The Best Interests of the Child Need Not Necessarily be a Primary Consideration

ECJ 22 June 2023, Case C-459/20, *X* v *Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais)*

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Introduction and background: derived rights of residence for third country national parents of EU citizen children

Can the Thai mother of a Dutch child derive a right of residence in the Netherlands under Article 20 TFEU, despite that child having been born and continuing to reside in Thailand?

This is the question which sits at the heart of the recent judgment of the European Court of Justice (ECJ) in *X* v *Staatssecretaris van Justitie en Veiligheid* (hereinafter *X*).[1] The case forms part of a complex body of ECJ jurisprudence pertaining to residence rights which third country nationals (TCN) may derive from the EU citizenship rights of family members or dependents based on Article 20 TFEU.[2] According to that provision, every person holding the nationality of a member state shall be a citizen of the Union. EU citizens enjoy rights and are subject to duties provided for in the EU Treaties, including the right to move and reside freely within the territory of the member states. According to settled ECJ

[1]ECJ 22 June 2023, Case C-459/20, *X* v *Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais)*.

[2]N. Nic Shuibhne, *EU Citizenship Law* (Oxford University Press 2023) p. 226-259.

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case law, Union citizenship is intended to be the fundamental status of the nationals of the member states.[3] In addition to the citizenship rights explicitly enumerated in the EU Treaties and EU secondary legislation, the Court also (in) famously held in its landmark *Ruiz Zambrano* judgment that Article 20 TFEU obliged member states to allow for family reunification between TCN parents and their Union citizen children, even in the member state of which that EU citizen is a national, and even when that EU citizen had never left their member state of nationality.[4] This was because a decision to deport the TCN parents (and thereby refuse to allow for such family reunification) would result in the EU citizen children having to leave the territory of the Union in order to accompany their TCN parents. This would have the effect of depriving an EU citizen of the genuine enjoyment of the substance of the rights that they derive from their status as a Union citizen.[5]

As most EU lawyers know, the paucity of reasoning in the *Ruiz Zambrano* judgment gave rise to numerous questions about its possible scope of application and its impact, both upon the rights of EU citizens and the obligations of the member states.[6] The Court has since taken a 'stone-by-stone' approach, whereby novel questions of constitutional significance have been progressively tackled as and when they arise in individual cases.[7] On the basis of the post-*Ruiz Zambrano* case law, there are very specific situations in which a right of residence must be granted to a TCN family member of a Union citizen, notwithstanding the fact that the Union citizen has not made use of their freedom of movement and that EU legislation on the right of residence of TCNs does not apply. This is because a refusal to grant a right of residence to a TCN interferes with the freedom of movement and residence rights of the Union citizen who is dependent upon the TCN.[8] However, any refusal to grant a right of residence to a TCN will only undermine the effectiveness of Union citizenship where: (i) a verified relationship of dependency exists between the EU citizen and a TCN family member; and (ii) as a result of that dependency, the refusal would lead to the Union citizen being compelled to accompany the TCN concerned and to therefore leave the territory of the Union as a whole.[9] Similarly, where a relationship of dependency

[3]ECJ 8 March 2011, Case C-34/09, *Ruiz Zambrano*, para. 41.

[4]Ibid.

[5]ECJ 6 December 2012, Joined Cases C-356/11 and C-357/11, *O and Others*, para. 45.

[6]N. Nic Shuibhne, 'Seven Questions for Seven Paragraphs', 2 *European Law Review* (2011) p. 161.

[7]K. Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-stone" Approach', 1 *International Comparative Jurisprudence* (2015) p. 1.

[8]ECJ 10 May 2017, Case C-133/15, *Chavez-Vilchez and Others*, para. 64.

[9]ECJ 8 May 2018, Case C-82/16, *K.A. and Others (Family reunification in Belgium)*, para. 52.

exists between an EU citizen and a TCN family member, a ban on entry into the territory of the EU can deprive the Union citizen of the genuine enjoyment of the substance of their rights which EU citizenship confers.[10]

The above principles have taken many years and numerous cases to flesh out. It has taken a long time to clarify precisely what the 'substance of rights' that EU citizens are supposed to 'genuinely enjoy' entails.[11] Moreover, the EU legislature has failed to bring much needed clarity to derived rights of residence which TCNs may enjoy under Article 20 TFEU. Consequently, it is only through an in-depth understanding of a complex and continually expanding body of case law that one can come to understand and advise on this area of EU citizenship law.[12] And yet, as the case under review in this note amply demonstrates, numerous questions pertaining to the derived rights of residence of TCNs remain unanswered. The precise scope of application and meaning of the prohibition against national measures which deprive EU citizens of the genuine enjoyment of the substance of their rights remains uncertain.[13] Additionally, the grounds upon which member states may derogate from a derived right of residence under Article 20 TFEU continues to be subject to considerable confusion.[14]

Facts of the case

Against this background, the following examines the recent judgment in of *X* v *Staatssecretaris van Justitie en Veiligheid*.[15] The case concerned a Thai national (hereinafter X) who had resided lawfully in the Netherlands. She was married to A, a Dutch national, with whom she had a child. That child was born in Thailand, where he was brought up by his maternal grandmother; his mother having returned to the Netherlands after his birth. The child is a Dutch national but has never lived in the Netherlands. He does not speak Dutch or English. His mother, X, visited her son in Thailand on a few occasions.

Following her divorce from A, X had her right of residence in the Netherlands revoked and she was informed that she would be deported to Thailand. Soon thereafter, she applied to reside in the Netherlands with B, a Dutch national. In assessing that application, the Dutch authorities examined whether the applicant

[10]ECJ 27 April 2023, Case C-528/21, *M.D. (Interdiction d'entrée en Hongrie)*, paras. 68-69.

[11]H. Kroeze and P. Van Elsuwege, 'Revisiting *Ruiz Zambrano*: A Never Ending Story?', 23 *European Journal of Migration and Law* (2023) p. 4.

[12]Ibid.

[13]For a detailed analysis *see* C. Neier, *Der Kernbestandsschutz der Unionsbürgerschaft* (Nomos 2019).

[14]Kroeze and Van Elsuwege, *supra* n. 11, p. 7.

[15]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1.

could obtain a derived right of residence in the Netherlands based on the rights that her EU citizen child possesses under Article 20 TFEU. The Dutch Secretary of State rejected this application.

On appeal, the applicant argued that the decision to deny her a residence permit would deprive her EU citizen son (of whom she now had sole custody, and who was dependent upon her) from enjoying the rights that he derives from his status as a Union citizen. Despite her having lived in the Netherlands, she claimed to have maintained regular contact with her son via digital means while her mother took care of the child in Thailand. Since her deportation and her return to Thailand, she had herself taken personal care of the child. Moreover, because her son does not speak Dutch or English, he cannot communicate with his father and has not had any contact with his father for years. Therefore, by denying X a right of residence in the Netherlands, the child was also being deprived of the possibility of exercising his rights to move and reside freely in the territory of the Union as an EU citizen.

In contrast, the Dutch government argued that the relevant principles on derived rights of residence for TCN parents of EU citizen children did not apply to this case. The refusal of X's application for a residence permit did not have the effect of compelling her EU citizen child to leave the territory of the Union, since the child has been resident in Thailand since birth. Furthermore, there was no objective proof that there was a relationship of dependency between the child and his mother. It was therefore questionable whether the rejection of her application for a residence permit in the Netherlands, which had the effect of compelling her to reside outside the territory of the Union, would also compel her son to reside outside the Union as well. Finally, X had not proved that her child wanted to come to live in the Netherlands, or that it would be in the best interests of the child to allow for X to acquire a residence permit in the Netherlands.

Against this background, the Dutch courts referred three questions to the ECJ via the preliminary ruling procedure enshrined in Article 267 TFEU. First, did Article 20 TFEU preclude a member state from denying a TCN parent, who has a dependent EU citizen child, a derived right of residence in that member state, when the EU citizen child resides outside the territory of the Union, with the consequence that the Union citizen is effectively denied access to the territory of the Union? (Question 1) Second, should the minor EU citizen declare or demonstrate an interest in exercising the rights conferred on him via EU citizenship (e.g. the right to move and reside freely), given that children are often dependent on their parents to take decisions as to their place of residence? (Question 2) Third, in assessing a relationship of dependency between a TCN parent and EU citizen child, how much weight should be accorded to: (i) the fact that the parent had not always assumed day-to-day care of that child, even though she had now assumed sole parental responsibility; and (ii) the fact that that child

could, if necessary, settle in the territory of the EU with his father, who is a Union citizen? (Question 3).[16]

Opinion of Advocate General Richard de la Tour

In response to the first question, Advocate General Richard de la Tour noted that the application for a derived right of residence by the TCN parent had no connection to the entry or residence of her EU citizen son in the member state of which he was a national (i.e. the Netherlands). The EU citizen child had never resided in the Netherlands with his TCN parent. At the time when the application was lodged, the mother and child had always lived separately in two different countries and had not led a family life together. Consequently, any refusal to grant the TCN mother a derived right of residence would not infringe upon any right to family reunification that the child or mother might possess. Furthermore, his mother's application contained no indication as to the will of her EU citizen child to exercise his EU citizenship rights to enter and reside with his TCN parent in the Netherlands. In the Advocate General's Opinion, there was some doubt as to the intention of the TCN mother to settle with her EU citizen son in the Netherlands if her application was accepted. There was some indication that the mother would acquire a right of residence in the Netherlands, return to live there, and leave her EU citizen child in Thailand.[17] On this basis, the refusal to grant the mother a derived right of residence would not oblige her EU citizen child to leave the territory of the Union, since the child was not residing there. Nor would it prevent the child from entering the Union, since there was no indication in the application of any steps being taken in that direction. Thus, there was no decision which had the effect of depriving the child of the genuine enjoyment of the substance of the rights that they enjoyed by virtue of being an EU citizen.[18]

According to the Advocate General, the above analysis would differ if an application for a derived right of residence was made by a TCN parent in circumstances where the EU citizen child *did* wish to exercise his/her right to move and reside freely within the EU. Here, for the minor EU citizen to effectively enjoy their right to move and reside freely, they would necessarily need to be accompanied by the person who is legally, financially and emotionally responsible for their day-to-day care. Given this dependency, it may well be the parents who are making a claim on behalf of the minor Union citizen for the right to exercise his or her Union citizenship rights. Crucially, however, these decisions,

[16]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 18.

[17]Opinion of A.G. Richard De La Tour in ECJ 16 June 2022, Case C-459/20, *X* v *Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais)*, paras. 30-33.

[18]Ibid., paras. 21-22, 34-36.

taken by the parents, may not be in the best interests of the minor Union citizen child. It would thus be necessary to ensure that the exercise of the child's EU citizenship rights (along with any derived rights granted to the parent on the basis of that EU citizenship) comply with the best interests of the child.[19]

On the second question, the Advocate General started from the perspective that the exercise of rights flowing from EU citizenship (and any derived TCN rights) are only effective insofar as they serve the best interests of the child and comply with Article 24 of the Charter of Fundamental Rights (Charter).[20] Article 24 Charter required the competent national authorities to verify, in light of all relevant circumstances, whether the removal of the child from Thailand to the Netherlands would be in accordance with the child's best interests.[21] This involves verifying that the move was not likely to have a detrimental impact upon the child's well-being and that any such move would be part of a 'tangible family life plan'.[22] The competent national authorities must consider the possible negative impact that the removal of that child could have on his or her physical and moral well-being, on his familial, social and emotional relationships, or even on his material situation.[23] The following were said to be relevant to any such assessment: (i) the child was ten years old and therefore of school age; (ii) he was educated in Thailand, which testifies to the links he maintains with the linguistic and cultural environment of that country, where other members of his family also live ; (iii) since birth he has resided in Thailand and has been brought up by his maternal Grandmother, with whom he had formed a strong bond; (iv) he has never been to the Netherlands and does not speak Dutch or English. It was also necessary to consider recent developments in the child's family life, including (v) the nature and the intensity of the relations which have now been established between the child and his mother since the latter's return to Thailand; and (vi) whether the EU citizen father of the child, who resides in the Netherlands, is able and willing to assume the day-to-day care of the child, and the child wishes to maintain direct contact and personal relations with his father.

In addition, Advocate General Richard de la Tour stated that the competent national authority must assess the reasons behind the child's removal from the country of habitual residence to their member state of nationality. This includes an assessment of the TCN parent's true intentions.[24] The Advocate General appeared to have been sceptical on this point. Doubt was cast on the intention of the child's mother to settle with her child in the Netherlands. Moreover, the

[19]Ibid., paras. 21-22, 37-38.
[20]Ibid., para. 43.
[21]Ibid., para. 46 and references cited therein.
[22]Ibid., para. 46.
[23]Ibid., paras. 49-50.
[24]Ibid., paras. 54-57.

re-establishment of her relationship with her child in Thailand in recent years did not appear to be the result of a carefully taken decision, but was simply a consequence flowing from her deportation to Thailand.[25] The implication, therefore, was that there was a risk that the child was simply being used as the means by which X could obtain a right to remain in the territory of the Union. If true, this would constitute a misuse of the derived right of residence principle stemming from Article 20 TFEU.[26] At the same time, the Advocate General noted that no one fact may give rise to the conclusion that there is a risk of abuse in relation to acquiring a derived right of residence under Article 20 TFEU. It would be necessary to objectively discover whether the intentions of the mother to settle with the child in the Netherlands were genuine, that his removal to that country would be neither temporary nor occasional, and that such a removal would be in his best interests. Strong indicators of such a genuine intention to settle in the Netherlands would be acquisition of rental accommodation or enrolment in a school in the member state concerned.[27] Finally, the Advocate General considered it necessary to interview the EU citizen child and third country national parent to ascertain whether the child indeed wished to leave Thailand and move and subsequently reside in the Netherlands. Ascertaining what the views of the child and mother were on the proposed move to the Netherlands were viewed as one part of the overall assessment of whether such a move was in the best interests of the child under Article 24 Charter.[28]

Finally, on the third question, when assessing the relationship of dependency for the purposes of a derived right of residence under Article 20 TFEU, the competent national authorities must consider all the relevant circumstances of the case. This includes the child's age, physical and emotional development, the nature of his relationship with both his Union citizen parent and TCN parent, and the risk that separation from the latter would create for their equilibrium.[29] That an EU citizen parent is capable and willing to assume the day-to-day care of the EU citizen child in the member state concerned is a relevant, but not in itself determinative, consideration for establishing whether a relationship of dependency exists between the TCN parent and her child.[30] Nor was the fact that the child's grandmother had cared for him in Thailand since birth decisive in proving that a relationship of dependency did not exist between the TCN parent and the EU citizen child.[31] Similarly, that the TCN parent and EU citizen child

[25]Ibid., para. 55.
[26]Ibid., para. 52.
[27]Ibid., paras. 57-58.
[28]Ibid., paras. 59-60.
[29]Ibid., paras. 62-64.
[30]Ibid., para. 64.
[31]Ibid., paras. 66, 73.

had not lived together for long periods of time was not in itself sufficient to demonstrate that no relationship of dependency existed.[32] For the Advocate General, the moment at which the TCN parent assumed day-to-day care of the child in Thailand was a decisive factor in assessing a relationship of dependency.[33] Whilst the ECJ had held in *KA and others* that the cohabitation of a TCN parent and EU citizen child was not necessary to establish a relationship of dependency, the Advocate General maintained that such cohabitation remained an element of particular importance in the case at hand. In addition to not cohabiting with her son, the TCN parent had been staying in another country, on another continent, and so could not have assumed the day-to-day care of the child during these periods.[34] Notably, the relationship between the TCN parent and EU citizen child had changed in the period between the initial application for derived residence being made (mother and child were living in different countries) and the time at which the appeal against the initial decision to reject was upheld (mother and child were now living together in Thailand following the mother's deportation from the Netherlands).[35] Thus, the competent national authorities must ascertain whether the factual circumstances have changed in such a way that a relationship of dependency between the child and his mother could have arisen during the course of the proceedings.[36]

Judgment of the Court

On the first question, the ECJ's conclusions were similar to those of the Advocate General. The Court started from the proposition that, in principle, the situation of the TCN parent and her EU citizen child in this case differed from all the cases decided thus far in relation to Article 20 TFEU. Unlike in those cases, the refusal of a right of residence for the TCN parent would not lead to her child being compelled to leave the territory of the Union, because he had lived in Thailand since birth and had never resided in the EU.[37] However, if one assumes that there is a relationship of dependency between the TCN parent and her EU citizen child, any refusal of a right of residence to the former in the Netherlands could prevent her EU citizen child from moving or residing within the territory of the Union, since he would be compelled to remain in a third country with his parent. Thus, the consequences for the EU citizen child of being denied in practice entry

[32]Ibid., paras. 69, 73.
[33]Ibid., paras. 67, 72.
[34]Ibid., para. 69.
[35]Ibid., paras. 68-69.
[36]Ibid., para. 71.
[37]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 28.

and residence in the Union were analogous to those of being compelled to leave the territory of the Union.[38]

Much depended on whether (and, if so, why) the child was moving to and then residing within the Union. According to the Court, the refusal of a right of residence for the TCN parent of a Union citizen, in a situation where that parent is to reside alone in the territory of the EU whilst the child remains in a third country, would not have any effect whatsoever on the exercise by the child of their EU citizenship rights. Refusing a right of residence for a TCN parent would only be capable of affecting the child's exercise of their EU citizenship rights whenever: (i) the child was entering the territory of the member state concerned (the Netherlands) with their parent; or (ii) the child was entering to be reunited with that parent and to subsequently remain in that national territory thereafter.[39] Consequently, Article 20 TFEU did not require a derived right of residence to be granted to a TCN parent of an EU citizen child when neither the application by the parent for residence, nor the general context of the case, makes it possible to conclude that the EU citizen child, who has never resided in the Netherlands, will exercise their EU citizenship rights by entering and residing with that parent in the territory of that member state.[40] It was for the referring court to carry out the necessary factual assessments in order to determine: (i) whether there is a relationship of dependency as understood in the jurisprudence of the ECJ between X and her son; and (ii) whether it is established that the EU citizen child will actually enter and reside in the Netherlands with his TCN parent.

On the second question pertaining to the best interests of the child, the ECJ took a markedly different approach than the Advocate General. The Court did not place Article 24 Charter and the child's best interests at the forefront of the analysis. Instead, decisive weight was placed on the rights that EU citizens have, by virtue of their status as Union citizens, to move and reside freely within the territory of the Union. The exercise of those rights is not subject to any requirement on the part of the Union citizen to prove an interest before relying on the benefits that those rights confer.[41] A minor EU citizen can rely on his or her right of freedom of movement and residence guaranteed by EU law, and their capacity to be the holder of such rights cannot be made conditional upon the attainment of the age required for the acquisition of legal capacity to exercise those rights personally.[42] Moreover, in accordance with the principles of international law (which the Union cannot infringe), member states cannot refuse their own

[38]Ibid., paras. 30-31.
[39]Ibid., para. 32.
[40]Ibid., paras. 34-36.
[41]Ibid., paras. 40-41.
[42]Ibid., para. 42.

nationals the right to enter their territory and to remain there. Nationals therefore enjoy an unconditional right of residence in their state of nationality.[43] Finally, the Court explained why Article 20 TFEU precluded the competent national authorities from considering the best interests of the child when assessing the TCN mother's application for a derived right of residence under Article 20 TFEU. In the Court's view, the need for such a consideration arises only: (i) when assessing whether there is a relationship of dependency between the EU citizen and TCN family member for the purposes of ascertaining whether the denial of a derived right of residence to the TCN parent would compel that EU citizen to accompany their parent and leave the territory of the Union as a whole;[44] and (ii) when assessing the possible consequences of derogating from a derived right of residence provided for by Article 20 TFEU on the grounds of public security or public order.[45] In such cases, the best interests of the child could be relied on *not* in order to reject an application for a residence permit, but, rather, to preclude the adoption of a decision that compelled that child to leave the territory of the Union.[46] To allow the national authorities to make such a determination would infringe upon the minor EU citizen child's capacity to exercise their rights which they derive from Article 20 TFEU. Such a determination would also result in the national authorities 'improperly substituting themselves for those with parental responsibility for the child concerned, in the absence of measures having been adopted to provide a framework for the exercise of that responsibility'.[47] For all the above reasons, Article 20 TFEU precluded member states from rejecting an application for a derived right of residence of a TCN parent of a dependent EU citizen minor on the grounds that moving to the EU citizen's member state of nationality is not in the real or plausible interests of that child.[48]

In response to the third question, the Court relied heavily on established case law when determining which factors were and were not decisive for assessing whether a relationship of dependency exists between a TCN parent and EU citizen child. It was in light of 'the intensity of the relationship of dependency' that any such application must be assessed, with such an assessment requiring that all the circumstances of the case be taken into account.[49] It was necessary to consider the actual care of the child and whether the legal, financial or emotional

[43]Ibid., para. 41.
[44]Ibid., para. 43.
[45]Ibid., citing *Chavez-Vilchez and Others*, *supra* n. 8, para. 71.
[46]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 43.
[47]Ibid., para. 44.
[48]Ibid., para. 45.
[49]Ibid., paras. 47-48 and case law cited therein.

responsibility for that child is borne by the TCN parent, the age of the child, his or her physical and emotional development, the extent of his or her emotional ties both to the Union citizen parent and the TCN parent and the risks which separation from the latter might entail for that child's equilibrium.[50] The fact that the child's father is a Union citizen residing in an EU Member State may be relevant for the purposes of Article 20 TFEU if that parent is able and willing to assume the day-to-day care responsibility of the child. However, even if this were to be proven, it is insufficient, in itself, to demonstrate that there is not a relationship of dependency between the minor Union citizen and his TCN mother. Any determination of such an impact upon the Union child may only be made following an examination of all relevant circumstances.[51] It follows that there is no single criterion that will always be determinative in such cases – an individualised assessment that is sensitive to relevant facts and the context within which they arise is required.[52]

In addition, the Court found that national authorities must take account of the situation as it appears to be at the time when they are required to decide upon an application for a derived right of residence under Article 20 TFEU. They must assess the foreseeable impacts that their decision may have on the genuine enjoyment of the substance of the rights that the minor Union citizen derives from Article 20 TFEU. In the event of an appeal, the authorities concerned must consider factual matters arising after the initial decision was taken.[53] That a TCN parent had not previously assumed day-to-day care of the minor EU citizen child for a long period cannot be treated as being decisive when determining an application for derived residence. It was not inconceivable that, at the material time when a ruling on the residence application is to be taken, the parent had in fact since assumed greater responsibility for the care of the child.[54] Similarly, cohabitation of the TCN parent and minor EU citizen is not a prerequisite for determining that a relationship of dependency exists between them.[55] Moreover, the fact that the TCN parent has assumed sole parental responsibility for the minor Union child is a relevant but not decisive factor in assessing whether a relationship of dependency exists between the two.[56]

[50]Ibid., para. 49 and case law cited therein.
[51]Ibid., paras. 56-57.
[52]Ibid., paras. 49, 57.
[53]Ibid., para. 52.
[54]Ibid., para. 53.
[55]Ibid., para. 54 and case law cited therein.
[56]Ibid., para. 60.

Comment

Three comments can be made in response to the judgment in *X*. First, the ECJ has taken further steps to clarify how national authorities should assess whether a relationship of dependency exists and when such a relationship was established. Second, the Court appears to have rejected the possibility of examining whether derived rights of residence of TCN parents of dependent EU citizen children have been acquired through deceptive or fraudulent means. This sits in marked contrast to the opinion of the Advocate General. Consequently, it appears difficult for national authorities to reject the application for a derived right of residence of TCN parents whenever a relationship of dependency can be established. This appears to be so, irrespective of any *prima facie* evidence being adduced that TCN parents may be using the EU citizenship rights of their dependent children as a means of acquiring a derived right of residence purely for their own benefit. Third, it is now established that Article 20 TFEU precludes a member state from rejecting an application for residence from a TCN parent of a dependent EU citizen child on the grounds that the movement of that child to his member state of nationality is not in his best interests. Once again, this sits in marked contrast to the Opinion of the Advocate General, who took the view that the right to move and reside freely must serve the best interests of the child and comply with Article 24 Charter. It is submitted that the reasoning of the ECJ is somewhat opaque on this point and, as a result, is far from convincing.

Clarifying elements in the assessment of a relationship of dependency

The judgment under review builds upon the ECJ's prior jurisprudence on the material time at which a relationship of dependency came into existence. In *K.A. and Others*, the Court held the fact that a relationship of dependency came into being after the imposition of a national entry ban on the TCN parent did not prevent a derived right of residence from being granted. It was also immaterial that the entry ban had become final when the application for residence was submitted.[57] In the case of *X*, the ECJ pushes this rationale a step further. The Court requires national authorities who receive an application for a derived right of residence from a TCN parent of a dependent EU citizen child to take account of the situation as it appears to be at the time when they are called upon to take a decision. Also, the authorities 'must assess the foreseeable consequences of their decision on the genuine enjoyment, by the child concerned, of the substance of the rights that he or she derives from the status that Article 20 TFEU confers on

[57] *KA and Others (Family reunification in Belgium)*, *supra* n. 9, paras. 77-84.

him or her'.[58] It is worth pondering how far this obligation to assess the foreseeable consequences of a decision to reject an application for a derived right of residence stretches. Based on the reasoning in *X*, it seems possible that a TCN parent may challenge the decision to reject their application on the grounds that the competent authorities failed to assess the foreseeable consequences that such a rejection would have upon their EU citizen child's enjoyment of their EU citizenship rights.

Relatedly, the judgment also helps to further our understanding of the importance of establishing precisely when a relationship of dependency has been established.

The Advocate General's Opinion was clear that the moment at which the relationship of dependency arises constitutes a decisive factor in examining an application for a derived right of residence.[59] For the Advocate General, the date on which the TCN parent was living in the same country as the EU citizen child (Thailand) and had assumed day-to-day care of the child was the date on which a relationship of dependency was established.[60] The Advocate General was in no doubt that these factors were decisive – the relationship of dependency must exist in the country where the EU citizen is located and must be in place, at the very least, at the time when the TCN parent claims a derived right of residence.[61] It follows that the absence of the TCN parent assuming day-to-day care of the EU citizen child in the country in which that child is based will result in there being no relationship of dependency, with the consequence that an application for a derived right of residency should be rejected. Whilst the lack of cohabitation might not be decisive in all cases, it most certainly was for the Advocate General in this case, where, for many years, the TCN parent and EU citizen child had lived on separate continents.[62]

The ECJ did not go so far on this point. It reiterated its position from past case law that a lack of cohabitation between the TCN parent and EU citizen child is not itself determinative of there being no relationship of dependency. Conversely, the assumption by the TCN parent of day-to-day care of the EU citizen child is not determinative of a relationship of dependency having been established. Similarly, the fact that a TCN parent has sole parental responsibility for the minor EU citizen child is a relevant factor in assessing a relationship of dependency, but it is not decisive. Such a relationship cannot follow directly from a legal relationship between the TCN parent and his or her minor child who is a Union

[58]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 52.

[59]Opinion of A.G. De La Tour in *X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 17, para. 67.

[60]Ibid., para. 67.

[61]Ibid., para. 67.

[62]Ibid., para. 69.

citizen.[63] Whereas some had taken the view that single parent custody, being an expression of legal dependency, automatically meant that a residence permit be given to the TCN parent, the judgment in *X* confirms this not to be so.[64] For the ECJ, an examination of all the circumstances of the case must always be carried out before reaching a conclusion on the relationship of dependency and no one factor seems to be capable of being decisive.[65]

The question left open by the ECJ's refusal to go as far as the Advocate General on this point is whether a relationship of dependency can ever be established when the TCN parent and EU citizen child live in different countries (or even continents)? In other words, can a relationship of dependency ever reach a sufficient 'intensity' in circumstances where parent and child live thousands of miles apart and have done so for many years?[66] One gets the distinct impression when reading the Opinion of the Advocate General that he believes this to be so unlikely as to be virtually impossible. For the ECJ, however, it all depends on a holistic assessment of all the relevant facts and circumstances of the case.

The risk of abuse in acquiring a derived right of residence

The Opinion of Advocate General Richard de la Tour confronts the complex and controversial question of acquiring derived rights of residence under Article 20 TFEU through deceptive or even fraudulent means. As he points out, it is necessary to take into account any risk that the child is 'considered as the means for the third-country national to live in the territory of the European Union, which would constitute an *abuse of the derived right of residence* granted under Article 20 TFEU'.[67] His Opinion makes it clear that he believes there is a chance that X may not be being entirely honest when seeking to obtain a derived right of residence in the EU.[68] The worry, which the referring court shared, is that the derived right of residence is being applied for by the TCN mother because she wants to return to the Netherlands, and not because her EU citizen child wishes to exercise his right to move and then reside there.[69] For the Advocate General, these doubts as to the veracity of X's claims are relevant circumstances that must be considered by the national authorities when assessing whether the exercise of the

[63] *X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 60.
[64] Kroeze and Van Elsuwege, *supra* n. 11, p. 6.
[65] *X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, paras. 54-55.
[66] Ibid., paras. 47-48.
[67] Opinion of A.G. De La Tour in *X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 17, para. 52.
[68] Ibid., paras. 52-58.
[69] Ibid., para. 42.

child's EU citizenship rights are in the best interests of the child.[70] The very prospect of TCN parents using the EU citizenship rights of their dependent children as a means of acquiring a derived right of residence purely for their own benefit sits uncomfortably with the idea – implicit in much of the ECJ jurisprudence – that 'the notion of dependency expresses that it is in the child's best interests to confer to a parent a derived residence right'.[71]

In contrast, the ECJ did not address the question of derived rights of residence being acquired through deceptive or fraudulent means. Unlike the Advocate General, there is no reference whatsoever to any abuse of the derived right of residence. For the Court, there were only two pertinent questions. First, is there a relationship of dependency between the child and his TCN parent? Second, is the child entering the territory of the member state concerned (Netherlands) with their parent, or is the child entering the member state to be reunited with that parent and to subsequently remain in that national territory thereafter? These are questions for the national authorities to assess. A derived right of residence need not be given if it is clear from that assessment that the child will not actually be entering and then residing in the Netherlands with his TCN parent.[72]

There are two possible readings of this passage in the judgment. The first is narrow in nature. It stipulates that X's application for a derived right of residence may be rejected if it is clear from an assessment of all facts and circumstances that her dependent child will not actually exercise his EU citizenship rights by entering and residing with his TCN parent in the territory of that member state. Simply put, if the son will not be travelling to the Netherlands (either with his mother or to meet his mother there), then a derived right of residence for the mother need not be granted. Conversely, if the son will be exercising his right to move and reside with his mother, a derived right of residence to X must be granted. I shall return to this possibility below when examining the absolute or relative nature of EU citizenship rights.

The second possible reading of this part of the judgment is broader in nature. It provides that, in addition to what has just been said, national authorities may also reject X's application if the assessment reveals that she does not intend to reside with her child following their entry into the Netherlands. Presumably this could occur by the mother sending the child back to Thailand soon after their arrival in the Netherlands, or, in the worst scenario imaginable, the mother may cease to care for her child upon their entry into the Netherlands. If this broader reading of the judgment is correct, then the ECJ should have been much clearer in saying so.

[70]Ibid., paras. 54-57.

[71]L. Lonardo, 'The Best Interests of the Child in the Case Law of the Court of Justice of the European Union', 29 *Maastricht Journal of European and Comparative Law* (2022) p. 605.

[72]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, paras. 36-37.

The ability of national authorities to reach such a conclusion goes to the very heart of the best interests of the child. And yet, the Court held that an application for a residence permit cannot be rejected on the grounds that it would not be in the best interests of that EU citizen child to move to their member state of nationality with their TCN parent upon whom they are dependent.[73] So, what should the national authorities do when they believe a TCN parent might be bringing their EU citizen child to his/her member state of nationality simply to acquire a derived right of residence in that country and then play no further part in that child's life?

One solution here would be to say that facts and circumstances such as these may be factored in when assessing whether there is a relationship of dependency. Such an evaluation must look to the 'intensity of the relationship' and consider, *inter alia*:

> the actual care of the child and . . . whether the legal, financial or emotional responsibility for that child is borne by the TCN parent. The age of the child, his or her physical and emotional development, the extent of his or her emotional ties both to the Union citizen parent and to the TCN parent, and the risks which separation from the latter might entail for that child's equilibrium have also been held to be relevant factors.[74]

It seems possible to fit any concerns as to the deceptive or fraudulent intentions behind a TCN parent's application for a derived right of residency within this framework. Indeed, one might contend that the best interests of the child are protected within the context of determining whether there is a genuine relationship of dependency, i.e. whether the well-being of the child can only be ensured by not separating him/her from the TCN parent. Consequently, if there is a relationship of dependency and it is clear the son is exercising his EU citizenship right to free movement, member states must allow a derived right of residency for the TCN parent. This is either because: (a) EU law assumes that decisions taken by TCN parents upon whom EU citizen children are dependent about the best place for the two of them to live will always be a decision in that child's best interests; or (b) EU law in this area is solely concerned with whether an EU citizen is trying to exercise their right to move and reside freely and, if they are, member states cannot attach any conditions to the permissibility of that exercise; or (c) both of these things.[75] But if this reading is correct, the Court should have said so more clearly. This would have clarified the issue of EU citizenship rights being absolute in nature in some circumstances (see below). It

[73]Ibid., paras. 44-45.

[74]Ibid., paras. 48-49.

[75]I am grateful to an anonymous peer reviewer for alerting me to this way of thinking about the judgment.

also would have removed any ambiguity about the extent to which TCN parents of dependent EU citizen children are permitted (or precluded) from taking decisions about the exercise of their child's right to move and reside freely. As things stand, one is left questioning whether EU law has any scope for probing into whether TCN parents of dependent EU citizen children will always take decisions about the latter's right to move and reside that are in his/her best interests?

On the basis of the ECJ's reasoning, national authorities are left in the unsatisfactory position of being required to assess: (i) whether there is a relationship of dependency between the EU citizen child and TCN parent; and (ii) whether the EU citizen child will enter and reside in the member state of nationality with their TCN parent. At the same time, they are precluded from rejecting the TCN parent's residency application on the grounds that (iii) the movement of the EU citizen child (and TCN parent upon whom he is dependent) from his habitual place of residence to his member state of nationality is not in his best interests. Additionally, in stark contrast to the Advocate General's Opinion, there is an absence of any reasoning in the ECJ's judgment on about trying to ascertain the true intentions behind the TCN parent's application for residency and the significance to be attached to any such findings. In this regard, the solution provided by the Advocate General has the benefit of clearly articulating several criteria that the national authorities should consider when assessing whether any such movement by a minor EU citizen child is in their best interests, including the intentions behind the TCN parent's application.

Precluding member states from rejecting a TCN residence application for being contrary to an EU citizen's best interests

This brings us squarely to the reasoning behind the Court's finding that Article 20 TFEU precludes a member state from rejecting an application for residence from a TCN parent of a dependent EU citizen child on the grounds that the movement of that child to his member state of nationality is not in his best interests. To recall, the Court held that considering the best interests of the child is only relevant in two other circumstances: first, when assessing whether there is a relationship of dependency between the EU citizen and TCN family member for the purposes of the genuine enjoyment of the substance of EU citizenship rights doctrine; and second, when assessing the possible consequences of derogating from a TCN's derived right of residence provided for by Article 20 TFEU on the grounds of public security or public order.[76] In these two scenarios only, the best interests of the child may be considered so as to preclude the adoption of a

[76]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 43.

decision that compels the Union citizen child to leave the territory of the Union with their TCN parent upon whom they are dependent.[77]

In the present case, however, the ECJ noted that it entailed rejecting an application for a residence permit and, crucially, this was different from the two scenarios above.[78] Unfortunately, the Court did not provide any further reasoning as to why this type of scenario was different.

Nor was there much provided by way of convincing reasoning as to why national authorities cannot consider the best interests of the child when assessing an application for a residence permit for a TCN parent of a dependent EU citizen child. To re-emphasise, the Court finds that such an assessment cannot be undertaken whenever the EU citizen is entering the territory of their member state of nationality with their parent upon whom they are dependent, or if they are entering that territory to be reunited with that parent and to subsequently remain in that national territory thereafter.[79]

It is submitted that much of the ambiguity here stems from the Court's unwillingness to clearly identify which particular right or rights stemming from EU citizenship are engaged in this case and, once identified, to pronounce on whether they are absolute or relative in nature.[80] This is regrettable, not least because the referring Dutch court specifically asked:

> Are those rights [i.e. rights conferred by EU citizenship] absolute, in the sense that no obstacles may be placed in their way or that the Member State of which the (minor) Union citizen is a national might even have a positive obligation to enable that citizen to exercise those rights?[81]

Such questions have also long been considered in the literature.[82] Frustratingly, the Court opted to reformulate the question so as to focus exclusively on the assessment of the best interests of the child aspect of the question.[83] In so doing, the Court puts forward four reasons in support of its conclusion that national authorities are precluded from considering the best interests of the child when assessing X's application for a derived right of residence. They are:

[77]Ibid. For a recent articulation *see M.D.* (*Interdiction d'entrée en Hongrie)*, *supra* n. 10, paras. 68-69.

[78]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 43.

[79]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, paras. 34-38.

[80]By an absolute right I mean a right that can never lawfully be subject to limitation in the pursuit of legitimate public interests. By relative rights I mean those rights that can lawfully be subject to such limitations. On the general confusion about which rights are conferred by EU citizenship *see* D. Kochenov, 'The Right To Have What Rights? EU Citizenship in Need of Clarification', 19 *European Law Journal* (2013) p. 502.

[81]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 18.

[82]Kroeze and Van Elsuwege, *supra* n. 11, p. 7.

[83]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 39.

(i) The capacity of EU citizens to be the holder of rights guaranteed by EU free movement law cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally.[84]
(ii) To allow for an assessment of the best interests of the child would result in the national authorities 'improperly substituting themselves for those with parental responsibility for the child concerned, in the absence of measures having been adopted to provide a framework for the exercise of that responsibility, and without infringing the capacity of that child to exercise rights that he or she derives from the status conferred on him or her by Article 20 TFEU.[85]
(iii) Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the members of the family of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status.[86]
(iv) The EU is bound to respect the international law principle that a member state cannot refuse to its own nationals the right to enter and remain on its territory and that those nationals enjoy an unconditional right of residence.

Turning first to reasons (i) and (ii) above, the judgment might be read as suggesting that the right of EU citizens to move and reside freely within the territory of the Union (in circumstances such as those in the case under review) is an absolute right that cannot be subject to any limitations. If correct, this would suggest something of a parallel between derived rights of residence under Article 20 TFEU and the *Zhu and Chen* line of case law under Article 21 TFEU.[87] To recall, in that case the Court built upon the idea that EU citizenship was 'destined to be the fundamental status of nationals of the Member States'[88] when holding that a child who was born in Belfast, Northern Ireland and consequently acquired Irish citizenship was entitled to move and reside freely within the territory of the Union and could thus settle in the UK. Furthermore, what is now Article 21 TFEU required the authorities of the UK to grant a residence permit to the EU citizen child's primary carer, since to not do so would deprive the child's right of residence of any useful effect.[89] Under international law, it was for each member state to lay down the conditions for the acquisition and loss of nationality and it was not permissible for a member state to restrict the effects of the grant of the nationality of another member state by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in

[84]Ibid., para. 42.
[85]Ibid., paras. 40-42, 44.
[86]Ibid., paras. 22 and 40.
[87]ECJ 19 October 2024, Case C-200/02, *Zhu and Chen*.
[88]ECJ 17 September 2022, Case C-413/99, *Baumbast and R*, para. 82.
[89]*Zhu and* Chen, *supra* n. 87, para. 45.

the Treaty.[90] Notably, the argument that Mrs Chen had improperly attempted to exploit provisions of EU law by moving to Northern Ireland so as to ensure her child acquired Irish nationality and to then derive a right of residence in the UK was rejected.[91] The idea here, which features prominently in cases such as *Akrich*,[92] is that once an EU citizen is trying to exercise their 'primary and individual right to move and reside freely'[93] then the motive which motivated said exercise cannot be called into question in an attempt to place an obstacle in the way of said movement. Similarly, in *X* the ECJ held that subjecting the right of the EU citizen son to move from Thailand to the Netherlands to an examination of whether such a move is in his best interests would infringe upon his capacity to exercise rights that he or she derives from the status conferred on him or her by Article 20 TFEU.[94] Furthermore, to allow an examination of the best interests of the child would place an obstacle in the way of exercising the right to move and reside that did not stem from EU law. The overriding principle at work in this area of EU citizenship law, therefore, seems to be that possession of EU citizenship, regardless of the intentions with which it is mobilised, has to be the overriding source of rights.[95] Moreover, it is only conditions that are clearly provided for in EU law that may capable of limiting the exercise of those rights, i.e. those derived from the Treaties or secondary EU legislation.[96]

The problem with this reading of the judgment, however, is that it has long been clear that the right of EU citizens to move and reside freely throughout the Union is not absolute and can be subject to restrictions.[97] It follows that since this right is not absolute, it cannot form the basis of an explanation as to why such free movement may not be subject to the consideration of whether such movement is in the best interests of the child. Alternatively, we might say that the right of EU citizens to move and reside freely can be subject to some restrictions which derive from the EU Treaties and secondary legislation, but these do not include whether such movement is in the best interests of the EU citizen child exercising such rights. If this is correct, it would be tremendously helpful if the Court would tell us, particularly since the Advocate General's Opinion was so clearly grounded in

[90]Ibid., paras. 37-39.

[91]*Zhu and Chen*, *supra* n. 87, paras. 36-41.

[92]ECJ 23 September 2003, Case C-109/01, *Secretary of State for the Home Department* v *Hacene Akrich*.

[93]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 21.

[94]Ibid., paras. 40-42, 44.

[95]I am grateful to an anonymous reviewer for alerting me to this line of argumentation.

[96]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 21.

[97]*See* the text of Art. 20 TFEU, for example, which provides that the rights provided by that provision 'shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.

Article 24 Charter.[98] Alternatively, of course, it might well be that the Court believes that any decision as to the residence and movement of an EU citizen child is a decision best taken by the adult(s) upon whom they are dependent. If this is the determinative reason behind the outcome in this part of the judgment, it arguably leads one to the somewhat uncomfortable conclusion that the decision of a parent to move their EU citizen child from their place of residence to their member state of nationality (thereby engaging their Article 20 TFEU rights) is a decision that cannot be called into question on the basis of the best interests of the child enshrined in Article 24 Charter.[99]

This brings us to the possibility that the ECJ's judgment focuses not so much on the right of EU citizens to move and reside freely, but, rather, on (iii) the genuine enjoyment of the substance of rights which EU citizens enjoy by virtue of their status as Union citizens.[100] It has been noted that there is much ambiguity surrounding what the 'substance of rights' in this context entails.[101] There is a question over when Article 20 TFEU permits or does not permit member states to take measures (such as denying residence permits to TCN parents of EU citizen children) that have the effect of preventing EU citizens from the genuine enjoyment of the substance of their rights.[102] Initially, the Court in *Zambrano* held that Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of rights without qualification. This suggested that member states were always required to grant a right of residence to TCN parents (upon whom minor EU citizens were dependent) irrespective of the circumstances, because any denial of such a permit would require the EU citizen to leave the territory of the Union. Such a decision would always deprive the EU citizen of the genuine enjoyment of the substance of their citizenship rights.[103] Put differently, the genuine enjoyment of the substance

[98]Opinion of A.G. De La Tour in *X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 17, para. 46.

[99]H. van Eijken, 'Dependency without Borders? Judgment in *Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais)*', *EU Law Live* Op-Ed, 25 September 2023, https://eulawlive.com/op-ed-dependency-without-borders-judgment-in-staatssecretaris-van-justitie-en-veiligheid-mere-thailandaise-dun-enfant-mineur-neerlandais-by-hanneke-van-eijken/, visited 7 January 2025.

[100]For discussion *see* D. Ferri and G. Martinico, 'Revisiting the *Ruiz Zambrano* Doctrine and Exploring the Potential for Its Extensive Application', 27 *European Public Law* (2021) p. 685.

[101]Kroeze and Van Elsuwege, *supra* n. 11, p. 8. *See also* N. Nic Shuibhne, 'The "Territory of the Union" in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives', 38 *Yearbook of European Law* (2019) p. 291.

[102]H. Kroeze, 'The Substance of Rights: New Pieces of the *Ruiz Zambrano* Puzzle', 44 *European Law Review* (2019) p. 248-249.

[103]K. Hailbronner and D. Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi*', 48 *Common Market Law Review* (2011) p. 1265-1266.

of rights doctrine (or parts of it at least) was absolute in nature and could not be restricted by the member states in the pursuit of public interests. Viewed in this way, the reasoning in *X* can be understood as meaning that whenever an EU citizen child seeks to travel from a third country back to their member state of nationality, their TCN parent (upon whom they are dependent) must always be granted a derived right of residence under Article 20 TFEU. To not grant such a right of residency would be to deprive the EU citizen of the genuine enjoyment of the substance of their rights, because they would not be able to enter and reside in the territory of the Union.

The difficulty with this understanding of the Court's reasoning, however, is that in cases subsequent to *Zambrano* the ECJ has clarified that a derived right of residence under Article 20 TFEU is not absolute, since member states may refuse to grant it in certain specific circumstances.[104] Article 20 TFEU does not affect the possibility of member states restricting residence rights in order to safeguard public policy or public security.[105] Consequently, the refusal of a right of residence founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security is permitted, even if its effect is that the Union citizen who is a family member of that TCN is compelled to leave the territory of the EU.[106] In such cases, the ECJ has made clear that any derogation from a TCN's derived right of residence under Article 20 TFEU must be interpreted strictly, and any assessment must take account of the right to respect for private and family life (Article 7 Charter) read in conjunction with the obligation to take into consideration the child's best interests (Article 24(2) Charter).[107]

It is therefore clear that member states may derogate, in certain specified circumstances, from rights of residency which TCN parents have derived from their dependent EU citizen children.[108] It is also clear that member states may not deny a right of residence to a TCN spouse of an EU citizen solely on the grounds that the latter has insufficient resources.[109] And yet, member states may not reject a TCN parent's application for a residence permit on the grounds that their EU citizen child's movement from a third country back to their member state of nationality is not in that child's best interests. This brings us back to the question of whether a member state must always grant a derived right of residence under Article 20 TFEU to a TCN parent whenever their EU citizen child (who is dependent upon them) is moving from a third country back to their member state

[104]ECJ 27 February 2022, Case C-836/18, *Subdelegación del Gobierno en Ciudad Real* v *RH*, para. 43.
[105]ECJ 13 September 2016, Case C-304/14, *CS*, para. 36.
[106]*K.A.*, *supra* n. 9, para. 92 and case law cited therein.
[107]Ibid., para. 90.
[108]*See* n. 110 *infra*.
[109]ECJ 5 May 2022, Joined Cases C-451/19 and C-532/19, *Subdelegación del Gobierno en Toledo* v *XU and QP*, paras. 49-50.

of nationality. If the answer to this is yes, it follows that aspects of the right to move and reside freely and/or the genuine enjoyment of the substance of rights tests are absolute in nature. It would further follow that Member States must always grant a derived right of residence to TCN parents of dependent EU citizen children in circumstances such as those in *X*. This is certainly one way of making sense of the reasoning as to why the Netherlands cannot reject a derived right of residence for X on the grounds that the movement of her dependent EU citizen child from Thailand to the Netherlands is not in his best interests.

The only other plausible interpretation would be to say that an application by a TCN parent for a derived right of residency under Article 20 TFEU – in circumstances where the child is exercising their right to move from a third country back to their member state of nationality – *can* be derogated from in certain specific circumstances, but not in others. Specifically, derogations from the derived right of residence may be permissible when there exists a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, but may not be permissible if done to protect the best interests of the child. However, the Court came nowhere close to saying this. As a result,the Court left completely unanswered the referred (and in my view very important) question of whether the genuine enjoyment of the substance of EU citizenship rights and/or X's derived right of residence in this case was absolute or relative in nature. A further consequence is that the precise grounds upon which a derived right of residence for a TCN parent of a dependent EU citizen child may be derogated from by the member states remains uncertain.[110]

So where does this leave us? Well, it leaves us in the rather unsatisfactory position of concluding that reasons (i), (ii) and (iii) above do not convincingly explain why the best interests of the child cannot form the basis of a decision to reject a TCN parent's application for a derived right of residence in the case under review.

Accordingly, one is led to the conclusion that the only clearly stated and persuasive reason that can support the Court's conclusion on this point is (iv) above. That reason is that Union law cannot infringe the international law principle that member states cannot refuse their own nationals the unconditional right to enter and remain on their territory.[111] This right is generally conceived of in absolute terms.[112] In essence, the Court is here stating that EU citizenship law cannot require member states, when assessing an application for a residency permit from a TCN parent of a dependent EU citizen child, to determine whether

[110]There remains uncertainty over whether the permissible derogations from residency rights based on Art. 20 TFEU are the same as those enshrined in Directive 2004/38. The case under review has not assisted in clarifying these uncertainties. For discussion *see* Kroeze, *supra* n. 102, p. 248-249.

[111]*X (Mère thaïlandaise d'un enfant mineur néerlandais)*, *supra* n. 1, para. 41.

[112]Protocol No. 4, Art 3. ECHR.

the entry and residence of that child on their territory is in that child's best interests. Put differently, the obligation to comply with EU fundamental rights norms, such as considering the best interests of the child, cannot result in member states breaching their international law obligation to allow their own nationals to enter and reside unconditionally on their territory. If this reading is correct, it appears to sit uncomfortably with previous, well-known pronouncements of the Court about the inability of international law to have the effect of prejudging the constitutional principles of the EU Treaties, including the principle that all EU legal acts must respect fundamental rights.[113]

Conclusion

The outcome of the ECJ's judgment in *X* is perhaps not all that remarkable. To have held that the refusal to grant the TCN mother a derived right of residence in the Netherlands when her EU citizen child continued to live and reside in Thailand would likely have been viewed as a step too far in the Court's already expansive jurisprudence. What is truly remarkable, however, is the Court's refusal to allow national authorities to consider whether the movement of an EU citizen child from their third country of habitual residence back to their member state of nationality is in that child's best interests. The reasons given by the ECJ in support of this conclusion are fundamentally at odds with those given by the Advocate General in the case. Consequently, national authorities are in the rather difficult position when assessing claims for derived rights of residency in cases where the factual circumstances give rise, as they did here, to well-founded concerns about the true intentions of TCN parents and the best interests of their EU citizen children. It also sits uneasily with the broader fundamental rights jurisprudence of the ECJ, in which it has variously been said that the obligations imposed by international law cannot have the effect of prejudicing the constitutional principles of the EU legal order, which includes the protection of fundamental rights.

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[113]ECJ 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, para. 285.