EMN Ad-Hoc Query on Impact of 2017 Chavez-Vilchez ruling

Requested by NL EMN NCP on 8th August 2018

Family Reunification

Responses from Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Slovak Republic, Sweden, United Kingdom (21 in total)

Disclaimer:

The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

Background information:

The European Court of Justice has considered preliminary questions on 10 May 2017 in the Chavez-Vilchez 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 third-country national parent of a minor with the nationality of an EU Member State, when the relationship between the child and third-country national 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 MS 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 third-country national parent to be denied.

Up to and including June 2017 on average 11 applications for the residence of a third-country national 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.

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

Questions

1. Did your MS have to amend policy as a result of the Chavez-Vilchez ruling (the requirements for third-country national parents of minors with citizenship of your MS to qualify for the right of residence in your MS)? Yes/No

   If yes, what were the amendments introduced? Please proceed to question 2.
   If No, why not?
   If you answer No, you do not need to answer questions 2-6.
2. How do you determine that the dependency relationship between the third-country national 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?)
3. Are there other requirements than the ones described in question 2 in your MS in order to qualify for right of residence in the situation mentioned in the introduction? What means of evidence have to be submitted for this? (E.g. a birth certificate proving the existence of a family relationship between parent and child).

4. Do you keep statistics on the number of applications appealing to the ruling in your MS? 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)
5. If known, what percentage of these applications is granted?
6. Are there indications that false recognition of parenthood occur in your MS where a third-country national child acquires the nationality of your MS solely in order to obtain the right of residence for the third-country national 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

Responses

	Country	Wider Dissemination	Response
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Belgium	Yes	**1.** No, not really. Because of the rulings Chen and Zambrano (prior to the ruling Chavez-Vilchez) the Belgian Council for Alien law Litigation had already ruled in line with Chavez-Vilchez. On 8 July 2011 the Belgian Immigration Law was changed regarding the possibility of family reunification for parents of Belgian and EU minors (articles 40 bis and 40ter of the law of 15 December 1980). **2.** Please see question 1 **3.** Please see question 1 **4.** 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. **5.** Not available

			6. Yes. The Belgian authorities are confronted with Belgians, almost always of foreign origin, who falsely recognise children who have foreign mothers. One man recognized no less than 18 children (16 different mothers). On 19 September 2017 the law on the fight against false declarations of parenthood was adopted. Although the Belgian authorities could already implement certain measures to fight against false declarations of parenthood, this law (http://www.ejustice.just.fgov.be/cgi/article.pl)provides new preventive and repressive actions by modifying the Civil Code, the Immigration Act, the Judicial Code and the Consular Code. Registrars acquired the legal possibility to postpone (for two months) or to refuse the registration of a declaration of parenthood. The judicial authorities can investigate the case for another three months at most (http://www.agii.be/nieuws/inwerkingtreding-wet-schijnerkenningen). 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. A circular letter of the Minister of Justice specifying the actions of each actor in such cases - the local authorities, the judicial authorities and the Immigration Office - was published on 21 March 2018 (http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=2018-03-26&numac=2018030678). 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's why they asked the Constitutional Court to annul this law (https://www.mo.be/nieuws/wet-tegen-schijnerkenningen-draconisch-en-overbodig#namen). 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.
	**Bulgaria**	Yes	**1.** At this time, no impact of the judgment on national practice has been reported. The Migration Directorate respects the principle of the best interest of the child, as well as assessing the non-separation of families into its work in any case. **2.** N/A

			3. N/A **4.** N/A **5.** N/A **6.** N/A
	**Croatia**	Yes	**1.** 1.No. According to Act on Foreigners, Article 54. and 55., parents and adopters of minor children are considered family members, and have a right to family reunification. To prove the relationship between a child and a parent it is necessary to provide a birth certificate or a decision on adoption from a competent authority. **2.** N/A **3.** N/A **4.** N/A **5.** N/A **6.** N/A
	**Cyprus**	Yes	**1.** The Republic of Cyprus didn't have to amend policy according to the Chavez-Vichez ruling. The international conventions on the children rights , signed by the Republic of Cyprus, protect children's best interests. Thus, the parents of minors, especially those with Cypriot citizenship, are already receiving a favorable treatment. **2.** N/A **3.** N/A

			4. N/A **5.** N/A **6.** N/A
	**Czech Republic**	Yes	**1.** No, the Czech Republic didn´t amend its policy as a result of the Chavez-Vilchez ruling. This issue was already solved by the Section 15 of the Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic. **2.** N/A **3.** N/A **4.** N/A **5.** N/A **6.** N/A
	**Estonia**	Yes	**1.** No, there were no amendments made as a result of the Chavez-Vilchez ruling. In Estonia there have not been any such cases where a third-country national parent of minor with Estonian citizenship does not have the possibility to gain the right of residence in accordance with the current legislation. **2.** N/A **3.** N/A **4.** N/A **5.** N/A

			6. N/A
	**Finland**	Yes	**1.** No. No changes were deemed necessary as Finland always makes a general assessment of the situation in these cases, including the best interest of the child when deciding on a residence permit. **2.** N/a **3.** N/a **4.** N/a **5.** N/a **6.** N/a
	**France**	Yes	**1.** No. According to article L. 313-11, paragraph 6, of the Code on Entry and Residence of Foreign Nationals and Right of Asylum (CESEDA), the foreign national, who is not living in a polygamous relationship, and who is father or mother of a French minor child living in France, provided he/she establishes that he/she has effectively contributed to the child's care and education as stipulated in article 371-2 of the French Civil Code since the child's birth or for at least two years, can obtain a VPF (vie privée et familiale - private and family life) residence permit, unless their presence constitutes a threat to public policy. Conditions: 1. The condition of residency of the child can be proven by any means. No condition of residency time in France is explicitly provided for in the CESEDA. 2. Condition of effective contribution to the child's care and education. It is up to the prefectural services to verify the effectiveness of this contribution. The contribution is assessed on a case by case basis. Proof may be established by any means, such as: - Purchases for the child: nutrition, cloths, toys etc. - Proof of educational participation: regular accommodation, monitoring of school achievements, testimonies etc. - Proof of a real emotional bond: interest for the evolution of the child, knowledge of his/her environment etc. **2.** n/a

			3. n/a **4.** n/a **5.** n/a **6.** n/a
	Germany	Yes	**1.** No. The legal situation existing before the judgment of the European Court of Justice of 10 May 2017 and still valid takes into account the interests of the German child when deciding on the residence of its foreign parent. For the exercise of personal care, the foreign parent has such a legal right to a residence permit. This also applies if the German parent also exercises the personal care. If the foreign parent is not entitled to custody, the issuing of the residence permit is at the discretion of the Foreigners Authority, which must take into account the best interests of the child. **2.** n/a **3.** n/a **4.** n/a **5.** n/a **6.** n/a
	Hungary	Yes	**1.** No. There is a section in the Hungarian national legislation [Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals Section 7 Subsection (3)], which stipulates, that if the third-country national parent is applying for a residence card because (s)he takes care of a minor with the nationality of an EU Member State, even if the third-country national will be the burden to the Hungarian social care system, the residence card may be granted if it is in the interest of the child. The immigration authority has right of deliberation to decide, whether the equity may be granted.

			2. Not applicable. **3.** Not applicable. **4.** Not applicable. **5.** Not applicable. **6.** Yes, because in this case, the family relationship was made in the favor to obtain the status, which is a reason of refusal.
	Ireland	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Italy	Yes	**1.** No. Italy did not have to amend policy due to specific provisions already existing on the matter within the national legislation. Specifically, Article 30, paragraph 1, letter d) of the Legislative Decree on Immigration n. 286/1998 (Testo Unico T.U.) foresees the issuance of the residence permit for family reasons "to the third-country national parent, also natural, of an Italian child residing in Italy. In such case, the residence permit for family reasons is also issued regardless of the possession of a residence permit, provided that the requesting parent has not been deprived of the parental authority according to Italian law". Moreover, according to Article 29, paragraph 6, the third-country national parent shall prove, within one year from the entry into Italy, the possession of the requirements of availability of: • of an accommodation that falls within the minimum criteria set by the regional law for residential accommodation in public owned housing, or, in case of a child aged under 14 accompanied by one of the parents, the consent of the owner of the accommodation in which the minor will actually live; • an annual income deriving from lawful sources not lower than the annual amount of the social allowance, in asking for the reunification of a single family member, twice the annual amount of the social allowance if asking for the reunification of two or three family members, triple the annual amount of the social allowance if asking for the reunification of four or more family members. For the purposes of determining income, the total annual income of family members living with the applicant is also taken into account. Such regulatory provisions are recognized taking into account the priority of the child's best interests, in

			accordance with the provisions set by the Article 3, paragraph 1, of the Convention on the Rights of the Child of 20 November 1989, ratified and enforced pursuant to Law n. 176 of the 27 May 1991. **2.** n/a **3.** n/a **4.** n/a **5.** n/a **6.** n/a
	Latvia	Yes	**1.** No. Latvia is aware of the respective ruling however there have not been any changes in the national legislation inspired by it. If the case would be similar to that described in the ruling, theoretically it would be possible to apply some articles of the Immigration Law (an Article where "humanitarian reasons" are mentioned as a ground for issuance of the residence permit or an Article stipulating that "other reasons" can be ground for granting the permit). Office of Citizenship and Migration Affairs has not received any applications where circumstances would be comparable. **2.** - **3.** - **4.** - **5.** - **6.** -
	Lithuania	Yes	**1.** No. It was decided that no amendments to current national laws were necessary after the Chavez-Vilchez ruling, as responsible institutions are obliged to respect the right for private and family life

			(Article 7 of the Charter of Fundamental Rights of the European Union), which consequently has to be interpreted in accordance with the obligation to hold child's best interests as a primary consideration in all actions relating to children (Article 24 of the same Charter). **2.** n/a **3.** n/a **4.** n/a **5.** n/a **6.** n/a
	Luxembourg	Yes	**1.** . No. In Luxembourg, the refusal of a right of residence always takes into account the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium. After having undertaken the necessary enquiries, it is very rare that in Luxembourg the right of residence is refused to a third-country national parent. Only in cases of violence or lose of custody, the right of residence will not be granted. **2.** N/A **3.** N/A **4.** N/A **5.** N/A **6.** N/A

	Malta	Yes	**1.** No Prior to the said ruling, the parents concerned did not have a right of residence and decisions regarding the grant of a residence permit was on the basis of a case by case assessment. It is the general policy that the said parents are granted a residence permit and following the ruling, obviously the decision of the European Court of Justice will be applied accordingly. More so the Maltese Authorities will abide by the said ruling following the decision of Malta's national court to uphold the plea of the parent of a Maltese national to be granted residence in Malta on the basis of her relationship to her Maltese children from her Maltese partner. **2.** Please refer to question 1 **3.** Please refer to question 1 **4.** Please refer to question 1 **5.** Please refer to question 1 **6.** Please refer to question 1
	Netherlands	Yes	**1.** Yes. In the Netherlands policy was amended as a result of the Chavez-Vilchez ruling and certain policy rules concerning residence permit applications on the basis of the ruling were implemented. The following requirements apply for right of residence based on the Chavez-Vilchez ruling: a. The third-country national has to prove his identity and nationality by submitting a valid travel document or a valid identity card. In case the third-country national is not able to submit this information, his identity and nationality will have to be unequivocally proven by other means of evidence; b. the third-country national has a minor child (in the Netherland this means younger than 18 years old) who has Dutch nationality; c. the third-country national performs tasks in parental caregiving (either together with the parent with Dutch nationality or not); d. the dependency relationship between the third-country national parent and the minor child is of such strong dependency, that in case this parent would be denied residence the child would be obliged to leave the EU. Tasks in parental caregiving also include tasks of child upbringing. Care- and/or upbringing tasks that are considered marginal, will not be qualified as actual caregiving tasks. This is not the case when the marginal character of these tasks cannot be directly attributed to the third-country national parent. If this parent can demonstrate that the other parent with Dutch nationality frustrates the

			access to the child, this will not be attributed to the third-country national parent. **2.** In the Netherlands, in accordance with the ruling all relevant circumstances are considered when assessing the dependency relationship between the third-country national parent and the child, in the best interests of the child. Especially the age of the child, the physical and emotional development and the extent of his emotional ties both to the parent with Dutch nationality and to the third-country national parent are considered, as well as the risks which separation from the latter might entail for that child's equilibrium. In the Netherlands residence permit applications are assessed by the Immigration- and Naturalisation Service (IND), that falls under the Ministry of Justice and Security. In case the IND does not have sufficient information or expertise to determine the dependency relationship on the basis of submitted evidence, the Council for Child Protection (Raad voor de Kinderbescherming) is asked for advice. The Dutch Council for Child Protection is an 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. **3.** In Dutch policy no specific means of evidence are mandatory. In the Netherlands in general the family relationship is proven by submitting a birth certificate during the application. It is also permitted to prove the biological relationship by means of a report of a DNA-test, on the condition that the test has taken place in an accredited laboratory. When establishing the parental caregiving tasks, this is based on information the third-country parent submits. In case this parent lives together with the child it is assumed that this parent takes care of the child, unless there are indications for the contrary. In case of a divorce the arrangement for parental access (whether or not confirmed by a judge) can prove the access between the child and third-country national and the caregiving tasks performed by this parent. **4.** In the Netherlands the number of applications is recorded. Up to and including June 2017 on average 11 applications for the residence of a third-country national 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. **5.** In the Netherlands more than 90% of the applications is granted. **6.** In the Netherlands 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.
	Slovak Republic	Yes	**1.** No. De jure in the SR a TCN has a right to apply for a permanent residence for five years if the TCN is a dependent relative in direct line of the Slovak national (in this case the child) in line with the regulations of the Act on Residence of Aliens. **2.** N/A **3.** N/A **4.** N/A **5.** N/A **6.** N/A
	Sweden	Yes	**1.** Rarely! It happens rarely, until today, that legal discussions at our permits divisions ends up with the possibility to use this verdict when we process an application. **2.** Not applicable **3.** This I most likely because we in some situations are able to grant residence permits under national aliens law to parents who are guardians of Swedish children or children with permanent residence in Sweden. The conclusion will be that the ruling, as of now, has been relevant in relatively few situations and cases. It is more common that the Zhu and Chen (C-200/02) verdict is relevant for the assessment of the rights of a third-country national/parent whose child is an EU national. So we are sorry to say that we can't give you so much feedback about how the agency deals with the outcome of the Chavez-Vilchez ruling.

			4. Not applicable **5.** Not applicable **6.** Not applicable
	United Kingdom	Yes	**1.** Yes. To fully explain the amendments that have been introduced, we will first set out the position as it was prior to the ruling. Prior to Chavez-Vilchez, there was a requirement that the person either: (i) has primary responsibility for another person's care; or (ii) shares equally the responsibility for the child's care with one other person who is not an "exempt person". An exempt person is defined, by regulation 16(7)(c), as a person: (i) who has a right to reside under another provision of these Regulations; (ii) who has the right of abode under section 2 of the [Immigration Act 1971]; (iii) to whom section 8 of the [Immigration Act 1971], or an order made under subsection 2 of that section applies An exempt person is, therefore, 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). When the Chavez-Vilchez judgment was promulgated, it was implemented by amending regulation 16(8)(b)(ii) of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations'). Regulation 16(8) defines a "primary carer" for the purposes of derivative rights of residence – i.e. those rights established by the CJEU cases of Chen (C-200/02), Ibrahim & Teixeira (C-310/08), and Zambrano (C-34/09). The definition is: A person is the "primary carer" of another person ("AP") if – (a) the person is a direct relative or a legal guardian of AP; and (b) either – (i) the person has primary responsibility for AP's care; or (ii) shares equally the responsibility for AP's care with one other person who is not an exempt person Before Chavez-Vilchez, 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. 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. This was reflected in published guidance in February 2018, and can be found here:

			https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684300/derivative-rights-v4.0ext.pdf Second, the phrase "who is not an exempt person" was omitted from regulation 16(8) to bring it line with Chavez-Vilchez and the published guidance. The change to regulation 16(8) came into effect on 24 July 2018. **2.** As the CJEU ruled in Chavez-Vilchez, it is for the applicant to provide evidence which demonstrates that they meet the requirements for a derivative right of residence. Where the evidence is not sufficiently clear or determinative, the applicant may be contacted for further information and evidence. The 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. Decision-makers contact the Office of the Children's Champion when they consider it necessary or beneficial to do so on a case by case basis. **3.** The requirements for a Zambrano primary carer as set out in regulation 16(5) of the 2016 Regulations are as follows: (a) the person is the primary carer of a British citizen; (b) the British citizen is residing in the United Kingdom (c) the British citizen would be unable to continue to reside in the United Kingdom or in another EEA State if their primary carer left the United Kingdom for an indefinite period. **4.** No. This is not data that is recorded by the Home Office. **5.** This is not data that is recorded by the Home Office. **6.** As data of this nature is not held by the Home Office, we are unable to provide comment on indications of false recognition of parenthood and its effects on the applications for a right of residence.