

## OPEN Summary of EMN Ad-Hoc Query No. 2018.1326

Impact of 2017 Chavez-Vilchez ruling

31 May 2019, prepared by NL EMN NCP

### 1. KEY POINTS TO NOTE

- ★ Most Member States report no impact after the Chavez-Vilchez ruling. **NL** and **UK** report policy amendments; **SE** reports the verdict is rarely used when processing applications. **BE** reports the Alien Law Litigation had already ruled in line with Chavez-Vilchez because of the prior rulings Chen and Zambrano.
- ★ Prior to the Chavez-Vilchez ruling **NL** and **UK** denied a right of residence to a third-country national (TCN) parent of a national minor if the other parent with the Member State nationality (**NL**) or an exempt person (**UK**) is capable and willing to take care of the child. After policy changes in **NL** the TCN must prove his identity and nationality, parental and dependent relationship to the Dutch minor and performance of tasks in parental caregiving. In **UK** applications were no longer automatically refused if there is an exempt person and are instead considered on a case-by-case basis taking into account the relevant factors set out in Chavez-Vilchez.
- ★ **BE, DE, FR, HU, LT, LU, MT, NL** and **UK** report to assess the dependency relationship between TCN parent and child with the nationality of the Member State considering various aspects (*table 1*).

### 2. BACKGROUND AND CONTEXT

The European Court of Justice has considered preliminary questions on 10 May 2017 in the Chavez-Vilchez (C-133/15) ruling on the explanation of Article 20 TFEU concerning Union Citizenship.

On the basis of the Chavez-Vilchez ruling a right of residence should be granted to a TCN parent of a minor with the nationality of an EU Member State when the relationship between the child and TCN parent is of such strong dependency, that in case this parent is denied residence the child would be obliged to leave the EU. It is not considered sufficient when the other parent with the nationality of an EU Member State is capable and willing to take care of the child. As a result of the Chavez-Vilchez ruling, Dutch policy was amended. Prior to this ruling, in the case that a Dutch parent was capable and willing to take care of the child, this was sufficient for the right of residence of the TCN parent to be denied.

Up to and including June 2017 on average 11 applications for the residence of a TCN parent were submitted per month in the Netherlands. From July 2017 until February 2018, the number of applications requesting right of residence based on the Chavez-Vilchez ruling have increased to an average of 250 applications per month. The percentage of granted applications in the Netherlands is very high<sup>1</sup>.

The Dutch government would like to know what impact this ruling has in other EU Member States and how other Member States manage the ruling, so that the Netherlands can learn from this.

### 3. MAIN FINDINGS

*Question 1. Did your Member State have to amend policy as a result of the Chavez-Vilchez ruling (the requirements for TCN parents of minors with citizenship of your Member State to qualify for the right of residence in your Member State)? Yes/No. If yes, what were the amendments introduced? Please proceed to question 2. If no, why not? If your answer is no, you do not need to answer questions 2-6.*

<sup>1</sup> NL has not yet codified the policy changes after the Chavez-Vilchez ruling which possibly explains such increase.

In **BE, BG, CY, CZ, DE, FI, FR, HR, HU, IT, LT, LU, MT, SE** and **SK** no amendments were made as a result of the Chavez-Vilchez ruling. Due to prior national legislation acts the mere capability or willingness of the other parent with residency in the Member State is not decisive in the denial of the right of residence to the TCN parent.

In the **NL** policy was amended as a result of the Chavez-Vilchez ruling. Also certain policy rules concerning residence permit applications on the basis of the ruling were implemented. The following requirements apply for the right of residence based on the Chavez-Vilchez ruling: a. the TCN has to prove his identity and nationality by submitting a valid travel document or a valid identity card. In case the TCN is not able to submit this information, his identity and nationality will have to be unequivocally proven by other means of evidence; b. the TCN has a minor child (in the Netherland this means younger than 18 years old) who has Dutch nationality; c. the TCN performs tasks in parental caregiving (either together with the parent with Dutch nationality or not); d. the dependency relationship between the TCN parent and the minor child is of strong dependency.

Before Chavez-Vilchez in the **UK** applications for derivative rights were refused if the other parent or another direct relative was an "exempt person" and was able to continue or assume care of the child if the person asserting the derivative right would have to return to a non-EEA country. An exempt person is a person who already has residence rights in the UK either as a British citizen or other person with the right of abode, under the Citizens' Directive (Directive 2004/38/EC), because they have indefinite leave to enter or remain under the UK's domestic immigration legislation, or because they are exempt from immigration control (e.g. diplomats). There were two policy amendments made to implement Chavez-Vilchez. First, operationally, the effect of the judgment meant that applications were no longer automatically refused if there was an "exempt person" who could care for the child and are instead considered on a case-by-case basis taking into account the relevant factors set out in Chavez-Vilchez. Second, the phrase "who is not an exempt person" was omitted from regulation to bring it in line with Chavez-Vilchez and the published guidance.

*Question 2. How do you determine that the dependency relationship between the TCN parent and the child is strong to such an extent that right of residence should be granted to that parent? (E.g. is an expert advising on the matter involved?)*

**BE, DE, FR, HU, LT, LU, MT, NL,** and **UK** report to assess the dependency relationship between the TCN parent and the child with the nationality of the Member State in order to grant a residence permit. Several

Member States explicitly reported aspects to consider in determining such dependency relationship (**BE, DE, FR, HR, HU, IT, LU, NL** and **UK**).

For example: In **NL** in accordance with the ruling all relevant circumstances are considered, especially the age of the child, the physical and emotional development, the extent of his emotional ties both to the parent with Dutch nationality and to the third-country national parent and the risks which separation from the latter might entail for the child's equilibrium.

The table below provides an global overview of aspects as mentioned by Member States to take into account in determining the dependency relationship.

*Table 1 Aspects in determining the dependency relationship.*

<b>Aspect</b>	<b>Member State</b>
Age child	<b>LU, NL</b>
Child custody	<b>DE, FR, IT, LU</b>
Conditions of residence (country of residence, housing and cohabitation)	<b>BE, DE, FR, IT, UK</b>
Effective contribution to care (material or financial)	<b>BE, DE, FR, NL, UK</b>
(Active) Involvement in educational, emotional and physical development of the child	<b>FR, LU</b>
No polygamous relationship	<b>FR</b>
Performance of parental tasks as (primary) care giver	<b>NL, UK</b>
Proof of TCN's identity, nationality, family relationship in descending line	<b>BE, DE, FR, HR, HU, IT, NL</b>
Separation risks (to the child's (emotional) equilibrium)	<b>BE, DE, FR, LU, NL, UK</b>

In **NL** and **UK** where appropriate, advice may be asked respectively from the Dutch Council for Child Protection and the British Office of the Children's Champion<sup>2</sup>.

*Question 3. Are there other requirements than the ones described in question 2 in your Member State in order to qualify for right of residence in the situation mentioned in the introduction? What means of*

<sup>2</sup> The Council for Child Protection is a governmental advisory council for the Ministry of Justice and Security. The Council executes a number of statutory duties concerning civil matters and criminal law in relation to children. UK's Home Office has an Office of the Children's Champion which provides specialist safeguarding and welfare advice to borders and immigration staff who have questions or concerns about cases involving children.

evidence have to be submitted for this? (E.g. a birth certificate proving the existence of a family relationship between parent and child).

In **IT** for the purposes of applying Legislative Decree 30/2007, which transposes Directive 2004/38/EC, the provisions of the Chavez-Vilchez judgment are taken into account in the case-by-case assessment carried out by the Police Headquarters when a TCN parent applies for a residence permit, together with other relevant elements, for example the dangerousness of the applicant.

**FR, NL** and **UK** report that the applicant can provide evidence by any means. In **FR** the condition of effective contribution to the child's care and education is assessed by the prefectural services on a case by case basis.

*Question 4. Do you keep statistics on the number of applications appealing to the ruling in your Member State? Yes/No. If yes, what is the number of applications since the date of the ruling (10 May 2017) and what has been the trend during the period of May 2017 until now? (e.g. Decrease/ Increase/ Stable/ Fluctuation)*

Only **BE** and **NL** have provided such statistics. **BE** reports that in 2017, an average of 310 applications per month were filed by parents of Belgian minors. In the first half of 2018, the monthly average was about 350.

In **NL** the number of applications up to and including June 2017 was an average of 11 applications per month for the residence of a TCN parent. From July 2017 until February 2018, the number of applications requesting right of residence based on the Chavez-Vilchez ruling has increased to an average of 250 applications per month.<sup>3</sup>

*Question 5. If known, what percentage of these applications is granted?*

No report.

*Question 6. Are there indications that false recognition of parenthood occur in your Member State where a TCN child acquires the nationality of your Member State solely in order to obtain the right of residence for the TCN parent based on the Chavez-Vilchez ruling? If yes, is a false recognition of parenthood a reason for rejection of the application based on the ruling? Yes/No*

Most Member State do not hold data of this nature and were unable to provide comments on indications of false recognition of parenthood and its effects on the applications for a right of residence. **BE** and **NL** report as follows.

**BE** is confronted with Belgians, very often of foreign origin, who falsely recognise children who have foreign mothers. On 19 September 2017 the law on the fight against false declarations of parenthood was adopted and entered into force on 1 April 2018. This law provides new preventive and repressive actions e.g. to postpone or to refuse the registration of a declaration of parenthood. The law also introduced penalties for people who falsely declare parenthood (which is similar to the measures in place for marriages and partnerships of convenience): a possible prison sentence of up to one year for an attempt to do so, and up to five years for forcing somebody to be a part in such a declaration. People who are found guilty of falsely declaring parenthood can be refused a residence permit or lose their residence permit if the parentage tie is annulled later on. UNICEF, different NGOs and civil society organisations have criticized this law. They argue that the interest of the child is not taken into account, and that the law violates the Constitution. That is why they asked the Constitutional Court on 21 March 2018 to annul this law (still pending). Mid-October 2017, the Immigration Office created a special unit for coordinating the fight against false declarations of parenthood. This unit (with 2.6 FTEs) provides local authorities, the judicial authorities and the police with all the information they will need for their investigations.

In **NL** there are indications that in some cases false recognitions of parenthood solely in order to obtain the right on basis of the Chavez-Vilchez ruling possibly occur. The exact scope of this phenomenon is not known. In the case a false recognition of parenthood is determined, the recognition can be annulled by the judge. After this annulment the child no longer has Dutch nationality and as a consequence it is no longer possible to appeal on the Chavez-Vilchez ruling.

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<sup>3</sup> The increase of numbers can be attributed to the fact that the Netherlands the impact of the Chavez-Vilchez ruling was substantial and therefore the more assumed restrictive policy had to be adjusted.

**EMN NCPs participating:** Responses from Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Slovak Republic, Sweden, United Kingdom (19 in total).

A short note on the method of Ad-hoc Query no. 2018.1326: After the first response from the participating Member States **BE, DE, FR, IT** and **UK** were asked several follow-up questions for clarification purposes. The reported answers provided some clarity and have lead to minor changes.



European  
Commission

*The European Migration Network (EMN) is co-ordinated by the European Commission with National Contact Points (EMN NCPs) established in each EU Member State plus Norway.*

