

Valentin Vandendaele

Chavez-Vilchez: Sharing Residence Rights is Caring

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According to Chavez-Vilchez, the third-country national parent of a child who is a Union citizen may get a right of residence, even if the other parent is a Union citizen. Is this just another application of Zambrano or does it change the whole approach?

The European Court of Justice's [Chavez-Vilchez](#) judgment made clear that the third-country national (TCN) parent who cares for his or her child possessing Union citizenship, may get a derived right of residence in the EU. That is the case if there is a relationship of dependency between them that is so strong that if the parent were asked to leave the EU, the child would have to leave the EU with him or her. The child would then be deprived of the "genuine enjoyment" of the right of every Union citizen to move and reside in the EU. That the other parent is a Union citizen willing and able to care for the child, is relevant though not decisive for determining whether such a relationship of dependency exists. This is a consideration the Court had not addressed in its notorious [Zambrano](#) judgment, in which both parents were TCNs. *Chavez-Vilchez* therefore clarified the scope of this judgment. It is the claim of this contribution, however, that it is the hardest case on the *Zambrano* exception since *Zambrano* itself, and that in both cases the Court has ruled in the best interest of the children.

It all started with Chavez-Vilchez and seven other TCN women travelling to the Netherlands and having one or more children with Dutch citizens. The children were all acknowledged by their fathers, and received the Dutch nationality as a result. All women would eventually leave their partners and live in the Netherlands where they would care for their children. They all applied for child benefit and/or social assistance, but as they did not hold a residence permit, their applications were denied. The eight mothers brought actions to challenge this assessment and the cases eventually reached the *Centrale Raad van Beroep* (Higher Administrative Court). The latter then referred the question to the Court whether in such circumstances, TCNs could derive a right of residence under article 20 of the TFEU (and therefore be entitled to child benefit and social assistance).

As a general rule, the law on EU citizenship only confers a right of residence to TCNs if they have certain family ties with Union citizens who made use of their freedom of movement (see [Directive 2004/38/EC](#)). In *Zambrano*, the Court allowed for an exception. It stated then that the TCN parents of a child possessing Union citizenship who failed to make use of his or her freedom of movement, can nonetheless acquire a derived right of residence under article 20 of the TFEU. That is the case if their leaving the EU would mean that the child would have to leave the EU with them. It was obvious from the outset that the judge would have to determine whether the same was true with respect to the mothers in *Chavez-Vilchez*. The weight the judge would have to attribute to the consideration of a Dutch father who is willing and able to care for the child, was less obvious. Several Dutch authorities considered it sufficient that the father could care for the child for the Netherlands to be able to ask the TCN mother to leave the country.

The Court chooses to set aside this rather formalistic approach. Whether or not the child would have to leave the EU with the TCN parent, depends on who the primary caretaker of the child is and whether there is in fact a relationship of dependency between the child and the TCN. In this respect, it is a relevant consideration that the other parent is a Union citizen who is willing and able to assume the care for the child. It is not decisive, however, as this consideration should only be one of many. Indeed, the judge should also take into account the right to respect for family life and the best interests of the child, as well as all relevant circumstances such as “the age of the child, the child’s physical and emotional development, [...] his [or her] emotional ties [to both parents], and the risks which separation from the [TCN parent] might entail for the child’s equilibrium.”

Zambrano was a hard case to try. As it stood, the law on EU citizenship emphatically did not grant the TCN parents a right of residence. However, confirming this *status quo* would mean that children possessing Union citizenship would have to leave the EU. Facing opposition from no less than eight governments as well as the Commission, but motivated by the best interests of the children, the Court went out of its way to create the (in)famous *Zambrano* exception. The subsequent cases concerning this exception for TCN parents were easier, relatively speaking. In *Dereci*, the *Zambrano* conditions were not met and therefore, the exception did not apply. *En passant*, the Court was able to anticipate Alokpa’s right of residence in the *Alokpa* judgment. Finally and almost as easily, the Court limited the potential effects of the parent’s criminal record on his or her ability to rely on *Zambrano* in *Rendón Marín*.

With *Chavez-Vilchez* the Court faces a hard case again. It is different from *Zambrano* in that the children could stay with a parent who is a Union citizen. The children would not have to leave the EU if their TCN parent would and therefore, the exception does not simply apply. On the other hand, it would manifestly be in the best interest of the children for their TCN parent with whom they have this strong relationship of dependency to stay in the EU. In finding a right of residence for this parent, the Court’s judgment deviates from *Zambrano*, even if it does not say so. Yet it is once again in the best interest of the children.

Strictly limiting the scope of the *Zambrano* exception was never the goal of *Chavez-Vilchez*. On the contrary, it seems the Court is ready to share residence rights with TCN parents because it cares about children possessing Union citizenship.