examined IND decisions, the TCN mother had been registered in the Netherlands in May 2019, while the children had been registered with their father since 2016. This means that the children had lived in the Netherlands for almost three years without their mother. The TCN mother stayed in Nigeria to apply for a long-term visa but failed to pass the required integration exam successfully. In the IND's view, the father was therefore the primary caretaker and it was unlikely that the children would leave the territory of the EU, if the TCN would be denied a right of residence, as they would stay with their father.[42]

4.3 CJEU Case law

The CJEU stated in its case law that, in order to prove dependency, cohabitation is helpful but not a prerequisite.[43] The Court has explicitly declared that ties of dependency may also exist

[39] District Court Den Haag 27 June 2019, ECLI:NL:RBDHA:2019:6516.
[40] See Annex 1 of this expert opinion, case 5.
[41] District Court Den Haag 2 April 2020, ECLI:NL:RBDHA:2020:3515.
[42] See Annex 1 of this expert opinion, case 2.
[43] CJEU Case C-82/16 *K.A . and others* [2018], ECLI:EU:C:2018:308, para 73.

when family members do not reside in the same Member State.[44] There is a wide range of family situations in which parents and children might not live together. If a child lives with only one parent, this does not mean that there is no relation of dependency with the other parent.[45] The CJEU emphasised that a broader assessment must be made, which should include examining the effect of the removal of the TCN parent on the child's equilibrium.[46]

Recent case law demonstrates a different interpretation of the rules since the older *Baumbast* case.[47] In *Baumbast* the CJEU considered in relation to an EU citizen worker, that the unity of the family was proven by a period of cohabitation.[48] This does not mean, however, that there is no family unity without cohabitation. Advocate General Geelhoed, in his opinion in the *Baumbast* case, stressed that family situations were undergoing constant change, and that they are much more varied in modern times than they used to be. The economic and physical stability that was once expected has evolved, and with the increase in the ease of mobility, cohabitation cannot be considered a decisive factor to make or break dependency.[49]

4.4 Practice in other EU Member States

In Germany and France, TCN parents already had a right to residence, if they have a child with German/French nationality before the *Chavez-Vilchez* judgment. In Germany the TCN parent has a right to residence if s/he has custody and the right to take care of a German child. In France the TCN parent has the right to residence if they contribute to the maintenance and education of the child. Finally, in Belgium the dependency between the TCN parent and child is assumed and does not need to be proven.[50]

In Spain, the Supreme Court assumes that parental obligations are fulfilled, if the TCN parent lives together with the Spanish child.[51] However, this does not lead to an exclusion of other family situations from a right to residence under Article 20 TFEU.[52] The Spanish courts usually refer to both economic and emotional or affective ties.[53] Some Spanish courts directly acknowledged that a parent-child relationship and parental obligations amount to a bond beyond economic support and include intangible factors such as affection and education.[54] The

[44] CJEU Case C-83/11 *Rahman* [2012], ECLI:EU:C:2012:519, para 33.
[45] CJEU Case C-82/16 *K.A and others* [2018] para 72.
[46] Ibid.
[47] CJEU Case C-413/99 *Baumbast* [2002], ECLI:EU:C:2002:493.
[48] Ibid para 62, CJEU Case C-329/37 *Sezgin Ergat* [2000], ECLI:EU:C:2000:133, para 36.
[49] CJEU Case C-413/99 *Baumbast* [2002], ECLI:EU:C:2002:493, Opinion of AG Geelhoed, paras 22-26.
[50] See Annex 2 of this expert opinion.
[51] Spanish Supreme Court 9 October 2019, no 1336/2019 (appeal no 7077/2018).
[52] Basque Country High Court 9 May 2019, no 237/2019 (appeal no 573/2018).
[53] Basque Country High Court 18 December 2019, no 531/2019 (appeal no 941/2018) and 13 February 2019, no 85/2019 (appeal no 565/2018); Castilla y León High Court 27 February 2018, no 204/2018 (appeal no 590/2017); 30 November 2017 no 1335/2017 (appeal no 447/2017); 27 October 2017, no 1206/2017 (appeal no 468/2017) and 31 July 2017 no 968/2017 (appeal no 366/2017); Madrid High Court 26 September 2017 no 557/2017 (appeal no 786/2016).
[54] Castilla y León High Court 15 April 2019 no 110/2019 (appeal no 26/2019) and Madrid High Court 22 November 2017 no 387/2017 (appeal no 667/2017).

fact that the child is of a young age and suffering from a disability[55] or from a medical condition[56] has been considered to reinforce the dependency relationship with their parent.

British immigration authorities are also bound to consider each case on its individual merits when assessing dependency between the TCN parent and the EU citizen child.[57] Regardless of the living arrangements of the TCN and the child, evidence of shared responsibility should be assessed accordingly. Practice in the United Kingdom shows that a TCN parent cannot be considered a 'primary carer', if his or her responsibility is exclusively based on a financial contribution towards the British citizen's care.[58]

It follows from the laws and practices of the (former) EU Member States discussed that these Member States believe that the familial structure of their EU citizen children should be protected and that in certain situations dependency between the EU citizen child and TCN parent should be assumed. Moreover, the Member States do not require the TCN parent to live with the EU citizen child, but may include the factor that parent and child (do not) live together in the individual assessment of the child's dependency on the parent.

4.5 Sub conclusion

The CJEU held in *Chavez-Vilchez* that, 'it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent'.[59] However, the CJEU expressly acknowledged that the willingness and availability of the child's EU citizen parent to take on care duties are not enough to rule out the existence of dependency between the child and the TCN parent. More precisely, the CJEU stated that this cannot be the only factor taken into account in the assessment of the relationship regarding the TCN parent. The CJEU has not explicitly mentioned the 'scope of care tasks' as one of the mandatory factors to consider in assessing dependency. Arguably, having a 'marginal' care role can be an indication for lack of dependency, but it is itself not decisive. It can thus be deduced from the *Chavez-Vilchez* judgment that there may be a risk for the child to leave the EU, even if the TCN parent undertakes secondary care tasks.

Several EU Member States assume that there is dependency between an EU citizen child and the TCN parents or assess on the basis of all the individual circumstances of the case whether there is such dependency. Then, the fact that the TCN parent and the child are (not) living together is one of the circumstances, which is taken into account.

In spite of this, the IND and some Dutch courts give considerable attention to the fact that the TCN has 'secondary' care tasks, while the EU citizen parent is the primary carer. The

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[55] Basque Country High Court 5 July 2017 no 349/2017 (appeal no 806/2016).
[56] Catalonia High Court 11 June 2019 no 464/2019 (appeal no 558/2017).
[57] United Kingdom Home Office, Free movement rights: derivative rights of residence, Version 5.0 (3 May 2019) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799562/Derivative-rights-of-residence-v5.0ext.pdf> (accessed 11 November 2020) p 49.
[58] The Immigration (European Economic Area) Regulations 2016 (as amended in 2018) available at <https://www.legislation.gov.uk/uksi/2016/1052/made> (accessed 9 August 2020) Art 16(11).
[59] CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, para 70.

Council of State considered that the requirement that care tasks need to have a certain weight (thus not marginal), does justice to consideration 63 of *Chavez-Vilchez*, which mentions that the criterion in question is of a very special (*zeer bijzondere*) nature.[60] However, in consideration 63, the Court mentions 'very specific situations' and not 'a very special criterion'. Two linguistic remarks can be made here: first, 'situation' is not the same as 'criterion'; second, 'special' (*bijzonder*) is not the corresponding translation of the term 'specific' which should be translated as '*specifiek*'. These linguistic issues raise questions concerning the Council of State's interpretation of *Chavez-Vilchez*. The approach by the Council of State results in requiring an unlawful 'qualified' dependency of the EU citizen child on the TCN parent that does not (have to) correspond to the normal relationship between a parent and their child.

Further, TCN parents face a higher threshold in cases in which they do not live with their children. In fact, by doing this, the Netherlands returns to the pre-*Chavez-Vilchez* case law in which cohabitation was one of the requirements. It follows from the judgments in *K.A. and others* and *Rahman* that this factor may play a role in the decision, but it should not be decisive. In addition, the reasons behind the separation, for example the fact that the TCN parent complied with the Member State's migration legislation, need to be taken into account during the assessment.

Finally, even if the TCN parent has a secondary role, it still should be investigated whether the EU citizen parent is 'willing' (and not only 'able') to take the sole responsibility for the child, that is, independently and without the TCN parent. It can indeed be argued that the fact that the EU citizen parent is not 'willing' to take the sole responsibility can be seen as an indication for the existence of dependency.

For these reasons, Dutch practice is not fully in conformity with Article 20 TFEU, in particular not with the *Chavez-Vilchez* judgment. Moreover, the *Chavez-Vilchez* judgment, requires that the assessment of child interests should still be conducted, even if the TCN only conducted 'marginal' care tasks. In fact, the Dutch policy makes a distinction between the question of who is the primary carer[61], on the one hand, and the question whether there is such a dependency relationship between the TCN parent and the child that the child would be forced to leave the territory of the EU, if the TCN was refused a right of residence[62] on the other hand, does not echo the *Chavez-Vilchez* judgment, as these two questions are viewed by the CJEU as interlinked. As follows from *Chavez-Vilchez*, the question of who is the primary carer is part of the dependency assessment and even when the TCN does not have a primary care role, dependency still may exist. This means that the 'primary care' condition cannot be implemented as a separate condition. Concluding that the child is not obliged to leave the EU if the TCN parent has marginal care tasks, skips the core of the assessment, namely whether dependency exists and whether this dependency would force the child to leave the EU. As

[60] Council of State 20 May 2020, ECLI:NL:RVS:2020:1235, para 7.1. The CJEU mentions that a right of residence can be derived for TCN parents of EU citizen children who have not made use of their right to free movement in 'very specific situations'. See CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, para 63.

[61] Section B10/2.2 WBV 2018/4, requirement c.

[62] Section B10/2.2 WBV 2018/4, requirement d

stated by the Court in consideration 69 of the *Chavez-Vilchez* judgment, 'it is the relationship of dependency (…) that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in practice, to leave (…) the European Union (…)'. Thus, if dependency exists, in spite of having a marginal care role, it should then be assessed whether such dependency would force the child to leave the EU. In this context, the child's best interests should be taken into account. The role of the best interests of the child in the assessment, will be discussed in the next chapter.

5. The best interests of the child

This chapter will examine how the best interests of the child are taken into account in Dutch policy and practice and whether this complies with Article 20 TFEU.

5.1 Dutch policy

The Dutch Government has transposed the relevant considerations regarding the best interests of the child outlined by the CJEU in *Chavez-Vilchez* in its policy (see section 2.2 above).[63] As far as it concerns the best interests of the child, the current policy is therefore fully in line with the *Chavez-Vilchez* judgment.

5.2 Application in practice

The IND decisions and Dutch case law examined shows that the IND and courts rarely considers which factors were used in the assessment of the best interests of the child. Generally speaking, the circumstances of the child were not taken into account in a thorough and systematic manner.[64] Most of the examined case law contained a blanket statement on whether or not the best interest of the child was sufficiently taken into account, with no further explanatory details. In one case, the Court referred to the Council of State interpretation of the applicability of the best interests of the child rather than that of the CJEU.[65]

In the majority of the cases, which were upheld by the Council of State, the IND did not place emphasis on the child's equilibrium and age in relation to an effective relationship with the TCN parent in its assessment of the degree of dependency between the EU citizen child and this parent. A minority of cases indicated a holistic approach to assessing factors that contributed to the degree of dependency, which included the child's tender age.[66] Only a minority of Dutch courts has acknowledged that an expert, such as the Child Care and Protection Board (*Raad voor de Kinderbescherming*) should assess the dependency relationship and the impact of the separation on the best interests of the child.[67] In this context, it deserves to be noted that in the period between May 2017 and May 2018 (after the *Chavez-Vilchez* judgment, but before the 2018 policy amendment), the IND involved the Child

[63] Section 2.2 WBV 2018/4 requirement c.

[64] E Nissen and T Strik, 'Het Chavez-Vilchez arrest, artikel 24 Handvest en het Ruiz Zambrano criterium verenigd' in: H de Waele et al. (eds), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment* (Wolters Kluwer, 2019) pp 203-224.

[65] District Court Den Haag 28 August 2020, ECLI:NL:RBDHA:2020:8811.

[66] District Court Den Haag 25 November 2019, ECLI:NL:RBDHA:2019:14602.

[67] District Court Den Haag 25 November 2019, ECLI:NL:RBDHA:2019:14602; District Court Den Haag 24 April 2020, ECLI:NL:RBDHA:2020:3944 and District Court Den Haag 20 December 2018, ECLI:NL:RBDHA:2018:15832.

Care and Protection Board in 25 cases when assessing the dependency relationship.[68] However, after the 2018 amendment, involving the Board when assessing dependency has not been a standard practice. In the cases discussed in this expert opinion, the Board was involved only in very few cases. In one of these cases, the court ruled that the IND should actively investigate the dependency relationship and, if necessary, involve an expert, such as the Child Care and Protection Board. [69] In another case, the IND rejected the application although the Board reported that that there was a relation of dependency between the father and the child. The court found that the IND failed to sufficiently include the Board's report in its decision.[70]

5.3 CJEU case law

Before the *Chavez-Vilchez* judgment in 2017, the applicability of the best interests of the child was merely implied in the CJEU's case law concerning Article 20 TFEU.[71] The judgment of *O., S. and L*, decided in 2011, provides a glimpse of how the CJEU took account of the best interest assessment. This case involved the application for family reunification filed by a TCN on the basis of his marriage to his TCN wife who had permanent residence status in Finland, and with whom he shared a child, also a TCN. The TCN mother had the sole custody of a child with EU citizenship from a previous marriage with a Finnish spouse. This raised the question of whether the EU citizen child would be forced to leave the territory of the EU if the right of residence was denied to the new partner of his mother.[72] The CJEU reiterated the rule established in *Ruiz Zambrano* that Article 20 TFEU precludes national measures which have the effect of denying EU citizens the genuine enjoyment of the substance of the rights conferred by their status.[73] Furthermore, it reaffirmed that it is for the Member States to assess the factual circumstances in the light of the *Ruiz Zambrano* doctrine.[74]

To guide this assessment, the CJEU identified relevant factors that the Member States must take into account in determining whether its intended action would result in the interference with the genuine enjoyment of the substance of the rights conferred to an EU citizen. First, the CJEU took note that the decision of the TCN mother with the permanent residence status to leave the EU, following her partner, would result in the child's deprivation of all contact with its Finnish biological father.[75] Secondly, if the TCN mother decided to stay in Finland to maintain the EU citizen child's relationship with its Finnish father, the CJEU argued that this would tear him from his half-sibling, who was a TCN, who would have to join their

[68] The involvement of the Board took place in the context of a pilot launched by the IND. See J Liu, T Maasland and D de Wilde, *Analyse Chavez-Vilchez*, Ministerie van Justitie en Veiligheid, Immigratie- en Naturalisatiedienst, Directie Strategie en Uitvoeringsanalyse (30 November 2018) pp 26-27.
[69] District Court Den Haag 24 April 2020, ECLI:NL:RBDHA:2020:3944, para 6.
[70] District Court Den Haag, 20 December 2018, ECLI:NL:RBDHA:2018:15832, para 7.
[71] MAK Klaassen and PR Rodrigues, 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter' 19 *European Journal of Migration and Law* (2017) p 211.
[72] CJEU Case C-356/11 *O., S. and L.* [2012] para 32.
[73] Ibid, para 45.
[74] Ibid, para 49.
[75] Ibid, para 51.

biological father in his country of origin.[76] Finally, the relationship between the EU citizen child and his step-father was scrutinized to determine whether there existed a legal, economic, or emotional dependency between them.[77]

Although the CJEU did not refer to the best interests of the child directly in this part of the judgment, it considered that it is important for the Member State to take into consideration all the family relationships of the EU citizen child in order to decide whether the refusal of the residence permit to the TCN would deprive them of their rights under Article 20 TFEU. It is important to note that the CJEU stressed the importance of the ties of the EU citizen child with other family members, while the ties with the TCN parent for whom a residence right is sought are also considered relevant.

By laying out these factors, the CJEU implied that Member States must consider and balance the different interests involved to come up with a decision of whether the refusal of a residence right would seriously undermine the effective enjoyment of rights of the EU citizen child. The manner of assessment that the Member States were directed to do in *O., S. and L.* mirrors the consideration of the best interests of the child later affirmed in *Chavez-Vilchez*.[78]

In *K.A. and Others* the CJEU confirmed its earlier case law. It explained that a TCN may be denied their derived right to residence under Article 20 TFEU only if it had been determined that the applicant represented a genuine, present and sufficiently serious threat to public policy.[79] This determination should be based on all circumstances of the individual case and take into consideration the principle of proportionality, the best interests of the child, and fundamental rights.

5.4 Practice in other EU Member States

The Spanish Supreme Court has acknowledged that the rights arising from the child's EU citizenship include their right to reside with their TCN parent, who takes effective care of them. Otherwise, Article 20 TFEU would be deprived of its effect.[80] Even in situations in which circumstances of a serious nature are present (such as a criminal record for serious crimes[81]),[82] an assessment of the family circumstances must be carried out under Spanish law.[83]

In the UK, the Home Office has provided a non-exhaustive list of factors that should guide the assessment of best interest of the child in relation to dependency. This means that there is no one-size-fits-all manner of evaluating the best interest of the child. This is reflected in a judgment, in which the UK Supreme Court assessed the best interest of the child based on

[76] Ibid, para 51.
[77] Ibid, para 56.
[78] CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, para 71.
[79] CJEU Case C-82/16 *K.A .and others* [2018], ECLI:EU:C:2018:308, para 97.
[80] Spanish Supreme Court 30th September 2019, no 1270/2019 (appeal no 7101/2018).
[81] Art 31(5) Spanish Aliens Law.
[82] Basque Country High Court 21 May 2019, no 257/2019 (appeal no 664/2018).
[83] Spanish Supreme Court 26 November 2019, no 1638/2019 (appeal no 7066/2018); 9 October 2019, no 1336/2019 (appeal no 7077/2018); 3 October 2019, no 1305/2019 (appeal no 7163/2018); 30 September 2019, no 1270/2019 (appeal no 7101/2018) and 10 January 2017, no 15/2017 (appeal no 961/2013).

the facts and circumstances specific to the situation of the family members who were living together.[84]

5.5 Sub conclusion

Although the Dutch policy prescribes the assessment of the best interests of the child, it is in practice not considered to a full extent. The best interest of the child is mentioned in some IND decisions. However, the relevant circumstances are not (sufficiently) assessed. Unlike other EU (former) Member States, such as the United Kingdom, Dutch policy has not identified the circumstances, which should be taken into account in the best interests' assessment in the context of Article 20 TFEU. The dominant trend is that they remain out of the picture. Only a minority of cases before the Dutch courts indicates a holistic approach in assessing the relevant factors. This practice is therefore not in conformity with the CJEU case law. Finally, it appeared that requesting expert opinions, such as that of the Child Care and Protection Board, when assessing dependency, is not a standard practice.

[84] UK Supreme Court 16 December 2019 *Patel v. Secretary of State for the Home Department* UKSC 59, para 25.

6. The burden of proof

6.1 Dutch policy

Unlike the previous Dutch policy concerning the right of residence of TCN parents with EU citizen children, the current policy regulates the burden of proof. It states that the TCN parent should submit sufficient information 'by means of which it can be demonstrated' that the required conditions are met.[85] This implementation suggests that the TCN parent is the only party that should demonstrate that the required conditions are met, while the IND has no obligation to conduct further investigations. The explanations of the policy mention that the IND should conduct further investigations on the basis of submitted evidence, but do not clarify what should investigated by the IND. In particular, they do not provide whether the IND should examine whether the EU citizen parent is actually able and willing to assume sole responsibility for the primary day-to-day care of the child.

6.2 Application in practice

The IND has narrowed the assessment of the cases to specific circumstances and, in practice, increased the burden of proof for the applicant, who must demonstrate the relationship of dependency between them and their child, in order to be granted a derived residence right.
The IND's practice shows that the burden of proof placed on TCN parents in order to prove a relationship of dependency is high. The IND explicitly states that, according to the *Chavez-Vilchez* judgment, the burden of proof primarily lies with the TCN parent. Moreover, the IND requests the TCN parent to submit official birth certificates and evidence that demonstrates that they carry out caretaking duties for their children. Such evidence may be of a subjective or objective nature. Evidence is considered subjective if it concerns statements of family and friends, other third parties who are not professionals and photos. According to the Council of State no value needs to be attached to such subjective proof. That is different for proof that is considered objective, such as statements from doctors, schools and other professionals.[86]. All documents need to be legally valid in the Netherlands and therefore need to be in one of the following languages: Dutch, English, German or French.

The IND also asks the TCN parent to answer a series of questions in order to assess the dependency relationship. A few examples of these questions include the following:

- What is your role and what are your duties as a parent?
- What would it mean for your children if you had to leave the Netherlands?
- Are there specificities that have to do with the education of your children (family, school, help, network, care)?

[85] Section 2.2. WBV 2018/4, requirement c.
[86] Council of State 3 April 2013, ECLI:NL:RVS:2013:BZ8720.

Furthermore, TCN parents are allowed to submit a written statement, if they need any special facts or circumstances to be taken into account.

Legal issues arising from the IND practice and the Dutch case law are very often linked to the burden of proof applied by the IND and courts. As has been explained, the requirements stated in the current policy rules are cumulative. This means that, if there is not enough evidence on any one of these requirements, the IND will not consider the other evidence pertaining to the remaining requirements. There are for example cases in which the allegations of the applicant have been dismissed due to issues related to their ID[87], nationality[88] or the fact that the TCN father had not provided the necessary documents that proved that he was the legal and biological father of the children.[89]

Nonetheless, most of the cases revolve around primary care and the relationship of dependency. In practice, the IND receives evidence of varying nature, such as statements, certificates, pictures and other kinds of documents or verbal testimonies. This evidence is often considered to be insufficient[90] or not conclusive.[91] Although some courts ruled that, when the applicant submits evidence, national authorities are obliged to further investigate those claims before ruling them out[92], this is not the most common scenario. In some cases, the courts contrasted the applicant's argument on their relationship with the child with the fact that the other parent could take care of the child.[93] We have found a substantial number of cases in which reports from doctors, psychologists and specialised NGOs were dismissed as inconclusive or not supporting the applicant's claims.[94] Only in exceptional cases, such a decision was overturned.[95]

6.3 CJEU case law

According to the CJEU, it is for the Member States to set up rules to give effect to the derived residence rights arising from Article 20 TFEU.[96] Following general principles settled in CJEU case law, this means that there is national procedural autonomy with regard to the specific

[87] District Court Den Haag 28 January 2019, ECLI:NL:RBDHA:2019:1462.

[88] District Court Den Haag 12 July 2019, ECLI:NL:RBDHA:2019:7525 and District Court Den Haag, 19 December 2019, ECLI:NL:RBDHA:2019:13999.

[89] District Court Den Haag 4 December 2019, ECLI:NL:RBDHA:2019:14302.

[90] District Court Den Haag 30 January 2020, ECLI:NL:RBDHA:2020:2389; District Court Den Haag 2 April 2020, ECLI:NL:RBDHA:2020:3515; District Court Den Haag 2 April 2020, ECLI:NL:RBDHA:2020:3509; District Court 2 April 2020, ECLI:NL:RBDHA:2020:3131 and District Court Den Haag 9 April 2020, ECLI:NL:RBDHA:2020:3362.

[91] District Court Den Haag 27 June 2019, ECLI:NL:RBDHA:2019:6516.

[92] District Court Den Haag 24 April 2020, ECLI:NL:RBDHA:2020:3944 and District Court Den Haag 11 June 2019, ECLI:NL:RBDHA:2019:6187.

[93] Council of State 15 July 2019, ECLI:NL:RVS:2019:2409 and District Court Den Haag 20 April 2020, ECLI:NL:RBDHA:2020:3686.

[94] See eg District Court Den Haag zp Utrecht 20 May 2019, ECLI:NL:RBDHA:2019:5579, District Court Den Haag 9 April 2020, ECLI:NL:RBDHA:2020:3362 and District Court Den Haag 28 August 2020, ECLI:NL:RBDHA:2020:8811.

[95] District Court Den Haag 16 September 2019, ECLI:NL:RBDHA:2019:10055.

[96] CJEU Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* [2020], ECLI:EU:C:2020:119, para 51.

procedural rules governing the application for such a residence right. However, such autonomy is limited by the general principles of effectiveness and equivalence.[97]

As already reasoned in previous cases, the factors assessed must be consistent and relevant to the meaning of 'dependency'.[98] The CJEU has explained that the applicant must be free to rely on whatever factors that make it possible to assess the relationship of dependency between the TCN parent and the EU citizen child.[99] Once evidence is provided, satisfying the general burden of proof that the applicant bears, Member States must assess such evidence and, where necessary, conduct further investigations to determine the existence of a relationship of dependency.[100]

This conclusion is consistent with the CJEU's findings on the burden of proof in other EU law fields, such as tax law. There, the CJEU has ruled that the degree of detail and form of evidence accepted by the authorities cannot be formalistically interpreted so they pose an obstacle resulting in a disproportionate restrictive measure hindering one of the fundamental freedoms.[101]

Likewise, it is relevant to look at EU law provisions and the CJEU's interpretation of them in relation to a closer, although different, area of law: family reunification. In this regard, EU law expressly states that, when assessing the family relationships of relatives of a person granted refugee status, a decision cannot be made solely on the lack of documentary evidence.[102] Even though this provision concerns different situations and circumstances, it shows that too strict evidentiary requirements on a non-material reality such as a family relationship is liable to impair the effectiveness of the right to family reunification. The existence of national procedural autonomy is not an obstacle to this conclusion. The CJEU has confirmed that absence of documentary evidence is just a factor in the assessment[103] and that the best interests of the child have an influence on the intensity of the examination that authorities are obliged to conduct in family reunification cases. The latter would include the age of the child and the extent to which the child is dependent on their relative.[104]

These findings are consistent with the fact that the CJEU considers, as was mentioned before, that a relationship of dependency is assumed when children are involved. This has been confirmed in the recent judgment *Subdelegación del Gobierno*.[105] In this case, the CJEU affirmed the exceptional nature of dependency between adults, as opposed to that between adults and their children.[106] By deduction, if the situation for dependency between adults is exceptional and is different to the situation of minors, then the rule must be that dependency

[97] CJEU Case C-292/04 *Meilicke, and Others* [2007] ECLI:EU:C:2007:132, para 55.
[98] CJEU Case C-83/11 *Rahman* [2012], ECLI:EU:C:2012:519, para 24.
[99] CJEU Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* [2020], ECLI:EU:C:2020:119, para 52.
[100] Ibid, para 53.
[101] CJEU Case C-292/04 *Meilicke, and Others* [2007] ECLI:EU:C:2007:132, paras 40-46; CJEU Case C-310/09 *Accor SA* [2011], ECLI:EU:C:2011:581, para. 99; CJEU Case 199/82 *SpA San Giorgio* [1983] ECLI:EU:C:1983:318, para 12.
[102] Council Directive 2003/86/EC, Article 11(2).
[103] CJEU Case C-635/17 *E v Staatssecretaris van Veiligheid en Justitie* [2019], ECLI:EU:C:2019:192, para 69.
[104] Ibid, para 59.
[105] CJEU Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* [2020], ECLI:EU:C:2020:119.
[106] Ibid, para 56.

between parents and their children is presumed. The CJEU considered that dependency of a child on their parent(s) should be assumed, as the child is incapable of living an independent existence.[107] The reason for the presumption of dependency is that there are simply too many different types of family situations to define all-encompassing criteria. Even the most common criteria, such as legal guardianship, are sometimes not enough, as the court has stated that there are more factors than a simple blood link or legal link, which demonstrate dependency.[108] Because there is a presumption of dependency between parents and their children, the authorities are obliged to conduct further inquiries on the basis of the evidence provided by the persons concerned.

6.4 Practice in other EU Member States

Spanish courts seem to have a flexible approach on the kind of evidence accepted to support the existence of dependency. For instance, a court gave importance to a statement from the child's school teacher as to the involvement of the parent in the child's life.[109] Some Spanish courts require evidence or, at least some indication, of the *lack of* compliance by the applicant of their parental obligations, as they state that the contrary must not be assumed[110] (for instance, even in the case in which the parent is serving an imprisonment term).[111] Thus, following this reasoning, once the applicant has proved that they have a child and there is no evidence on the lack of compliance with parental obligations, it is on the authorities to disprove that there is a relationship between them resulting in dependency, by conducting the necessary investigations.

Practice in the United Kingdom shows that the assessment of the dependency relationship can be made based on evidence presented on a non-exhaustive list of factors.[112] For this assessment, the UK Home Office must consider all kinds of evidence presented to show to what extent the child is attached and dependent on the TCN applicant.[113]

6.5 Sub conclusion

The way in which the rules on the burden of proof are implemented in practice in the Netherlands is not in conformity with EU law. The IND often dismisses the applicant's claims

[107] CJEU Case C-82/16 *K.A .and others* [2018], ECLI:EU:C:2018:308, para 65.
[108] CJEU Case C-129/18 *SM v Entry Clearance Officer, UK Visa Selection* [2019], ECLI:EU:C:2019:248, para 69 and CJEU Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* [2020], ECLI:EU:C:2020:119, para 57.
[109] Basque Country High Court 25 June 2019, no 322/2019 (appeal no 753/2018).
[110] Madrid High Court 5 December 2018, no 815/2018 (appeal no 612/2018); 24 October 2018, no 708/2018 (appeal no 526/2018); 26 September 2018, no 649/2018 (appeal no 591/2018); 25 July 2018, no 588/2018 (appeal no 267/2018); 18 July 2018, no 555/2018 (appeal no 205/2018); 20 June 2018, no 474/2018 (appeal no 297/2018); 14 February 2018, no 105/2018 (appeal no 465/2017); 5 February 2018, no 50/2018 (appeal no 335/2017) and 24 July 2017, no 568/2017 (appeal no 1195/2016).
[111] Madrid High Court 24 January 2018, no 28/2018 (appeal no 314/2017).
[112] United Kingdom Home Office, Free movement rights: derivative rights of residence, Version 5.0 (3 May 2019).
[113] Ibid, p 57.

without further investigating the circumstances of the case. National courts do not correctly apply evidentiary rules. This is in particular not in line with the *Chavez-Vilchez* judgment that requires the applicant to submit evidence of their claims, but also obliges the national authorities to conduct further inquiries. Otherwise, this would impose a *de facto* higher burden of proof, which does not comply with the requirements set by the CJEU.

Furthermore, the IND and national courts request specific types of documents (such as pictures or statements) in order to substantiate the application for a residence permit on the basis of Article 20 TFEU. However, if provided, such documents are deemed insufficient or not supported by objective and verifiable evidence. This practice is not in line with the EU principle of effectiveness, because it renders the burden of proof unreasonably high. The IND or a national court cannot automatically dismiss the existence of a relationship of dependency in cases where evidence points to the existence of dependency. On the contrary, authorities are obliged to conduct further investigations, which will allow them to decide based on the standards set forth by CJEU case law. Such investigations could include a request of an expert opinion of the Child care and Protection Board.

7. Conclusion

This expert opinion concerned the right of residence of the TCN parent of EU citizen children under Article 20 TFEU, in the Member State of which the EU citizen child has the nationality and where they are remaining. It examined whether the Dutch translation of the CJEU's judgment in *Chavez-Vilchez* in policy and case law is consistent with EU law. It concluded that several aspects of Dutch policy and case law violate Article 20 TFEU. The expert opinion particularly focused on three aspects: primary care, the best interests of the child and the burden of proof.

Primary care

According to the CJEU, 'it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent'.[114] However, the CJEU expressly acknowledged that the willingness and availability of the child's EU citizen parent to take on care duties are not enough to rule out the existence of dependency between the child and the TCN parent. According to the CJEU's case law, cohabitation is helpful but not a prerequisite in order to prove dependency.[115] The CJEU has explicitly declared that ties of dependency may also exist when family members do not reside in the same Member State.[116] The CJEU emphasised that a broad assessment must be made, which should include examining the effect of the removal of the TCN parent on the child's equilibrium

The Dutch IND and courts focus their analysis on a narrow and unlawful interpretation of the concept of 'dependency'. First, the IND too easily considers the care tasks by the TCN as marginal, subsequently arguing that the EU citizen parent is the primary carer, there is no dependency between the TCN and the child and consequently, the child is not forced to leave the territory of the EU. The distinction between the question regarding primary carer, on the one hand, and the question regarding dependency, on the other hand, is not in line with the *Chavez-Vilchez* judgment, as these two questions should not be assessed separately as follows from the *Chavez-Vilchez* judgment, the question of who is the primary carer is part of the dependency assessment. Even if the TCN is not the primary carer role, there may still be dependency. The core of the assessment is whether dependency exists and whether this dependency forces the child to leave the EU. Second, non-cohabitation too easily leads to the assumption that care tasks are marginal. Third, dependency is understood as going beyond the normal dependency between parent and a child.

Best interests of the child

Finally, practice in the Netherlands shows a significant disregard for the best interests of the child, that are not considered in a thorough and systematic manner. In *Chavez-Vilchez*, the CJEU held that the best interests of the child should be taken into account when assessing the

[114] CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, para 70.
[115] CJEU Case C-82/16 *K.A .and others* [2018], ECLI:EU:C:2018:308, para 73.
[116] CJEU Case C-83/11 *Rahman* [2012], ECLI:EU:C:2012:519, para 33.

relationship of dependency between a child and a TCN parent. A best interests' assessment must take into account 'all the specific circumstances'. Here, the CJEU refers to four specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the EU citizen parent and to the TCN parent, and the risks which separation from the latter might entail for that child's equilibrium.[117]

Although the Dutch policy prescribes the assessment of the best interests of the child, it is in practice not considered to a full extent. The best interests of the child are mentioned in some IND decisions. However, the relevant circumstances are not (sufficiently) assessed. Dutch policy has not identified the circumstances, which should be taken into account in the best interests' assessment in the context of Article 20 TFEU. The dominant trend is that they remain out of the picture. Only a minority of cases before the Dutch courts indicate a holistic approach in assessing the relevant factors. This practice is therefore not in conformity with the CJEU case law. Further, it appeared that the authorities have not always requested expert opinions, such as that of the Child Care and Protection Board, in the context of the assessment of dependency.

Burden of proof

In the *Chavez-Vilchez* judgment, the CJEU requires TCN parents who apply for a residence permit to stay with their EU citizen child on the basis of Article 20 TFEU, to submit evidence of their claims. However, it also obliges the national authorities to conduct further inquiries on the basis of the evidence provided. Otherwise, this would impose a *de facto* high burden of proof, which does not comply with the requirements set by the CJEU.

The IND practice and national case law demonstrate a disproportionate burden of proof, which undermines the effectiveness of Article 20 TFEU. Even when the applicant has complied with the *onus* of submitting evidence on behalf of their request, the IND decision or court judgment often and unlawfully raises the burden of proof requiring some sort of 'qualified' evidence able to convince them.

This practice infringes the EU principle of effectiveness, because it renders the burden of proof unreasonably high. The IND or a national court cannot automatically dismiss the existence of a relationship of dependency in cases where evidence points to the existence of dependency. On the contrary, authorities are obliged to conduct further investigations, which will allow them to decide based on the standards set forth by CJEU case law. One way to do this is to request an expert opinion of the Child Care and Protection Board.

Questions for preliminary ruling

A comparison with practices of other EU Member States demonstrates that several Member States already provided a residence right to residence for TCN parents of EU citizen children prior to the *Ruiz Zambrano* and *Chavez-Vilchez* judgments. Other Member States' interpretations of the CJEU case law are less strict than the Dutch one, especially in how the relationship of dependency between parent and child is understood. Moreover, they carry out a more systematic consideration of the interests of the child. Finally, the burden of proof in those Member states is more in line with CJEU's case law.

[117] CJEU Case C-133/15 *Chavez-Vilchez* [2017], ECLI:EU:C:2017:354, paras 71-72.

Consequently, it is relevant that a national court in the Netherlands refers the following questions for preliminary ruling to the CJEU:

A. Should Article 20 TFEU be interpreted to allow national authorities to conclude that there is no relationship of dependency between the child and the TCN parent, because the TCN parent only provides 'marginal care' to the child, without a further assessment of other relevant circumstances, including the best interests of the child concerned?

B. What role does the fact that the TCN parent and EU citizen child are not or have not been living together, play in the assessment of the relationship of dependency between the EU citizen child and TCN parent?

C. Does Article 20 TFEU allow a Member State to refuse a TCN parent's application for a residence permit, in order to stay with their EU citizen child, if the TCN parent has submitted all objective and subjective evidence of a dependency relationship with their EU citizen child, which is reasonably available to them, without carrying out further investigations?

Annex 1: IND decisions

The researchers have been provided with IND decisions dealing with applications for derivative right to residence under Article 20 TFEU by the lawyers working at the law firm *Prakken d'Oliveira Human Rights Lawyers* in Amsterdam. For citation and organisational purposes, each of the five IND cases we received, has been given a reference number from one to five. In order to protect the confidentiality of the cases and individuals, no specific details or personal information is disclosed, including name, age, nationality, or the real reference number. These decisions refer to the following situations:

Case 1

Case 1 concerns a TCN mother and her Dutch child. Although the TCN mother had already submitted the required documents, the IND requested more documents in support of the existence of a dependency relationship. An important factor in this case was that the TCN mother and her Dutch child had been separated for a period of time. During this period, the older sibling of the Dutch child was providing care. Moreover, the Dutch father, who was previously not taking care of the children, started living together with the children.

Case 2

Case 2 concerns a TCN mother and her Dutch children. The TCN mother submitted the required documents, which included passports, birth certificates, school reports, photos, marriage certificate, school declarations, doctor declarations, and personal declarations. Nevertheless, the IND found that the required documents only proved marginal care-taking tasks and stated that they were not supported by objective evidence. Hence, they did not show proof of structural care or dependence. Moreover, the IND emphasized that the children had been living and were registered in the Netherlands prior to the registration of the TCN mother. The IND stated that the latter demonstrated that there was no dependency relationship, since the children did not leave the territory of the EU with the TCN mother. The IND considered the Dutch father to be the primary caretaker. It should be noted that the mother could only register in the Netherlands if she had legal residence.

Case 3

Case 3 concerns a TCN mother and her Dutch child, who has a disability. Due to the child's condition, it lived in a Dutch specialised care facility. The child's Dutch father was deceased. The TCN mother submitted the documents, including passport, photos, client plan at the institution, and a statement regarding their family situation. The IND ruled that the documents did not show actual care tasks nor did they demonstrate a relationship of dependency between mother and child. In particular, the IND focused on the client plan established with the healthcare institution. The client plan demonstrated that the mother visited once a month and had weekly telephone calls with her child. The IND did not consider the mother to perform care-taking tasks.

Case 4:

Case 4 concerns a TCN father and his Dutch children. The TCN father saw his request for a derived residence right rejected on the basis that he did not prove his identity. Since the requirements of the WBV 2018/4 are cumulative, this led to the rejection of the residence right. The TCN father submitted a parenting plan, which showed that the children lived with the mother and stayed with the father every two weeks for the weekend. The IND considered the parenting plan to only demonstrate marginal caretaking tasks and stated that it was not supported by objective evidence.

Case 5:

Case 5 concerns a TCN father and his Dutch children. The father submitted many documents, including passport, transaction overviews, a personal statement, bank statements and a parenting plan. The IND stated that these documents only proved marginal caretaking tasks. Moreover, the IND particularly focused on the fact that the TCN father had not been living with the children for an extended period of time. Therefore, the mother was considered the primary caretaker. Even though the TCN father submitted bank statements and transaction overviews that demonstrated that he was taking care of the children from abroad by sending money, the IND concluded that there was not enough evidence to show that the money was received or spent on the children, since the money was received by third-parties. Furthermore, the IND decided that the total amount sent to the children, if they would have in fact received it, was not a substantial contribution.

Annex 2. Practices in other EU Member States

1. Introduction

This annex gives an overview of the legislation and practice concerning the right of residence of TCN parents of EU citizen children under Article 20 TFEU in the following Member States: Belgium, France, Germany, Spain and the United Kingdom. It follows from the research conducted that, prior to the *Chavez-Vilchez* judgment, the national laws of **Germany, France and Belgium** were already in line with the principles and interpretation that stemmed from this judgment. As a result, the *Chavez-Vilchez* judgment had no impact on their national laws and policies with regards to the right to residence for TCN parents of children with EU citizenship.

Following *Chavez-Vilchez*, **Spanish Law** provides for temporary residence permits in cases of exceptional circumstances. This includes having family ties or roots in Spain. According to the literal wording of the provision, this is the case when the TCN parent takes care of their Spanish child and cohabitates with them or fulfils their parental obligations. Spanish courts often refer to *Ruiz Zambrano* and *Chavez-Vilchez* (or other related CJEU cases such as *Rendón Marín* or *K.A. and Others*) when dealing with this kind of residence permits. A significant characteristic of the Spanish case law is the overwhelming number of cases in which the proceedings (partially) deal with the fact that the applicant had a criminal record and/or they were considered a threat for national security or public policy.

In the **United Kingdom**, the *Ruiz Zambrano* and *Chavez-Vilchez* judgments triggered substantial policy reforms in domestic law with regard to the derivative right of TCNs to reside in the country. The Immigration (European Economic Area) Regulations 2016 and accompanying guidance documents issued by the UK Home Office were streamlined to comply with the developments brought about by *Ruiz Zambrano* and *Chavez-Vilchez.* However, legal practitioners have observed that:

> virtually all cases go to litigation in Courts, since the UK Home Office is generally strongly unsympathetic of most applications relying on Ruiz Zambrano and Chavez-Vilchez jurisprudence. Whilst we've had some success with Zambrano / Chavez-Vilchez matters in litigation at Court, the numbers are limited, since some of the judiciary of both the First-Tier Tribunal and the Upper Tribunal (Immigration and Asylum Chamber) seem to have limited appetite for EU law in general.[118]

Nevertheless, strategic litigation brought to the United Kingdom Supreme Court has been instrumental to further enrich the interpretation and application of the derivative right to residence in the United Kingdom context. The pronouncements of the United Kingdom Supreme Court in *Patel v Secretary of State for the Home Department* promulgated in 2019 were helpful in reaffirming the principles set out in *Ruiz Zambrano* and *Chavez-Vilchez* in relation to the domestic legal framework of the United Kingdom. The United Kingdom

[118] Consultation with Jahed Morad (Associate Lawyer) and Hayk Sayadyan (Consultant Solicitor) from Gulbenkian Andonian Solicitors in London through electronic mail (4 March 2020).

Supreme Court is set to hear on appeal the judgment of the England and Wales Court of Appeal in *Secretary of State for the Home Department v Cherrie Ann-Marie Robinson (Jamaica).*[119] It is expected to provide further guidance on the question of whether 'exceptional circumstances' need to be established before a primary carer in *Ruiz Zambrano*-like cases could be deported.[120]

2. Member States providing residence to TCN parents of EU citizen children

In this section the legislation of Belgium, France and Germany will be discussed. These Member States did not (have to) adapt their legislation after the *Chavez-Vilchez* judgment, because they already granted residence to TCN parents of respectively Belgian, French and German children.

2.1 Belgium

In Belgium, dependency between a child and a TCN parent is assumed. In order to receive a residence permit under Belgian law, a TCN parent of a Belgian child must demonstrate the child's minority, their parental link to the child and the fact that they are accompanying or joining the child. Moreover, the TCN parent must prove their identity.[121]

2.2 France

The French Code on the Entry and Residence of Foreign Nationals and Rights of Asylum (CESEDA) gives the right to a residence permit to a TCN parent of a French child, if they prove that they contribute to the maintenance and education of the child, in accordance with the conditions of Article 371-2 of the Civil Code.[122] If this is proven, the TCN parent cannot be forced to leave the French territory.[123] Article 371-2 of the Civil Code requires a parent to contribute to the maintenance and education of the child pursuant to their resources. Even though TCN parents are sometimes facing difficulties in order to get such residency permit or to get them renewed in practice, French case law shows that the courts apply these articles and that such documents are eventually granted in most of the cases.

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[119] England and Wales Court of Appeal 2 February 2018 *Secretary of State for the Home Department v Cherrie Ann-Marie Robinson (Jamaica* [2018] EWCA Civ 85.

[120] UK Supreme Court *Robinson (Jamaica) (AP) (Appellant) v Secretary of State for the Home Department (Respondent)* UKSC 2019/0010. Permission to appeal was granted by the UK Supreme Court in part on 4 July 2019, information is available at <https://www.supremecourt.uk/docs/permission-to-appeal-2019-060708.pdf> (last accessed 22 June 2020).

[121] Article 40ter of the Loi du 15 Décembre 1980 (Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers).

[122] Art L-313-11-6° of the CESEDA (Code de l'entrée et du séjour des étrangers et du droit d'asile).

[123] Art L-511-4-6° of the CESEDA (Code de l'entrée et du séjour des étrangers et du droit d'asile).

2.3 Germany

In Germany, a TCN parent of a German child has a legal right to a residence permit, if they have custody rights and the right of care. Even if the German child has a German parent who exercises the right of care, the TCN parent still has a right to a residence permit in order to protect the structure of the family and interests of the German child.[124]

3. Primary care

This section will discuss the requirement of 'primary care' as it is applied in Spain and the United Kingdom.

3.1 Spain

The Spanish Supreme Court has argued that, although granting a residence permit due to having family roots in Spain is considered as 'exceptional' by the Spanish Aliens Law, it does not mean that this provision must be interpreted restrictively.[125] Spanish courts have steadily stated that a biological link or the convenience of all the members of the family to reside in Spain is not enough to determine that there is an 'effective dependency' relationship.[126] Most courts refer to both economic and emotional or affective ties.[127] Some courts directly acknowledge that a parent-child relationship and parental obligations amount to a bond beyond economic support and include intangible factors such as affection and education.[128] Indeed, courts have also found this kind of dependency in cases where no biological relationship existed, but a legal one (e.g. Islamic kafala regime), because the relationship entailed all aspects of ordinary care such as providing food, clothes, education, healthcare and daily needs.[129] Finally, the fact that the child is of a young age and suffering from a disability[130] or from a medical condition[131] has been considered to reinforce the dependency relationship with their parent.

Some courts seem to have a more economy-related approach to the parent-child relationship. That is, they seem to be m inclined to determine that there is a 'dependency'

[124] German Family Reunification with Germans, Law on the Residence, Employment and Integration of Foreigners in the Federal Territory Residence Act (*AufenthG*) para 28.
[125] Spanish Supreme Court 27th May 2019, no 702/2019 (appeal no 4461/2017).
[126] Andalucía High Court 8 February 2019, no 162/2019 (appeal no 680/2017).
[127] Basque Country High Court 18 December 2019, no 531/2019 (appeal no 941/2018); 13 February 2019 85/2019 (appeal no 565/2018); Castilla y León High Court 27 February 2018, no 204/2018 (appeal no 590/2017); 30 November 2017, no 1335/2017 (appeal no 447/2017); 27 October 2017, no 1206/2017 (appeal no 468/2017); 31 July 2017, no 968/2017 (appeal no 366/2017); Madrid High Court 26 September 2017, no 557/2017 (appeal no 786/2016).
[128] Castilla y León High Court 15 April 2019, no 110/2019 (appeal no 26/2019) and Madrid High Court 22 November 2017, no 387/2017 (appeal no 667/2017).
[129] Andalucía High Court 23 May 2019, no 1171/2019 (appeal no 399/2018).
[130] Basque Country High Court 5 July 2017, no 349/2017 (appeal no 806/2016).
[131] Catalonia High Court 11 June 2019, no 464/2019 (appeal no 558/2017).

relationship, if the parent contributes financially to provide the child with essential needs.[132] Some assess the existence of a family unit according to the requirements to receive social assistance by the regional authorities.[133]

Cohabitation

The Spanish Supreme Court has recently outlined the reasoning to be applied when assessing a *Chavez-Vilchez* related case and which requirements to look into, by making a difference between two situations[134]:

a. The TCN parent takes care of the child and lives with them and therefore complies with parental obligations.
b. The TCN parent does not cohabitate with the child. In these cases, proof of the compliance with parental obligations is required.

According to the Supreme Court, 'taking care' entails a factual situation in which the parent provides the needed resources for the subsistence of the child. At the same time, 'parental obligations' include fulfilling their duties of protection or care, assistance, education and affection. In other occasions, the Supreme Court has referred to the 'effective care' that the parent carries out with respect to the child.[135] The Supreme Court thus gives important weight to the fact that the TCN parent and EU citizen child cohabitate: it assumes in that situation that parental obligations are fulfilled. Other courts have concluded that the TCN parent fulfilled parental obligations in situations that the parents of the child were separated and the child lived with the TCN parent.[136]

Similarly, this conclusion has been formulated by lower courts. They established 'dependency' where the parent has parental authority and custody and cohabitates with the child. On the other hand, they needed proof of the fulfilment of obligations arising from parental authority together with evidence of the dependency relationship, if the TCN parent and the child do not live together.[137] Such parental authority obligations would include exercise of visitation rights and fulfilment of alimony obligations, where applicable due to the relationship between the child parents.[138]

Regarding the presence and availability of the other parent of the child, courts do not usually make any specific statements, beyond the citations of *Chavez-Vilchez*. However, some courts have acknowledged that the presence and availability of the EU national parent is not a factor that can, by itself, rule out a dependency relationship between the TCN parent and the

[132] Catalonia High Court 21 May 2019, no 372/2019 (appeal no 353/2017); 8 April 2019, no 233/2019 (appeal no 288/2017); 30 October 2017, no 778/2017 (appeal no 138/2016) and Aragón High Court 2 March 2018, no 102/2018 (appeal no 17/2018).
[133] Basque Country High Court 18 September 2018, no 381/2018 (appeal no 1078/2017).
[134] Spanish Supreme Court 9 October 2019, no 1336/2019 (appeal no 7077/2018).
[135] Spanish Supreme Court 30 September 2019, no 1270/2019 (appeal no 7101/2018).
[136] Aragón High Court 7 July 2017 no 301/2017 (appeal no 86/2017).
[137] Basque Country High Court 23 May 2017, no 258/2017 (appeal no 735/2016).
[138] Basque Country High Court 14 May 2019, no 243/2019 (appeal no 670/2018) and 8 October 2018, no 429/2018 (appeal no 646/2018).

child.[139] Conversely, some other court rulings may imply that this fact played a role in deciding against granting the residence permit.[140] One court held against the applicant that he had spent some months abroad, without further analysing the reasons of this absence.[141] Some Spanish courts weighted against the applicant the fact that the TCN parent did not have custody over their Spanish children when assessing their dependency. In these cases, at a certain point the children had been found in a situation of destitution[142] and, being in that situation, the parent did not exercise their visitation rights.[143]

When the TCN parent and the Spanish child do not cohabitate, compliance with parental obligations must be established. However, the absence of cohabitation is not a reason *per se* to refuse a residence permit.[144] TCN parents who do not live together with their Spanish child, are thus not automatically excluded from the derived residence rights of Article 20 TFEU. Instead, the existing relationship should be assessed, no matter in which circumstances it takes place.

3.2 United Kingdom

In the United Kingdom, the derivative right to reside granted under Article 20 TFEU and expounded in *Ruiz Zambrano* and *Chavez-Vilchez* is transposed in 'The Immigration (European Economic Area) Regulations 2016', as amended in 2018. Such derivative right to residence shall be granted to a TCN if they satisfy the following requirements:

a) The person is a primary carer of a British citizen;
b) The British citizen is residing in the United Kingdom; and
c) The British citizen would be unable to reside in the United Kingdom or in another European Economic Area (EEA) State if the person left the United Kingdom for an indefinite period.[145]

The concept of 'dependency' is subsumed in the definition of a 'primary carer' laid down in the legislation. The main indicator used in the definition is the primary responsibility that a direct relative or legal guardian exercises over the care of the British citizen from which the right to residence can be derived.[146] Furthermore, it is implied that the care should be substantial in nature. A TCN cannot be considered a 'primary carer' if their responsibility is exclusively based on financial contribution towards the British citizen's care.[147] This underlines that 'dependency' is not (only) a matter of economic support.

[139] Andalucía High Court 8 February 2019, no 162/2019 (appeal no 680/2017).
[140] Madrid High Court Judgment 29 January 2018, no 50/2018 (appeal no 654/2017); Catalonia High Court 29 June 2018, no 575/2018 (appeal no 773/2016) and 26 March 2018, no 255/2018 (appeal no 468/2016).
[141] Murcia High Court 12 December 2018, no 564/2018 (appeal no 183/2018).
[142] Basque Country High Court 13 September 2018, no 824/2017 (appeal no 376/2018).
[143] Basque Country High Court 15 January 2019, no 14/2019 (appeal no 513/2018).
[144] Basque Country High Court 9 May 2019 no 237/2019 (appeal no 573/2018).
[145] The Immigration (European Economic Area) Regulations 2016 (as amended in 2018) Art 16(5).
[146] Ibid, Art 16(8).
[147] Ibid, Art 16(11).

Prior to *Chavez-Vilchez,* United Kingdom legislation on the derivative right to residence was worded in such a way that if primary responsibility was shared with the British parent who could assume care for the British child, a residence permit would not be issued to the TCN parent.[148] This legislation was amended in 2018 triggered by the *Chavez-Vilchez* judgment. Since then, British immigration officials could not automatically refuse a residence permit to TCN parents in situations where there is a British parent who can take care of the child. Instead, officials are directed to assess the application according to the elements set out in *Chavez-Vilchez* on a case-by-case basis.[149]

A presumption of primary responsibility for the care of a child exists where a parent 'resides with the child on a permanent basis and does not share equal responsibility for that child's care with another person'.[150] However, United Kingdom immigration authorities are required to make further inquiries whether there is either '(1) evidence that the child resides permanently with another parent or carer in the UK, (2) evidence that there is another parent in the UK or EEA who shares responsibility with the child, or (3) no evidence as to where the child resides'.[151]

Shared responsibility for the care of the child is generally assumed when both parents are living together in the same household with the child. 'Where a child's parents live apart, the parents will usually be considered to share equal responsibility for the child, if the other parent has legal parental responsibility and has regular contact with the child'.[152] Evidence of shared responsibility includes, but is not limited to, a custody agreement or court order, or statement(s) from the parent(s) to this effect.[153] It must be noted, however, that equal responsibility does not mean that there must be evidence of equal sharing of responsibilities. United Kingdom immigration authorities are directed to consider each case on its individual merits.[154]

4 Best interests of the child

This section will discuss the legislation and case law concerning the assessment of the best interests of the child in cases concerning the right of residence of TCN parents with their EU citizen children on the basis of Article 20 TFEU.

4.1 Spain

The Spanish Supreme Court has pointed out the protection of children and their best interests as the aim of the assessment that authorities need to perform in the context of Article 20

[148] European Migration Network, 'Ad-Hoc Query on Impact of 2017 Chavez-Vilchez ruling' (8 August 2018) available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1326_-_impact_of_2017_chavez-vilchez_ruling.pdf> (accessed 22 June 2020) p 15.

[149] Ibid.

[150] United Kingdom Home Office, Free movement rights: derivative rights of residence, Version 5.0 (3 May 2019) p 46.

[151] Ibid.

[152] Ibid , p 49.

[153] Ibid.

[154] Ibid.

TFEU.[155] As a consequence of the application of CJEU case law, the Supreme Court has affirmed that children's rights arising from their EU citizenship include their right to reside with their TCN parent who takes effective care of them. Otherwise, Article 20 TFEU would be deprived of its effect.[156]

Some courts have affirmed that children have the right to live with their parents (unless recommended otherwise due to their best interests), which renders the expulsion order against a TCN parent an infringement of such right. This situation would lead to the child leaving the EU as the only answer to remedy such violation,[157] something prohibited by the interpretation of Article 20 TFEU rights.

In many cases, the Spanish courts based their conclusions on the protection of children, indirectly by citing the best interests of the child and the application of the Charter as guiding provisions. On some other occasions, they claimed directly that the assessment in these situations must be whether the child is obliged to leave the EU or whether their interests are hurt.[158] However, in some other cases the conclusions were summarised by transposing the CJEU's reasoning on the obligation of the child to effectively leave the territory of the EU,[159] or narrowing the assessment to situations in which their best interests also recommend to leave the territory in case their TCN parent would be expelled[160] (despite those best interests being violated by the separation and expulsion order themselves).

Spanish courts have acknowledged that the CJEU's findings in *Ruiz Zambrano* and *Chavez-Vilchez* oblige to override certain provisions of Spanish migration law to enforce a proper interpretation of the legal regime arising from the application of Article 20 TFEU rights. Even in situations in which circumstances of a serious nature are present (such as a criminal record for serious crimes[161]),[162] an assessment of the family circumstances must be carried out.[163] The CJEU ruled in *Rendón Marín* (a preliminary ruling referred by the Spanish Supreme Court) that Articles 20 and 21 TFEU preclude an automatic refusal under national law of a

[155] Spanish Supreme Court 27 May 2019, no 702/2019 (appeal no 4461/2017).

[156] Spanish Supreme Court 30 September 2019no 1270/2019 (appeal no 7101/2018).

[157] Madrid High Court 26th July 2019 no 541/2019 (appeal no 765/2018); 16 July 2019, no 478/, (appeal no 704/2018); 5 December 2018, no 815/2018 (appeal no 612/2018); 24 October 2018708/2018 (appeal no 526/2018); 26 September 2018, no 649/2018 (appeal no 591/2018), 25 July 2018, no 588/2018 (appeal no 267/2018); 18 July 2018, no 555/2018 (appeal no 205/2018); 20 June 2018474/2018 (appeal no 297/2018); 22 November 2017, no 387/2017 (appeal no 667/2017) and Castilla y Léon High Court 12 January 2018, no 12/2018 (appeal no 222/2017).

[158] Basque Country High Court 27 June 2018, no 314/2018 (appeal no 906/2017); 14 May 2019, no 243/2019 (appeal no 670/2018) and Murcia High Court 28 February 2019 no 99/2019 (appeal no 174/2018).

[159] Murcia High Court 28 February 2019, no 99/2019 (appeal no 174/2018); 12 December 2018, no 564/2018 (appeal no 183/2018); Madrid High Court 14 December 2017, no 733/2017 (appeal no 226/2017) and Madrid High Court 14 December 2017, no 734/2017 (appeal no 186/2017).

[160] Castilla y León High Court 15 April 2019, no 110/2019 (appeal no 26/2019).

[161] Art 31(5) Spanish Aliens Law.

[162] Basque Country High Court 21 May 2019, no 257/2019 (appeal no 664/2018).

[163] Spanish Supreme Court 26 November 2019, no 1638/2019 (appeal no 7066/2018); 9 October 2019, no 1336/2019 (appeal no 7077/2018), 3 October 2019, no 1305/2019 (appeal no 7163/2018); 30 September 2019, no 1270/2019 (appeal no 7101/2018) and 10 January 2017, no 15/2017 (appeal no 961/2013).

residence permit on the sole ground that a person has a criminal record.[164] According to the Spanish Supreme Court, the situation of the TCN who takes care of a Spanish child needs to be assessed, before taking a decision on the residence permit request.[165] The Spanish courts have even extended the requirement to assess the family situation in some cases where the child was not Spanish or a national of another EU Member State but a long-term resident.[166] This highlights the importance of the interests at stake, that is the right to protect family life and the best interest of the child.

4.2. United Kingdom

In all immigration matters involving children in the United Kingdom, it should be ensured that their welfare is safeguarded and promoted.[167] This reflects the requirement that the best interests of the child should be made a primary consideration in immigration cases involving children. Thus, in determining whether the child would be forced to leave the United Kingdom if their TCN parent would have to leave the territory, decision-makers are directed to consider all evidence and information provided concerning the child's best interests.[168]
The legal framework of the United Kingdom provides that staff of the Home Office, who are to make the assessment regarding derivative right to reside on the basis of Article 20 TFEU, could generally assume that it is in the British child's best interests to:

- Remain in the UK, unless they have equal or stronger ties to another country;
- Live with both parents or, if the parents live apart, to have contact with both parents, unless there are any child welfare concerns; and
- Minimise disruption to their everyday life, unless it is in their best interest to change the status quo.[169]

Furthermore, it is important in the best interests' assessment to examine how the separation from the TCN parent would affect the child's everyday life. Some of the factors that should be analysed are:

- Would they be safe, well cared for, and have access to any support they need to cope with the change?
- Would they be able to keep in contact with the primary carer, for example through letters, telephone calls, instant messaging, and video messaging services such as Skype and FaceTime, email and/or visits?
- Would they need to move home, and if so, how does the nature, quality and location of their current home compare with where they would live in the future?
- Would there be disruption to their education, for example could they keep attending the same school?

[164] CJEU Case C-165/14 *Rendón Marín* [2016].
[165] Spanish Supreme Court 10 January 2017, no 15/2017 (appeal no 961/2013).
[166] Basque Country High Court 13 February 2019, no 85/2019 (appeal no 565/2018).
[167] Borders, Citizenship and Immigration Act 2009, section 55.
[168] United Kingdom Home Office, Free movement rights: derivative rights of residence, Version 5.0 (3 May 2019).
[169] Ibid, p 59.

- Would they be able to keep contact with their friends and other family members?[170]

Specialists from the Office of the Children's Champion, a unit in the United Kingdom Home Office, can provide further guidance to border and immigration staff determining the best interest whenever necessary or beneficial to the case assessed.[171]

Tribunals and courts in the United Kingdom have also relied on the best interest of the child doctrine laid out in *Chavez-Vilchez* and *K.A. and Others.* In one case, the United Kingdom Supreme Court considered that in a situation where the parents of the British child are not separated, and the TCN parent is the primary carer and the parent with whom the child has the relevant relationship of dependency, it will be in the child's best interests to remain with both parents.[172] It must be remembered that *Chavez-Vilchez* dealt with separated parents, thus a direct analogy on the assessment is not proper. Thus, the United Kingdom Court opted to make the assessment on the best interest of the child based on the facts and circumstances specific to the situation of the family members who were living together.

5. Burden of proof

This section will discuss legislation and case law concerning the burden of proof in cases concerning the right to residence of a TCN parent with an EU citizen child under Article 20 TFEU.

5.1. Spain

Spanish courts seem to have a flexible approach on the kind of evidence accepted to support the existence of dependency. For instance, a court gave importance to a statement from the child's school teacher as to the involvement of the parent in the child's life.[173] Furthermore, if such evidence is initially not submitted together with the application to the corresponding residence permit, the authorities must request such submission before deciding.[174] Courts tend to accept the fact that the applicant is registered at the same address where the child lives, as evidence of cohabitation. However, this means of evidence is not sufficient *per se* to prove a relationship between the parent and their child or even any kind of effective dependency.[175] Some courts have acknowledged that a parent being registered at the same address as their child amounts to a presumption of cohabitation and a relationship parent-child in absence of

[170] Ibid, p 58.
[171] European Migration Network, 'Ad-Hoc Query on Impact of 2017 Chavez-Vilchez ruling' (8 August 2018) available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1326_-_impact_of_2017_chavez-vilchez_ruling.pdf> (accessed 12 November 2020) p 16.
[172] UK Supreme Court 16 December 2019 *Patel v. Secretary of State for the Home Department* UKSC 59, para 25.
[173] Basque Country High Court 25 June 2019, no 322/2019 (appeal no 753/2018).
[174] Catalonia High Court 15 January 2018, no 17/2018 (appeal no 263/2016).
[175] Spanish Supreme Court 26 November 2019, no 1638/2019 (appeal no 7066/2018) and Basque Country High Court Judgment 27 June 2018, no 314/2018 (appeal no 906/2017).

other indications.[176] Also, the date in which registration at t),hat same address has taken place in comparison to the child or the rest of the family is sometimes used as an indication of the family relationship.[177]

Some courts have ruled in application of the *Chavez-Vilchez* doctrine that there is need for evidence or, at least some indication, that the parent does not comply with their parental obligations, as the contrary cannot be assumed[178] (even in the case in which the parent is serving an imprisonment sentence).[179] Thus, once the applicant has proved that they have a child and there is no evidence on the lack of compliance with parental obligations, it is on the authorities to disprove that there is no relationship among them resulting in dependency, by conducting the necessary investigations.

5.2 United Kingdom

The United Kingdom legal framework subscribes to established principles set by CJEU case law to the effect that it is for the applicant to provide evidence which demonstrates that they meet the requirements for a derivative right to residence. Staff members of the Home Office are directed to consider evidence presented that would show the extent that the child is emotionally attached to and dependent on the TCN parent vis-à-vis the level of dependence on the other parent, if responsibility is shared.[180] Furthermore, assessment on dependency could be made based on evidence presented on the following non-exhaustive factors:

- The child's age, stage of his or her physical and emotional development and the level of care required;
- The level of emotional, physical, and financial support the applicant and the other person/parent currently provide, or have previously provided, to the child;
- Who makes the decisions that affect the child's life;
- Who the child currently lives with and who he or she have lived with previously; and
- How much time the child spends with the applicant and the other parent/person who is able to care for them and how they spend their time together.[181]

In 2019, the United Kingdom Supreme Court ruled that a TCN can derive the right to residence from his child who is a British citizen, even if they are living as a family together with his British

[176] Madrid High Court 26 July 2019, no 541/2019 (appeal no 765/2018). See *a contrario* Madrid High Court 16 July 2019, no 481/2019 (appeal no 248/2018).
[177] Spanish Supreme Court 30 September 2019, no 1270/2019 (appeal no 7101/2018).
[178] Madrid High Court 5 December 2018, no 815/2018 (appeal no 612/2018); 24 October 2018 708/2018 (appeal no 526/2018); 26 September 2018, 649/2018 (appeal no 591/2018); 25 July 2018, no 588/2018 (appeal no 267/2018); 18 July 2018, no 555/2018 (appeal no 205/2018); 20 June 2018, no 474/2018 (appeal no 297/2018); 14 February 2018, no 105/2018 (appeal no 465/2017) and 5 February, no 201850/2018 (appeal no 335/2017); 24 July 2017, no 568/2017 (appeal no 1195/2016).
[179] Madrid High Court Judgment 24 January 2018, no 28/2018 (appeal no 314/2017).
[180] United Kingdom Home Office, Free movement rights: derivative rights of residence, Version 5.0 (3 May 2019).
[181] Ibid, p 57.

wife.[182] The Court deferred to the factual findings determined by the First-Tier Tribunal that the TCN father was the primary carer of his infant son and that he, rather than the mother, had by far the greater role in his son's life.[183] This was supported by the mother's unchallenged testimony before the First-Tier Tribunal that since she worked full time and could not take full responsibility, her husband was the primary carer of their child.[184] In answering the question of whether the son would be compelled to leave by reason of his dependency with his father, the Supreme Court maintained that the best interests of the child must be taken into account when considering the factual circumstances surrounding the case.[185]

[182] UK Supreme Court 16 December 2019 *Patel v. Secretary of State for the Home Department* UKSC 59, para 25.
[183] Ibid, para 28.
[184] Ibid, para 28.
[185] Ibid, para 30.