ECLI:EU:C:2022:354

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Article 20 TFEU – Union citizenship – Union citizen who has never exercised his or her right of freedom of movement – Application for a residence card for his or her family member who is a third-country national – Refusal – Obligation for the Union citizen to have sufficient resources – Obligation for spouses to live together – Minor child who is a Union citizen – National legislation and practice – Genuine enjoyment of the substance of the rights conferred on EU nationals – Deprivation)

In Joined Cases C-451/19 and C-532/19,

Two REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice, Castilla-La Mancha, Spain), made by decisions of 29 April 2019 and 17 June 2019, received at the Court on 12 June 2019 and 11 July 2019 respectively, in the proceedings

Subdelegación del Gobierno en Toledo

v

XU (C-451/19),

QP (C-532/19),

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Spanish Government, initially by M.J. Ruiz Sánchez and S. Jiménez García, and subsequently by M.J. Ruiz Sánchez, acting as Agents,

– the European Commission, by J. Baquero Cruz and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2022,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 20 TFEU.

2 The requests have been made in two sets of proceedings between the Subdelegación del Gobierno en Toledo (Provincial Office of the Government in Toledo, Spain; 'the Provincial Office') and XU and QP, respectively, concerning the Provincial Office's refusal of applications for XU and QP to receive a residence card as a member of the family of a Union citizen.

Legal context

European Union law

3 Article 2 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) states:

'For the purpose of this Directive:

…

(c) "sponsor" means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;

…'

4 Article 3 of that directive provides:

'1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

…

3. This Directive shall not apply to members of the family of a Union citizen.

…'

5 Under Article 4(1) of that directive:

‘The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

…

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

…’

Spanish law

6 Article 32 of the Constitution provides:

‘1. Men and women have the right to marry with full legal equality.

2. The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefor, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof.’

7 Article 68 of the Código Civil (Civil Code) provides:

‘Spouses are obliged to live together, to be faithful to each other and to come to each other’s assistance. They must, furthermore, share domestic responsibilities and the care and attendance of ascendants and descendants and other dependants under their charge.’

8 Article 70 of that code states:

‘Spouses shall establish the marital domicile by common consent and any disagreement shall be resolved by a court which must take into account the interests of the family.’

9 Under Article 110 of that code:

‘The father and mother, even if they do not hold parental authority, are obliged to care for their minor children and must maintain them.’

10 Article 154 of the Civil Code reads as follows:

‘Non-emancipated minors shall be under the parents’ parental authority.

…’

11 Article 1 of Real Decreto 240/2007, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo (Royal Decree 240/2007 on the right of citizens of Member States of the European Union and other States which are parties to the Agreement on the European Economic Area to enter, move freely and reside in Spain) of 16 February 2007 (BOE No 51 of

28 February 2007) in the version applicable to the disputes in the main proceedings ('Royal Decree 240/2007'), provides:

'1. This Royal Decree shall govern the conditions for the exercise of the right of nationals of other Member States of the European Union and other States which are parties to the Agreement on the European Economic Area to enter, leave, move freely, stay, have permanent residence, and work in Spain, as well as the limits imposed on those rights for reasons of public policy, public safety or public health.

2. The provisions of this Royal Decree shall be without prejudice to those of special laws and international treaties to which [the Kingdom of Spain] is party.'

12 Article 2 of that royal decree provides:

'This Royal Decree shall also apply, in accordance with its provisions, to the following family members of a national of another Member State of the European Union or another State party to the Agreement on the European Economic Area, regardless of their nationality, where they are accompanying or joining that national:

(a) the spouse, provided that there has been no agreement or declaration of nullity of the marriage, divorce or legal separation;

…

(c) his or her direct descendants, and those of his or her spouse or registered partner, who are under 21 years of age or over that age and dependent on him or her or do not have capacity, provided that there has been no agreement or declaration of nullity of the marriage, divorce or legal separation or that the registration of the partnership has not been annulled;

…'

13 Under Article 7 of that royal decree:

'1. All Union citizens and nationals of another State party to the Agreement on the European Economic Area have the right to reside within Spanish national territory for a period of more than three months:

…

(b) if they have sufficient resources for themselves and for their family members so as not to become a burden on the Spanish social assistance system during their period of residence and have comprehensive sickness insurance cover in Spain; or

…

(d) if they are a family member accompanying or joining a Union citizen or a citizen of another State party to the Agreement on the European Economic Area who himself or herself satisfies the conditions set out in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State when they accompany or join in Spain the Union citizen or citizen of

another State party to the Agreement on the European Economic Area, provided that that citizen satisfies the conditions set out in paragraph 1(a), (b) or (c).

…

7. As to sufficient means of subsistence, no fixed amount can be established; regard shall be had to the personal situation of the nationals of a Member State of the European Union or of another State party to the Agreement on the European Economic Area. In any event, that amount shall not exceed the level of financial resources below which Spanish nationals receive social assistance or the amount of the minimum social security pension.'

14 Article 8(1) of that royal decree states:

'The family members of a national of a Member State of the European Union or of another State party to the Agreement on the European Economic Area specified in Article 2 of this Royal Decree, who are not nationals of one of those States may, when they accompany or join that person, reside in Spain for a period of more than three months and shall be required to apply for and obtain a "residence card of a family member of a Union citizen".'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-451/19

15 XU a Venezuelan national, was born on 19 September 2001 in Venezuela. XU's mother, a Venezuelan national, holds a *Tarjeta de Residencia Comunitaria* (Community residence card) and has lived with her child in Spain since 2004.

16 On 20 January 2011, a family court judge in Venezuela granted her sole custody of her child.

17 On 6 September 2014, XU's mother married, in El Viso de San Juan (Spain), a Spanish national who has never exercised his right of free movement within the European Union.

18 The spouses have lived together in El Viso de San Juan since 12 December 2008. On 24 July 2009, their child, a Spanish national, was born.

19 On 28 September 2015, XU's stepfather made an application for XU to receive a temporary residence card as a family member of a Union citizen, in accordance with Article 2(c) of Royal Decree 240/2007.

20 That application was refused on the ground that XU's stepfather had not established that, as required by Article 7 of Royal Decree 240/2007, he had sufficient resources for himself and for the members of his family. Only the economic situation of XU's stepfather was taken into account.

21 On 28 January 2016, the Provincial Office confirmed the refusal of the application made by XU's stepfather. That stepfather brought an action against that refusal decision before the Juzgado de lo Contencioso-Administrativo No 1 de Toledo (Administrative Court No 1, Toledo, Spain).

22 That court upheld that action, finding that Article 7 of Royal Decree 240/2007 was not applicable in the present case, since XU's stepfather had never exercised his right of free movement within the European Union.

23 The Provincial Office brought an appeal before the referring court against the judgment given by the Juzgado de lo Contencioso-Administrativo No 1 de Toledo (Administrative Court No 1, Toledo, Spain).

24 The referring court points out that the Tribunal Supremo (Supreme Court, Spain) held, in a judgment of 1 June 2010, that Royal Decree 240/2007 applies to Spanish nationals, whether or not they have exercised their right of free movement within the territory of the European Union, and applies to their family members who are third-country nationals.

25 The referring court asks whether Article 20 TFEU precludes the Spanish practice which requires a Spanish national who has never exercised his or her right of free movement within the European Union and who wishes to obtain a residence permit for a child, who is a third-country national, of his or her spouse, who himself or herself is a third country national and who has sole custody of that child, to provide evidence that he or she has sufficient financial resources for himself or herself and his or her family members so as not to become a burden on the social assistance system, and to provide evidence that he or she has insurance covering health risks. That court states, more specifically, that that systematic requirement, without the possibility of it being adjusted to specific situations, could be contrary to Article 20 if it were to result in that Spanish national having to leave the territory of the European Union.

26 The referring court considers that that could be the case in view of the Spanish legislation applicable to marriage. That court states that the right to life together derives from the minimum content of Article 32 of the Constitution. In addition, Articles 68 and 70 of the Civil Code provide that spouses are required to live together, must be faithful and assist each other and that they are to establish by mutual agreement the place of the matrimonial home. The obligation on spouses to live together under Spanish law differs from a simple decision as to desirability or convenience.

27 According to the referring court, it might not be possible to comply with those obligations if the lawful residence of the minor child of the Spanish citizen's spouse, when they are third-country nationals, depended on economic criteria. A refusal to grant XU a right of residence would require his stepfather to leave the territory of the European Union with his wife, as the only means of complying with the obligation under national law for spouses to live together. In order to reach that conclusion, it would not be necessary for it to be legally possible to compel spouses to live together.

28 Furthermore, the departure of XU and his mother from the territory of the European Union would require not only the mother's husband, but also the minor child, a Spanish national born from their marriage, actually to leave the territory of the European Union as a whole, in order for the parents, in accordance with Articles 110 and 154 of the Civil Code, to be able jointly to exercise their parental responsibility over their child and to fulfil their maintenance obligations.

29 Moreover, the referring court considers that, in any event, Article 20 TFEU is infringed by the Spanish practice of automatically refusing the family reunification of a third-country national with a Spanish national who has never exercised his or her right of freedom of movement, on the sole ground that that Spanish national does not have sufficient resources, without the authorities having examined whether there is a relationship of dependency between that Union citizen and the third-country national of such a nature that, in the event of a refusal to grant that third-country national a derived right of residence, that Union citizen would, in practice, be forced to leave the European Union as a whole.

30 The referring court takes the view that the Provincial Office refused XU a residence card on the sole ground that his mother's spouse did not have sufficient resources, without examining the

particular circumstances of the marriage in question, which show that there has been integration into the labour market and a significant integration in Spain by all the members of the family, in particular XU who has been living in Spanish territory for a long time, where he has received a full education.

31 In those circumstances, the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice, Castilla-La Mancha, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. In the light of Article 68 of the Civil Code which provides that spouses must live together, is the requirement that a Spanish citizen who has not exercised his right of free movement must satisfy the conditions laid down in Article 7(1) of Royal Decree 240/2007, as a necessary condition for a right of residence being granted to the third-country minor child of the third-country spouse, in accordance with Article 7(2) [of that Royal Decree], liable, in the event that those conditions are not satisfied, to constitute an infringement of Article 20 TFEU if, as a result of the refusal to grant that right, the Spanish citizen is compelled to leave the territory of the European Union as a whole?

2. In any event, notwithstanding the foregoing and the answer to the first question, in the light of the case-law of the Court of Justice including, in particular, the judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308), does the practice of the Spanish State of automatically applying the rule laid down in Article 7 of Royal Decree 240/2007, and refusing to grant a residence permit to the third-country national who is the minor child of a Union citizen's third-country spouse, where that Union citizen has never exercised freedom of movement (those spouses in turn having a Spanish child who is a minor who has also never exercised freedom of movement), solely and exclusively on the ground that the Union citizen does not satisfy the conditions laid down in that provision, without having examined specifically and individually whether there exists a relationship of dependency between that Union citizen and the third-country national of such a nature that, for any reason and in the light of the circumstances, it would mean that were the third-country national refused a right of residence, the Union citizen could not be separated from the family member dependent on him and would have to leave the territory of the European Union, infringe Article 20 TFEU in the terms set out above? And is this the case in particular where the Spanish citizen and his third-country spouse are in turn the parents of a Spanish minor who could also have to leave Spanish territory to follow his parents?'

Case C-532/19

32 On 25 September 2015, QP, a Peruvian national, married a Spanish national who has never exercised her right of freedom of movement within the European Union. QP and his wife are parents of a girl, a Spanish national, born on 11 August 2012.

33 On 2 October 2015, QP submitted an application for a residence card as a family member of a Union citizen, attaching, inter alia, his wife's employment contract of indefinite duration and payslips.

34 During the consideration of the file, the Provincial Office noted the existence of QP's three criminal convictions dated 7 September, 25 October and 16 November 2010, the first and third for driving a vehicle without a licence, and the second for drink-driving, and invited him to submit his observations, which he did.

35 On 14 December 2015, QP's application was refused by the Provincial Office on the ground that the conditions laid down by Royal Decree 240/2007 were not satisfied, since QP had a criminal

record in Spain and his wife did not have sufficient financial resources for herself and her family members. Only the income of QP's wife was taken into account by the Provincial Office.

36 On 1 February 2016, the Provincial Office confirmed the refusal of QP's application. QP brought an action against that decision before the Juzgado de lo Contencioso-Administrativo No 2 de Toledo (Administrative Court No 2, Toledo, Spain) which upheld his action.

37 The Provincial Office brought an appeal before the referring court against the judgment of the Juzgado de lo Contencioso-Administrativo No 2 de Toledo (Administrative Court No 2, Toledo, Spain).

38 The referring court states that a refusal to grant a right of residence to QP would force his wife to leave the territory of the European Union because it would be the only way to give effect to the right and obligation to live together laid down by Spanish law.

39 Furthermore, the referring court considers that the Provincial Office refused QP's application on the ground that his wife did not have sufficient resources, without examining the particular circumstances of the marriage in question. The Spanish State relies exclusively and automatically on the insufficient means of subsistence specific to Spanish nationals in order to refuse to grant a third-country national a residence card as a family member of a Union citizen, which, as such, may have to be regarded as a practice contrary to Article 20 TFEU.

40 In those circumstance, the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice, Castilla-La Mancha) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. In the light of Article 68 of the Civil Code which provides that spouses must live together, is the requirement that a Spanish citizen who has not exercised his or her right of free movement must satisfy the conditions laid down in Article 7(1) of Royal Decree 240/2007, as a necessary condition for the grant of a right of residence to his or her third-country spouse under Article 7(2) of that Royal Decree, liable, in the event that those conditions are not satisfied, to constitute an infringement of Article 20 TFEU if, as a result of the refusal to grant that right, the Spanish citizen is compelled to leave the territory of the European Union as a whole?

2. In any event, notwithstanding the foregoing and the answer to the first question, in the light of the case-law of the Court of Justice including, in particular, the judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, [EU:C:2018:308]), does the practice of the Spanish State of automatically applying the rule laid down in Article 7 of Royal Decree 240/2007, and refusing to grant a residence permit to a family member of a Union citizen where that Union citizen has never exercised freedom of movement, on the ground that the Union citizen does not satisfy the conditions laid down in that provision, without having examined specifically and individually whether there exists a relationship of dependency between that Union citizen and the third-country national of such a nature that, for any reason and in the light of the circumstances, it would mean that were the third-country national refused a right of residence, the Union citizen could not be separated from the family member who is dependent on him or her and would have to leave the territory of the European Union, infringe Article 20 TFEU in the terms set out above?'

41 By decision of the President of the Court of 16 April 2020, Cases C-451/19 and C-532/19 were joined for the remainder of the proceedings.

Consideration of the questions referred for a preliminary ruling

The second question in each of Cases C-451/19 and C-532/19

42 By its second question in each of Cases C-451/19 and C-532/19, which it is appropriate to examine first, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as precluding a Member State from refusing an application for family reunification made for the benefit of a third-country national who is a family member of a Union citizen, the latter being a national of that Member State who has never exercised his or her right of freedom of movement, on the sole ground that that Union citizen does not have, for himself or herself and for that family member, sufficient resources so as not to become a burden on the national social assistance system, without there having been an examination of whether there exists, between that Union citizen and that member of his or her family, a relationship of dependency of such a nature that, in the event of a refusal to grant a derived right of residence to that family member, that Union citizen would be forced to leave the territory of the European Union as a whole and would thereby be deprived of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen.

43 In the first place, it should be noted that EU law does not, in principle, apply to an application for family reunification of a third-country national with a member of his or her family who is a national of a Member State and has never exercised the freedom of movement and that, accordingly, it does not, in principle, preclude legislation of a Member State under which such family reunification is subject to a condition of sufficient resources such as that described in the preceding paragraph (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 33).

44 It is, however, appropriate to note, second, that the systematic imposition, without any exception, of such a condition is liable to fail to have regard to the derived right of residence which must be recognised, in very specific situations, under Article 20 TFEU, as being held by a third-country national who is a family member of a Union citizen (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 34).

45 There are very specific situations in which, despite the fact that secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him or her of the genuine enjoyment of the substance of the rights conferred by that status (judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 42 to 44, and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 39).

46 However, a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole (judgments of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 52, and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 40).

47 It follows that a third-country national may claim a derived right of residence under Article 20 TFEU only if, in the absence of the grant of such a right of residence, both the third-country national and the Union citizen, as a family member, would be obliged to leave the territory of the European Union. Accordingly, the grant of such a derived right of residence may be possible only where a third-country national who is a family member of a Union citizen does not satisfy the requirements for obtaining, on the basis of other provisions and, in particular, under the national legislation applicable to family reunification, a right of residence in the Member State of which that citizen is a national (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 41).

48 However, once it has been established that no right of residence, under national law or secondary EU law, may be granted to a third-country national who is a family member of a Union citizen, the consequence of the fact that there is, between that third-country national and that Union citizen, a relationship of dependency such as would result in that Union citizen being obliged to leave the territory of the European Union as a whole, in the event of removal of his or her family member, who is a third-country national, from that territory, is that, in principle, Article 20 TFEU requires the Member State concerned to recognise that that third-country national has a derived right of residence (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 42).

49 In the third place, while it is true that the Court has already accepted that the derived right of residence flowing from Article 20 TFEU is not absolute and that the Member States may refuse to grant it in certain specific circumstances, the fact remains that it has also held that Article 20 TFEU does not allow Member States to introduce an exception to the derived right of residence enshrined in that article which is linked to a requirement that the Union citizen have sufficient resources. To refuse a third-country national who is a family member of a Union citizen a derived right of residence in the territory of the Member State of which that citizen is a national on the sole ground that the latter does not have sufficient resources, even though there is, between that citizen and that third-country national, a relationship of dependency as described in paragraph 46 of the present judgment, would constitute an impairment of the effective enjoyment of the essential rights deriving from the status of Union citizen which would be disproportionate in relation to the objective pursued by such a means test, namely to preserve the public finances of the Member State concerned (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraphs 44 and 46 to 48).

50 It follows that, where there is a relationship of dependency, within the meaning of paragraph 46 of this judgment, between a Union citizen and a third-country national who is a member of his or her family, Article 20 TFEU precludes a Member State from providing for an exception to the derived right of residence which that third-country national has under that article, on the sole ground that that Union citizen does not have sufficient resources (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 49).

51 Accordingly, the obligation imposed on a Union citizen to have sufficient resources for himself or herself and his or her family member who is a third-country national, is such as to undermine the effectiveness of Article 20 TFEU if it results in that citizen having to leave the territory of the European Union as a whole and, by reason of the existence of a relationship of dependency between that national and the Union citizen, the latter is, in fact, obliged to accompany him or her and, consequently, also to leave the territory of the European Union (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 50).

52 Lastly, it must be noted, in the light of the facts in the main proceedings in Case C-532/19, that Article 20 TFEU does not affect the possibility of Member States relying on an exception to the derived right of residence, flowing from that article, linked to upholding the requirements of public policy and safeguarding public security (judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 81, and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 44).

53 However, a refusal of a right of residence based on that ground cannot be based solely on the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment of all the relevant circumstances of the case, in the light of the principle of proportionality, the fundamental rights whose observance the Court ensures and, where appropriate, the best interests of the child of the third-country national concerned (see, to that effect, judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 85, and of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 93). Thus, the competent national authority may take into consideration, inter alia, the gravity of the offences committed and the degree of severity of those convictions, as well as the period between the date on which they are handed down and the date on which that authority gives its decision. Where the relationship of dependency between that third-country national and a Union citizen who is a minor stems from the fact that the former is the parent of the latter, account must also be taken of the age of that child and his or her state of health, as well as his or her family and economic situation (judgments of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 42, and of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 86).

54 In the light of the foregoing considerations, the answer to the second question in each of Cases C-451/19 and C-532/19 is that Article 20 TFEU must be interpreted as precluding a Member State from refusing an application for family reunification made for the benefit of a third-country national who is family member of a Union citizen, the latter being a national of that Member State who has never exercised his or her right of freedom of movement, on the sole ground that that Union citizen does not have, for himself or herself and for that family member, sufficient resources so as not become a burden on the national social assistance system, without there having been an examination of whether there exists, between that Union citizen and that member of his or her family, a relationship of dependency of such a nature that, in the event of a refusal to grant a derived right of residence to that family member, that Union citizen would be forced to leave the territory of the European Union as a whole and would thereby be deprived of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen.

The first question in Case C-532/19

55 By its first question in Case C-532/19, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as meaning that a relationship of dependency capable of justifying the grant of a derived right of residence under that article exists on the sole ground that a national of a Member State who is an adult and has never exercised his or her right of freedom of movement, and his or her spouse, who is an adult and third-country national, are required to live together under the obligations arising from marriage according to the law of the Member State of which the Union citizen is a national and in which the marriage was entered into.

56 In the first place, it must be noted that, unlike minors, particularly if they are infants, an adult is, in principle, able to lead a life independent of the members of his or her family. It follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there

could be no form of separation of the individual concerned from the member of his or her family on whom he or she is dependent (judgments of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 65, and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 56).

57 It also follows from the case-law of the Court that the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his or her family together in EU territory, for the members of his or her family who do not have the nationality of a Member State to be able to reside with him or her in EU territory is not sufficient in itself to support the view that the Union citizen will be forced to leave the European Union if such a right is not granted (judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 68, and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 57).

58 Accordingly, the existence of a family link, whether natural or legal, between the Union citizen and his or her third-country national family member cannot be sufficient ground to justify the grant, under Article 20 TFEU, of a derived right of residence to that family member in the territory of the Member State of which the Union citizen is a national (judgments of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 75, and of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 58).

59 The Court has also held that it is a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which EU law cannot be assumed to disregard in the relations between Member States, that a Member State is precluded from refusing its own nationals the right of entry or residence (judgment of 4 December 1974, *Van Duyn*, 41/74, EU:C:1974:133, paragraph 22). Since it is thus recognised that nationals of a Member State enjoy an unconditional right of residence in the territory of that State, a Member State cannot lawfully require one of its nationals to leave its territory, in order, in particular, to comply with the obligations arising out of his or her marriage, without infringing such a principle of international law (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 60).

60 Accordingly, even if, as the referring court states regarding Spanish law, the rules of a Member State relating to marriage require a national of that Member State and his or her spouse to live together, nonetheless, such an obligation could never legally compel that national to leave the territory of the European Union, even if his or her spouse, who is a third country national, is not granted a residence permit in the territory of that Member State. Having regard to the foregoing, such a legal obligation on the spouses to live together is not in itself sufficient to establish that there is a relationship of dependency such as to require the Union citizen, in the event of removal of his or her spouse from the territory of the European Union, to accompany him or her and, consequently, also to leave the territory of the European Union (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraph 61).

61 In any event, it is apparent from the order for reference that the obligation on spouses to live together under Spanish law is not enforceable by judicial means.

62 That said, it should be noted, in the second place, that it is also apparent from the request for a preliminary ruling in Case C-532/19 that the Union citizen and her spouse, a third-country national,

are the parents of a Spanish national who is a minor and who has never exercised her freedom of movement within the European Union.

63 In accordance with the Court's settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it, by extracting, where appropriate, from the body of material provided by that court, and in particular from the statement of reasons for the order for reference, the elements of EU law which require interpretation in the light of the subject matter of the dispute in the main proceedings (judgment of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraphs 49 and 50 and the case-law cited).

64 It is therefore still necessary to examine whether Article 20 TFEU must be interpreted as meaning that a relationship of dependency capable of justifying the grant of a derived right of residence to a third-country national may exist where that national and his or her spouse, who is a national of a Member State and who has never exercised his or her right of freedom of movement, are the parents of a minor who is a national of the same Member State and who has not exercised his or her right of freedom of movement either.

65 In that regard, it should be noted that the Court has held that factors of relevance, for the purposes of determining whether a refusal to grant a derived right of residence to a third-country national parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him or her by that status, by compelling that child, in practice, to accompany the parent and therefore leave the territory of the European Union as a whole, include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent (judgments of 10 May 2017, *Chavez-Vilchez and Others,* C-133/15, EU:C:2017:354, paragraph 68, and of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 70).

66 More particularly, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine whether that parent is the primary carer of the child and whether there is in fact a relationship of dependency between them. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter, which encompasses the child's right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, as enshrined in Article 24(3) of the Charter (see, to that effect, judgments of 1 July 2010, *Povse*, C-211/10 PPU, EU:C:2010:400, paragraph 64, and of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 71 and the case-law cited).

67 The fact that the other parent, where that parent is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his or her emotional 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 that child's equilibrium (judgments of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 72, and of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 72).

68 Accordingly, the fact that the third-country national parent lives with the minor child who is a Union citizen is one of the relevant factors to be taken into consideration in order to determine whether there is a relationship of dependency between them, but is not a prerequisite (judgment of 8 May 2018, *K. A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 73 and the case-law cited).

69 Furthermore, in view of, inter alia, what has been stated in paragraphs 65 to 67 of the present judgment, where the Union citizen minor lives with both parents on a stable basis and where, therefore, the care of that child and the legal, emotional and financial responsibility in relation to that child are shared on a daily basis by those two parents, there is a rebuttable presumption that there is a relationship of dependency between that Union citizen minor and his or her parent who is a third-country national, irrespective of the fact that, as stated in paragraph 59 of the present judgment, the other parent of that child has, as a national of the Member State in which that family is established, an unconditional right to remain in the territory of that Member State.

70 It follows from all of the foregoing considerations that the answer to the first question in Case C-532/19 is that Article 20 TFEU must be interpreted as meaning, first, that a relationship of dependency capable of justifying the grant of a derived right of residence under that article does not exist on the sole ground that a national of a Member State who is an adult and has never exercised his or her right of freedom of movement, and his or her spouse, who is an adult and a third-country national, are required to live together under the obligations arising from marriage according to the law of the Member State of which the Union citizen is a national and in which the marriage was entered into and, second, that, where the Union citizen is a minor, the assessment of the existence of a relationship of dependency capable of justifying the grant of a derived right of residence under that article to that child's parent, who is a third-country national, must be based on the taking into account, in the child's best interests, of all of the circumstances of the case. Where that parent lives on a stable basis with the other parent, who is a Union citizen, of that minor, there is a rebuttable presumption of such a relationship of dependency.

The first question in Case C-451/19

71 By its first question in Case C-451/19, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as meaning that a relationship of dependency capable of justifying the grant of a derived right of residence under that article to a minor child, who is a third-country national, of the spouse, who himself or herself is a third-country national, of a Union citizen who has never exercised his or her right of freedom of movement exists where that Union citizen and his or her spouse are required to live together under the obligations arising from marriage according to the law of the Member State of which the Union citizen is a national and in which that marriage was entered into.

72 As a preliminary point, it should be noted that, although, since the adoption of the order for reference, XU has become an adult, his possible right to a residence permit under Article 20 TFEU, in any event for the period during which he was still a minor, could have consequences going beyond that grant itself, such as compensation for loss of social benefits, or even, as the case may be, the right to obtain another residence permit on the basis of lawful residence in Spanish territory (see, by analogy, judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675,

paragraph 30). Accordingly, the fact that XU is now an adult cannot be relevant for the purposes of answering the first question in Case C-451/19.

73 Having clarified that point, it is important, in the first place, to note that, in so far as, as stated in paragraph 47 of the present judgment, the derived right of residence which may be granted to a third-country national under Article 20 TFEU is subsidiary in scope, it is for the referring court to examine whether XU was not entitled, under another provision of EU law, to a right of residence in Spanish territory.

74 In order to provide that court with a useful answer, it should be noted, first of all, that, as is apparent from the request for a preliminary ruling, XU is the child of a third-country national who holds a residence permit on Spanish territory and that, on the date on which the application for a residence permit for XU was refused, XU was a minor.

75 In the light of those factors, it is for the referring court to examine whether, on that date, XU was not entitled to a right of residence on Spanish territory under Article 4(1)(c) of Directive 2003/86.

76 Next, it should be noted that, contrary to what the Spanish Government submits before the Court, the mere fact that XU's mother married a Spanish national and that she gave birth to a child of Spanish nationality does not mean that a right of residence could not have had to be granted to XU under Directive 2003/86.

77 As the Advocate General observed in points 100 to 108 of his Opinion, while it is true that Article 3(3) of that directive provides that it does not apply to members of the family of a Union citizen, the fact remains that, in view of the objective pursued by that directive, which is to promote family reunification, and the protection it aims to give to third-country nationals, in particular minors, the application of that directive for the benefit of a third-country national who is a minor cannot be excluded on the sole ground that his or her parent, who is a third-country national, is also the parent of a Union citizen born of the marriage to a national of a Member State (see, by analogy, judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 69).

78 Lastly, it must be stated that, although, as appears to be the case here, no application for family reunification under Directive 2003/86 has been submitted, in the Member State in question, it is still open to the authorities of that Member State, once they have received an application for a third-country national to have a derived right of residence under Article 20 TFEU, to grant that national a residence permit on the basis of that directive, if it appears that that national satisfies the conditions to be entitled to family reunification enshrined by that directive.

79 In the second place, in the event that XU does not hold any residence permit under a provision of secondary EU law or national law, it is necessary to examine whether Article 20 TFEU may permit the grant of a derived right of residence to that third-country national.

80 In that regard, it should be noted that, as has been established in paragraph 70 of the present judgment, the mere fact that, under Spanish law, XU's mother and her spouse are required to live together cannot constitute a relationship of dependency between them for the purposes of Article 20 TFEU. Nor, therefore, can such a circumstance justify XU obtaining a right of residence under that article.

81 That said, XU's mother is also the mother of a Union citizen who is a minor and who has never exercised his right of freedom of movement. In those circumstances, it is still necessary to examine, under Article 20 TFEU, whether, on the date on which the application for a residence permit for XU was refused, his forced departure could, in practice, have required his mother to leave the territory of the European Union as a whole because of the relationship of dependency between them and, if so, whether the departure of XU's mother would also, in practice, have forced her minor child, a Union citizen, to leave the territory of the European Union as a whole because of the relationship between that Union citizen and his mother.

82 From that perspective, it is important to note, first, that, on the date on which the application for a residence permit to XU was refused, it is not impossible that the forced departure of XU from Spanish territory would, in practice, have forced his mother to leave the territory of the European Union as a whole. On that date, XU was still a minor and his mother had sole custody of him, with the result that it cannot be ruled out that there was, on that date, a relationship of dependency between those two third-country nationals.

83 In that regard, where, as in the present case, it is appropriate to examine, exceptionally, whether there is a relationship of dependency between third-country nationals for the purposes of the application of Article 20 TFEU, such an assessment must be carried out by taking into account, *mutatis mutandis*, the criteria set out in paragraphs 65 to 69 of the present judgment, bearing in mind, however, that, where it is a third-country national minor child who is refused a residence permit in the territory of a Member State and who, therefore, is likely to be legally obliged to leave the territory of the European Union as a whole, it is necessary to examine whether his or her parent who is staying with him or her in that Member State would, in practice, by forced to accompany him or her. By analogy with what has been stated in paragraph 67 of the present judgment, the fact that his or her other parent can actually take care of that minor from a legal, financial and emotional perspective, including in his or her country of origin, constitutes, in that regard, a relevant factor, but is not, as such, sufficient to conclude that the parent residing in the territory of that Member State would not, in practice, be forced to leave the territory of the European Union.

84 Second, even if XU's mother had, in practice, been forced to leave the territory of the European Union as a whole in order to accompany XU, such a departure could also have forced her minor child, a Union citizen, to leave that territory. That would have been the case if a relationship of dependency between that citizen and his mother were to have been established on the basis of the criteria set out in paragraphs 65 to 69 of this judgment.

85 Accordingly, on the date on which the application for a residence permit for XU was refused, his forced departure from Spanish territory could, in practice, have forced not only his mother, a third-country national, but also her other child, a Union citizen, to leave the territory of the European Union as a whole. It is, however, for the referring court to ascertain whether that is the case. If that is the case, in order to prevent that Union citizen from being deprived, by his departure, of the enjoyment of the substance of the rights which he derives from his status, a derived right of residence should have been granted to his half-brother, XU, under Article 20 TFEU.

86 In the light of all the foregoing considerations, the answer to the first question in Case C-451/19 is that Article 20 TFEU must be interpreted as meaning that a relationship of dependency capable of justifying the grant of a derived right of residence under that article to a minor child, who is a third-country national, of the spouse, who himself or herself is a third-country national, of a Union citizen who has never exercised his or her right of freedom of movement exists where the marriage between that Union citizen and his or her spouse produces a child who is a Union citizen and who has never exercised his or her right of freedom of movement, and where that child would

be forced to leave the territory of the European Union as a whole if the minor child who is a third-country national were forced to leave the territory of the Member State concerned.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 20 TFEU must be interpreted as precluding a Member State from refusing an application for family reunification made for the benefit of a third-country national who is family member of a Union citizen, the latter being a national of that Member State and who has never exercised his or her right of freedom of movement, on the sole ground that that Union citizen does not have, for himself or herself and for that family member, sufficient resources so as not to become a burden on the national social assistance system, without there having been an examination of whether there exists, between that Union citizen and that member of his or her family, a relationship of dependency of such a nature that, in the event of a refusal to grant a derived right of residence to that family member, that Union citizen would be forced to leave the territory of the European Union as a whole and would thereby be deprived of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen.**

2. **Article 20 TFEU must be interpreted as meaning, first, that a relationship of dependency capable of justifying the grant of a derived right of residence under that article does not exist on the sole ground that a national of a Member State who is an adult and has never exercised his or her right of freedom of movement, and his or her spouse, who is an adult and a third-country national, are required to live together under the obligations arising from marriage according to the law of the Member State of which the Union citizen is a national and in which the marriage was entered into and, second, that, where the Union citizen is a minor, the assessment of the existence of a relationship of dependency capable of justifying the grant of a derived right of residence under that article to that child's parent, who is a third-country national, must be based on the taking into account, in the child's best interests, of all of the circumstances of the case. Where that parent lives on a stable basis with the other parent, who is a Union citizen, of that minor, there is a rebuttable presumption of such a relationship of dependency.**

3. **Article 20 TFEU must be interpreted as meaning that a relationship of dependency capable of justifying the grant of a derived right of residence under that article to a minor child, who is a third-country national, of the spouse, who himself or herself is a third-country national, of a Union citizen who has never exercised his or her right of freedom of movement exists where the marriage between that Union citizen and his or her spouse produces a child who is a Union citizen and who has never exercised his or her right of freedom of movement, and where that child would be forced to leave the territory of the European Union as a whole if the minor child who is a third-country national were forced to leave the territory of the Member State concerned.**

[Signatures]

* Language of the case: Spanish.