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Safeguarding the Rights of minor Union citizens: The right to emergency shelter in light of EU law

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1 Introduction

This expert opinion was written at the request of lawyer Else Weijsenfeld from Breeveld and Weijsenfeld Advocatuur, a law firm specialised in socio-economic rights and children's rights in the Netherlands. She represents an applicant and her minor son in a case brought before the Dutch Supreme Court (*Hoge Raad der Nederlanden*) and the Central Board of Appeal (*Centrale Raad van Beroep*).

1.1 Facts of the case

The applicant is of Moroccan nationality. She has a son aged six who acquired Dutch nationality by birth as he has a Dutch father. As the sole carer of the child, the mother has a derived right of residence in the Netherlands. She and her son arrived on the Dutch territory in 2018 and they have lived between the Netherlands and Morocco until the end of August 2019. On 5 and 9 September 2019, the mother reported to the Central Reporting Centre for Homeless Families of the Amsterdam Municipal Health Service (hereinafter: GGD). In a decision dated 10 September 2019, the municipality of Amsterdam (hereinafter: the municipality) rejected her request, stating she was not eligible for emergency housing under the 2015 Social Support Act (*Wet maatschappelijke ondersteuning 2015*, hereinafter: Wmo). Although she was admitted with her son to emergency shelter on the same day, the provision of emergency shelter was limited to 10 days on two grounds. First, she did not comply with the requirement to have lived two years in the Netherlands with Amsterdam as latest place of residence (the region connection requirement). And secondly, she decided not to make use of a return scheme offered by the municipality that would prolong access to family shelter until the day of departure. Under this scheme, the municipality would organise the return to Morocco by providing airline tickets and assistance.

The case is undergoing two different legal procedures: a civil and administrative one. At the time of publication, the status of both procedures is the following. With regard to the civil procedure, the District Court of the Hague ruled against the applicant in a decision dated 7 October 2019.¹ The applicant then appealed against this decision before the Court of Appeal of the Hague (*Gerechtshof Den Haag*) without success.² The applicant appealed again, and the case is awaiting a decision from the Supreme Court. The Advocate General gave his opinion on 18 December 2020.³

With regard to the administrative procedure, the applicant lodged an objection against the refusal of the municipality to grant her emergency shelter. The District Court (*Rechtbank*) of Amsterdam ruled in favour of the applicant on 8 June 2021.⁴ The municipality of Amsterdam then lodged an appeal before the Central Board of Appeal on 13 July 2021. However, the municipality has decided to withdraw this appeal, as the applicant has since found housing. The applicant has thus also removed their appeal though they have recently started a new procedure requesting damages.

From the onset, it must be stated that there is a housing shortage in the Netherlands. This leads in practice to 'exploding housing prices, rising rents in the private sector and a shortage of social housing'.⁵ It has been acknowledged by the municipality itself that there is an increasing number of families returning from abroad seeking emergency shelter.⁶ It is thus easy to imagine that many

¹ District Court (*Rechtbank*) The Hague, 7 October 2019, ECLI:NLRBDHA:2019:10632.

² Appeal Court (*Gerechtshof*) The Hague 8 November 2019, ECLI:NL:GHDHA:2019:3008.

³ Supreme Court (*Hoge Raad*), Opinion of Procureur Generaal Valk of 18 December 2020, ECLI:NL:PHR:2020:1189.

⁴ District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978.

⁵ Nicole Ogden, 'Enough Is Enough: Thousands of Protestors in Amsterdam March against the Housing Crisis' (*Dutch Review*, 13 September 2021) <<https://dutchreview.com/news/protestors-in-amsterdam-march-against-housing-crisis/>> accessed 22 December 2021.

⁶ District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978, para 5.2.1.

homeless families could be confronted with the same situation in the Netherlands and in other Member States as the one in which the applicants find themselves.⁷

While the case focuses on a national policy and local practices, the status of the child as a Dutch citizen – and by extension, a Union citizen – also raises complex issues of EU and international law. Indeed, Article 20 of the Treaty of the Functioning of the European Union (hereinafter: TFEU) grants Union citizenship to all nationals of a Member State. Amongst other rights, Article 20(2)(a) TFEU protects the right to free movement within the territory of the EU, a right also enshrined in Article 21(1) TFEU.

The Court of Justice of the EU (hereinafter: CJEU) has continuously ruled that this provision may require Member States to grant a residence permit to third-country national (hereinafter: TCN) parents of minor Union citizens when it is found that they are dependent upon them, as this may otherwise force the Union citizen child to leave the territory of the EU. This would pose an obstacle to the genuine enjoyment of EU rights such as those outlined in Article 20 TFEU.⁸

Meanwhile, the CJEU has interpreted Article 21 TFEU as precluding national measures that may discourage free movement to other EU Member States.⁹ The requirement entailing that applicants need to have lived in the municipality of Amsterdam for at least two years before being eligible for emergency shelter, conflicts with key rulings of the CJEU insofar as it discourages Union citizens living in Amsterdam from leaving the city for another EU Member State. Moreover, it prevents or discourages TCN parents and their Union citizen children to move to the Netherlands. Thus, beyond national social policy, this case also has implications for EU law.

The present expert opinion will therefore discuss the implications of the present case in light of EU law, with particular attention paid to the right to freedom of movement, non-discrimination and the rights of the child. The scope of the decisions will thus extend beyond the specific situation of the applicants and can also be used as a reference on how to interpret relevant European Union law. This research therefore does not provide an all-encompassing approach of the case but rather aims to address the most fundamental questions in light of EU law.

1.2 Research questions

In line with the legal questions discussed in this introduction, this expert opinion will answer the following questions:

1. Is the municipality of Amsterdam acting in line with Article 20 TFEU by refusing to provide emergency shelter to a TCN mother and her minor Dutch child?
2. Is the municipality of Amsterdam acting in line with Article 21 TFEU by requiring applicants to have lived in the municipality of Amsterdam for at least two years before being eligible for emergency shelter?

⁷ On the issue of destitution and compulsion to leave the EU territory have been discussed, see I. Solanke, 'On the Frontline: Residency Rights and non-EU Parents of British Citizens' (*Discover Society*, 6 June 2017) <<https://archive.discoverociety.org/2017/06/06/on-the-frontline-residency-rights-and-non-eu-parents-of-british-citizens/>> accessed 17 January 2022.

⁸ CJEU Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124; CJEU Case C-133/15 *Chavez-Vilchez* [2017] ECLI:EU:C:2017:354.

⁹ CJEU Joined Cases C-197/11 and C-203/11 *Eric Libert and Others* [2013] ECLI:EU:C:2013:288C-197/11.

1.3 Methodology

To answer these research questions, this expert opinion adopted a legal normative approach and drew on relevant Dutch law and policy, primary and secondary EU law and subsequent case law. Given its influence on EU law and CJEU case law, it also considers international law, focusing on the European Social Charter and the Convention on the Rights of the Child in particular. The expert opinion is further supported by relevant secondary literature in the field of anti-discrimination law, children's rights and EU social rights.

1.4 Structure

This expert opinion will proceed as follows. Chapter 2 examines whether the municipality of Amsterdam acted in line with Article 20 TFEU by refusing to provide emergency shelter to a TCN mother and her minor Dutch child. We first argue that the refusal to provide emergency shelter to a TCN parent and their Union citizen child should be considered a restriction of the Union citizen's rights guaranteed in Article 20 TFEU. In this context, the argument of the municipality that the TCN mother and her child can temporarily return to Morocco to arrange shelter from there is not relevant. Any (indirect) forced return to the country of origin of the TCN parent of a Union citizen child, which results from the refusal of emergency shelter, regardless of the duration, must be justified on grounds of public policy or public security. Such grounds have not been mentioned by the municipality. The chapter also argues that even though parents are primarily responsible for the living conditions of their child, States have an obligation under international law to provide shelter to homeless children. In this light, the fact that the parent is self-reliant is irrelevant, if the refusal of emergency shelter in practice leads to homelessness.

Chapter 3 demonstrates that the requirement that applicants need to have lived in the municipality of Amsterdam for at least two years before being eligible for emergency shelter, set out by the municipality is in itself infringing free movement rights protected by Article 21 TFEU. By imposing this requirement, the municipality restricts the freedom of movement of national *and* Union citizens. This restriction is not based on the law and is not sufficiently justified by overriding reasons related to the public interest.

2 The indirect forced return to a third country: An infringement of the genuine enjoyment of the substance of EU rights under Article 20 TFEU

2.1 Introduction

This section will discuss the right to emergency shelter for a minor Union citizen with a TCN mother within the framework of Article 20 TFEU. It will be shown that the child cannot reasonably be expected to leave the EU, since even a temporary and indirect forced return to a third country will necessarily lead to a violation of the genuine enjoyment of the substance of his rights as a Union citizen (as understood by Article 20 TFEU) read in light of the EU Charter of Fundamental Rights (hereinafter: CFR). To avoid this situation, the municipality of Amsterdam should have granted the family access to emergency shelter.

This section will first outline the scope of the rights enshrined in Article 20 TFEU, showing that as a Union citizen, the applicant's child has rights conferred directly by EU law. It then argues that any national measures which impede the genuine enjoyment of these EU rights will necessarily be contrary to Article 20 TFEU, in line with the case law of the Court, and *Chavez-Vilchez* particularly. Then, it tests whether the situation at hand, namely a forced indirect return, would constitute such a national measure that is prohibited by Article 20 TFEU. Finally, it addresses the argument of the municipality regarding the responsibility of the mother by showing that this consideration is irrelevant in the present case.

2.2 The right to move and reside on EU territory under Article 20 TFEU

Article 20 TFEU states the following:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
 - a) the right to move and reside freely within the territory of the Member States;
[...]These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 20(1) TFEU establishes a right to Union citizenship. Every person holding the nationality of a Member State is considered to also be a citizen of the Union, and all Union citizens derive various rights from this status under Article 20(2). Paramount among the rights conferred by the status of citizenship is 'the right to move and reside freely within the territory of the Member States' under the conditions set out in the TFEU as well as other secondary legislation.

The CJEU has ruled as early as 2005 that the age of the child does not matter in order to be considered a citizen of the Union under Article 20(1) TFEU.¹⁰ The fact that the child in the present case is only six years old does not preclude him from being entitled to rights conferred by his Union citizenship, automatically acquired as a Dutch national. The EU is thus considered the 'right place' for Union citizens – as members of the EU's political community they have a right to access and stay on its territory.¹¹

¹⁰ CJEU Case C-200/02 *Zhu and Chen* [2004] ECLI:EU:C:2004:639, paras 25-26.

¹¹ S. Coutts, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights' (2019) 21 *Cambridge Yearbook of European Legal Studies*, p 336.

Although the child has not made use of his free movement rights within the EU in what is traditionally referred to as a 'purely internal situation', EU law is nonetheless applicable. The CJEU has ruled that the status of Union citizenship is an autonomous and independent source of rights, and is not affected by any other element than being a national of a Member State.¹² In certain situations, Union citizens would therefore be able to claim the rights connected to their status as Union citizen even in the absence of a cross-border link to EU law.¹³ Thus, the child is entitled to rights under EU law that are granted to him by reason of his Dutch nationality. As such, EU law directly confers him a number of rights.

2.3 Article 20 TFEU precludes national measures impeding genuine enjoyment of EU rights

The CJEU has further defined the applicability of Article 20 TFEU in its case law. In *Zambrano*, the CJEU held that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.¹⁴ It held that a refusal to grant a right of residence and a work permit to a TCN parent with dependent minor EU citizen children has this effect, because the children would have to leave the territory of the Union with their parents.¹⁵

The municipality of Amsterdam argues in its grounds of appeal that the *Zambrano* reasoning is not applicable to the current case. It states that the CJEU merely held that the refusal to grant a residence and work permit to a TCN parent with a dependent minor EU citizen child is contrary to Article 20 TFEU because this refusal would render the minor Union citizen unable to genuinely enjoy the rights conferred under his Union citizenship.¹⁶ The mother who applied for emergency shelter already had a valid residence permit. The municipality argues that the *Zambrano* judgment and the scope of Article 20 TFEU cannot be extended to emergency shelter.

This interpretation of *Zambrano* by the municipality is arguably too narrow. The judgment does not only concern the right to a residence and work permit, but also has unmistakable implications for other rights necessary for the genuine enjoyment of Union citizenship. This is demonstrated by the way the CJEU summarised *Zambrano* in *Chavez-Vilchez*:

'The Court has held that Article 20 TFEU *precludes national measures*, including decisions refusing a right of residence to the family members 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.'¹⁷

It follows from this quote that Article 20 TFEU precludes any national measures, *including but not limited to* the refusal to provide a residence permit and a work permit, which have the effect of depriving Union citizens of the genuine enjoyment of their citizenship.

Furthermore, the municipality argues that from *Chavez-Vilchez*, it merely follows that a TCN parent with a dependent minor EU citizen child has a derived right to residence and a right to social

¹² CJEU Case C-135/08 *Janko Rottman* [2010] ECLI:EU:C:2010:104, para 56.

¹³ Described in academia as an 'extra-route for EU citizens' to claim their Union citizenship rights even when they did not have a cross-border link to EU law.' See H. van Eijken, 'Connecting the Dot Backwards, what Did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?' (2021) 23 *European Journal of Migration and Law*, p. 50.

¹⁴ CJEU Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, para 42.

¹⁵ CJEU Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, paras 43-44.

¹⁶ Letter concerning the municipality of Amsterdam's appeal grounds to the Centrale Raad van Beroep (23 August 2021), para 39.

¹⁷ CJEU Case C-133/15 *Chavez-Vilchez* [2017] ECLI:EU:C:2017:354, para 61. Emphasis is our own.

assistance connected to it.¹⁸ The municipality notes in that regard that the mother in the current case already has a right to residence and social assistance. It concludes that the case does not constitute an obligation of the State to provide emergency shelter to prevent a temporary return to the third country.¹⁹

The applicants argue that it follows from *Zambrano* and *Chavez-Vilchez* that social assistance, which guarantees a dignified existence such as emergency shelter, should be accessible for a minor Union citizen and their TCN parent on which they are dependent, because otherwise they would not be able to stay in the Union. The Advocate General of the Dutch Supreme Court argues in his opinion that this interpretation of *Chavez-Vilchez* is too broad,²⁰ stating that the only precedent set by this case is a right to residence for the TCN parent. In his view, the right to emergency shelter exceeds the right to residence and does not follow directly or indirectly from the *Chavez-Vilchez* judgment.

In *Chavez-Vilchez*, the Central Board of Appeal asked the CJEU whether it would be contrary to EU law to refuse a right of residence to the TCN parents who are responsible for the day-to-day and primary care of children with Union citizenship. It is therefore true that *Chavez-Vilchez* was primarily about the right of residence from the perspective of the referring court. However, the right of residence was important for determining a ‘connected’ right to social assistance and child benefit in accordance with the linking principle (the so-called *koppelingsbeginsel*). It is equally true that the Court did not limit itself to an assessment of a formal right of residence, but repeated its earlier case law in a way that placed emphasis on the fact that Article 20 TFEU precludes all national measures, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status.²¹ The key consideration by the Court, once again, was to assess whether the national measure at issue would compel the children involved to leave the Union and would thereby be deprived of their Union citizen rights.²²

An example of a case where the Court of Justice assessed a national practice rather than the granting of a formal right of residence is A.K. Put succinctly, Belgium did not grant a derived right of residence because the TCN parents were subject to a re-entry ban and, in the view of the competent Belgian authority, should first leave the Belgian territory in order to apply for the removal or suspension of the entry ban from abroad.²³ The Court concluded that the objective of Article 20 TFEU would be defeated if the TCN parent (and hence a dependent child with Union citizenship) were compelled to leave, ‘for an indefinite period’, the EU territory in order to obtain a withdrawal or suspension of the re-entry ban.²⁴

The current state of law is therefore well summarised in the opinion of Advocate General Pikamaä in the context of the judgment *Subdelegación del Gobierno en Ciudad Real*:

under Article 20(1), the Court *rejects any national measure*, including a decision refusing the right of residence to family members of a Union citizen, which has the effect of undermining that citizen’s freedom of movement and residence and depriving him or her of the “genuine enjoyment of the substance of the rights conferred by virtue of his/her status.”²⁵

¹⁸ Letter concerning the municipality of Amsterdam’s appeal grounds to the Centrale Raad van Beroep (23 August 2021), para 40.

¹⁹ From a Dutch legal perspective this is a curious claim, as the linking principle (*koppelingsbeginsel*) that was fundamentally at issue in *Chavez-Vilchez* also seems to apply to Wmo facilities by means of article 1.2.2 Wet Maatschappelijke Ondersteuning.

²⁰ Supreme Court (*Hoge Raad*), Opinion of Procureur Generaal Valk of 18 December 2020, ECLI:NL:PHR:2020:1189, para 3.29.

²¹ CJEU Case C-133/15 *Chavez-Vilchez* [2017] ECLI:EU:C:2017:354, para 61.

²² CJEU Case C-133/15 *Chavez-Vilchez* [2017] ECLI:EU:C:2017:354, para 70.

²³ CJEU Case C-82/16, *K.A. and Others* [2018], ECLI:EU:C:2018:308, para. 27.

²⁴ *Ibid*, para. 58.

²⁵ CJEU Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* [2019] ECLI:EU:C:2019:1004 Opinion of AG Pikamaä of 21 November 2019, para 50.

To summarise, the CJEU has repeatedly interpreted Article 20 TFEU as precluding any national measure which may undermine the rights granted by virtue of Union citizenship. The next section argues that the refusal of emergency shelter constitutes such a measure, because it undermines a minor Union citizen's genuine enjoyment of EU rights.

2.4 The indirect forced temporary return: leaving the EU territory as the only outcome

Given the standing case law of the CJEU, it must now be determined whether the denial of emergency shelter qualifies as a national measure which deprives the applicants of the 'genuine enjoyment of the substance of the rights' granted by Union citizenship.

First, it should be noted that the municipality offered a return scheme to the TCN mother and her Union citizen child in the case at hand. Under this scheme, the municipality would organise the return to Morocco by providing airline tickets and assistance. While the municipality argues that access to emergency shelter by families coming to Amsterdam from abroad is not conditional upon the acceptance of this return scheme, it should be emphasised that participation in this scheme would have prolonged access to family shelter until the day of departure. For the family at issue, (prolonged) access to the shelter was therefore conditional upon the return scheme. Instead, the municipality maintains that access to emergency shelter was refused on the basis of the requirement that applicants have lived in the municipality of Amsterdam for at least two years. This region connection (region connection) requirement will be discussed in chapter 3 of this expert opinion.

The municipality argues that it merely offers the return scheme as an additional service to families in order to enable them to return temporarily (in order to prepare for a return to the Netherlands) or indefinitely.²⁶ However, the municipality acknowledges that the effect of a refusal of emergency shelter may result in a (temporary) return of the minor Union citizen and their TCN parent to the country of origin of the parent.²⁷ In fact, the municipality encourages this in order for the TCN parent(s) to prepare for their return to the Netherlands by arranging housing, schooling and sufficient resources in advance. The rationale behind this position seems to be the following: by making these preparations from abroad, the applicants will not constitute a burden on overcrowded emergency structures and will not face homelessness.

In practice, the refusal of emergency shelter implies that the TCN parent and their Union citizen child are forced to rely on acquaintances to find a place to sleep and are constantly under the threat of having to sleep on the streets. This causes distress for both parent and child, as they face continuous uncertainty regarding where they are going to spend the night. This precariousness disrupts the possibility for the child to regularly attend school, impedes the mother's perspectives to find a job and greatly impacts their social lives. Given that homelessness is obviously not a sustainable solution, the return to the country of origin of the TCN parent becomes the only possible outcome in practice due to the absence of shelter. While the Dutch authorities have not taken any explicit measures to impose the return, the refusal of shelter (whether based on a return condition or not) nevertheless leads to an indirect forced return.

The argument that the return would only be of a temporary nature and would therefore not constitute a restriction of Article 20 TFEU cannot be accepted. As soon as the child is outside EU territory, he can no longer effectively enjoy any rights granted by virtue of Union citizenship. There is no evidence that the CJEU would permit such a temporary forced return, as the only relevant factor in the case law seems to have been the question whether a Union citizen would be compelled to leave the territory of the European Union as a whole. In fact, the abovementioned *A.K. and others* judgment rather points at the other direction. Here, the CJEU considered it completely irrelevant for how long the TCN parent would have to leave the territory of the Union in order to apply for a withdrawal or

²⁶ Letter concerning the municipality of Amsterdam's appeal grounds to the Centrale Raad van Beroep (23 August 2021), paras 28 and 29.

²⁷ *Ibid.*

suspension of the re-entry ban. The mere fact that this period was ‘indefinite’ (*‘onbepaald’*) in nature would, according to the Court, already undermine the effectiveness of Article 20 TFEU as this might compel the dependent Union citizen to leave the EU territory ‘in practice’.²⁸ In the case at issue in this expert opinion, we can also speak of such an indefinite period. After all, the exact time period for the ‘temporary’ return remains undefined and nothing prevents this ‘temporary’ return from eventually becoming a permanent one. In particular, where the standards of living between the Netherlands and the country of origin of the TCN parent differ, preparations to return to the Netherlands may be lengthy and uncertain.²⁹

Restriction of Article 20 TFEU

The refusal of emergency shelter should thus be considered a restriction of the rights of Union citizens guaranteed by Article 20 TFEU.³⁰ The CJEU held that restrictions of the derived right of residence of TCN parents of minor Union citizens may be justified on grounds of public policy or public security. These notions should be interpreted strictly such that ‘their scope cannot be determined unilaterally by the Member States.’³¹ Moreover, such restrictions must comply with the principle of proportionality and take account of the ‘child’s best interests and of the fundamental rights whose observance the Court ensures’.³²

In the case concerned in this expert opinion, neither reasons of public policy or public security have been invoked by the Dutch authorities in this case to justify a restriction of the right under Article 20 TFEU. Even if it could be argued that the municipality of Amsterdam based its decision to refuse emergency shelter on these grounds, it would be unlikely that applicants’ behaviour amounts to either a threat to public policy or a threat to public security. Their behaviour, if culpable at all, stays far from meeting the required thresholds of being a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ or a threat to the internal or external security of the Dutch state.³³

Various parties in the conflict seem to uphold the view that restrictions on other grounds are permissible, especially when they are of a temporary nature. To support his statement that a temporary return is not precluded by Article 20 TFEU, the Advocate General of the Dutch Supreme Court submits that a temporary return would not render the enjoyment of Union citizen rights ‘impossible or extremely difficult’.³⁴ However, this so-called ‘effectiveness test’ relied upon by the Advocate General is derived from the classic *Rewe* judgment³⁵ and is, as such, clearly not applicable to the current situation. The 1976 *Rewe* case, dealing with customs duties, concerns questions around the doctrine of *national procedural autonomy*, i.e. the extent to which national *legal procedures* are sufficient to enable individuals to invoke their European rights. In *Rewe* this concerned the expiring of time limits to actions at law. The condition that national *procedures* and remedies should not make it ‘practically impossible or excessively difficult’ to rely on European rights cannot be equated with the situation of the case at hand, which concerns the scope of the *substantive rights* that can be derived from Union citizenship, namely the right not to be forced to leave the EU territory as a Union citizen. The CJEU clearly explains this point in *K.A. and others*:

while it is indeed for the Member States to determine the rules on how to give effect to the derived right of residence which a third-country national must [...] be granted under Article 20

²⁸ CJEU Case C-82/16, *K.A. and Others* [2018], ECLI:EU:C:2018:308, para. 58.

²⁹ See also District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978, para 5.5.5.

³⁰ This is also reflected in Art 45 of the Charter.

³¹ CJEU Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] ECLI:EU:C:2016:675, para 82.

³² Art 52(1) CFR, CJEU Case C-165/14 *Alfredo Rendón Marín* [2016] ECLI:EU:C:2016:675, para 85.

³³ *Ibid*, para. 83.

³⁴ Supreme Court (*Hoge Raad*), Opinion of Procureur Generaal Valk of 18 December 2020, ECLI:NL:PHR:2020:1189, para 3.32.

³⁵ CJEU Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG* [1976] ECLI:EU:C:1976:188.

TFEU, the fact remains that those procedural rules cannot, however, undermine the effectiveness of Article 20.³⁶

Conclusion

To conclude, the decision by the municipality not to provide emergency shelter results in the Union citizen child having to leave the EU. It has the effect of depriving the child of the genuine enjoyment of his citizenship rights under EU law. The arguments related to the supposed 'temporary' nature of the return are irrelevant. It is clear that the child cannot make use of his rights under that article as they are rendered useless outside of the EU. The refusal of emergency shelter thus constitutes a restriction of the Union citizens' rights guaranteed by Article 20 TFEU. Such a restriction must be justified by a general interest recognised by the Union or the need to protect the rights and freedoms of others and be proportionate. The municipality has not substantiated on which ground the refusal of emergency shelter resulting in the restriction of the rights contained in Article 20 TFEU is based, or that such a restriction is proportionate. Therefore, the refusal to provide emergency shelter is precluded by Article 20 TFEU.

2.5 The positive obligation of the State to provide shelter to homeless children

The municipality of Amsterdam and the Advocate General of the Dutch Supreme Court argue that the primary responsibility for a child's well-being lies with its parent(s), rather than the State. They contend in the case at hand that homelessness is attributable to the TCN mother who refused to accept a return ticket to Morocco and thereby deprived her child of housing.

The previous sections made clear, however, that the legal debates around the supposed primary responsibility and self-reliance of the mother are irrelevant for the assessment whether the municipality of Amsterdam acted in conformity with Article 20 TFEU by denying applicants access to emergency shelter.³⁷ Even though the responsibility of the TCN parent is not relevant in the context of the assessment of whether a national measure will force a Union citizen child to leave the EU, we will nevertheless pay attention to this topic in this section. We will argue that, even though the TCN parent is primarily responsible for the living conditions of the Union citizen child, the State has an obligation under international law to provide children with shelter.

Responsibility of parents and of the State

The UN Convention on the Rights of the Child (hereinafter: UNCRC) suggests that the responsibility of parents for their children's living conditions, does not relieve states from their positive obligations to provide conditions of living necessary for the child's development. Indeed, under Article 27(2) UNCRC, the primary responsibility to secure the conditions that are necessary for the child's development lies with the parent(s). Crucial however, is that State Parties shall take appropriate measures to ensure the necessary living conditions, since the aforementioned parental responsibility exists only within the financial capacities of the parent.³⁸ Article 27(3) UNCRC states:

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

³⁶ CJEU Case C-82/16, *K.A. and Others* [2018], ECLI:EU:C:2018:308, para. 54.

³⁷ The concept of responsibility only plays a role in the Court's reasoning in *Chavez-Vilchez* when it provides the referring national court with guidelines on how to find out who of the parents is responsible for the day-to-day care of the child, CJEU Case C-133/15 *Chavez-Vilchez* [2017] ECLI:EU:C:2017:354, especially para. 71.

³⁸ Art 27(2) UNCRC.

The Children's Ombudsman for the Metropole of Amsterdam and Defence for Children have worked on a legal framework and policy recommendations – commissioned by the municipality itself – to improve children's rights in Amsterdam.³⁹ The 'Child's rights framework for the child's rights scan Amsterdam' (hereinafter: the framework) emphasised the child's right for an adequate standard of living and the obligations of municipalities in this respect. It explicitly highlighted that material assistance shall be offered, by the municipality, to homeless children as well as their priority in obtaining food, accessible medical care, education and a safe living space.⁴⁰ When parents cannot ensure an adequate standard of living for their child in accordance with the UNCRC, States have the duty to support families by offering material assistance such as food, clothes and housing. The framework expressly stated that Article 27(3) UNCRC does not leave a margin of appreciation for States in this regard. The aforementioned entitlements of children and their parents do not only follow from Article 27 of the UNCRC, but also Article 11 of the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR) as well as Articles 17 and 31 of the European Social Charter (hereinafter: ESC).⁴¹

In this context, it is relevant to note, that the European Committee of Social Rights (hereinafter: ECSR) already condemned the Dutch emergency shelter system for failing to provide sufficient shelters for women and women with children under *inter alia* Articles 13(1) ESC.⁴² This provision highlights the commitment of state parties to 'ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance'. In *FEANTSA v the Netherlands*, the ECSR, finds there to be an obligation to provide emergency shelter: 'States Parties have undertaken, under Article 13(1) of the Charter, to accord assistance to persons in need as of right' and 'are not merely empowered to grant assistance as they think fit, but are *under an obligation*, which they may be called on in court to honour'.⁴³ This reasoning is applicable to the present case since the ECSR, in establishing the international legal framework, clearly mentions Article 34(3) CFR, which provides the 'right to social and housing assistance so as to ensure a decent existence'.⁴⁴

It is also worth noting that the ECSR concluded in the aforementioned case that 'pursuant to Article 13(4) ESC, no conditions on the length of presence on the territory of the state party in question can be set on the right to emergency assistance and those concerned must be provided with assistance to cope with an immediate state of need'.⁴⁵ This will be the focus of the next chapter related to indirect discrimination in the context of EU law.

Self-reliance of the parent

The next question is whether the case at hand and its factual circumstances necessitate the government to take appropriate measures in protecting the rights and interests of the child. It is undisputed between both parties that the refusal of emergency shelter renders the mother and her son in a situation of homelessness. However, the question is whether the municipality could refuse emergency shelter because the TCN mother could be considered self-reliant.

The threshold that 'activates' the State's obligations to offer (material) assistance cannot be interpreted as being passed, only if parents are labelled as not self-reliant. In fact, and rather paradoxically, the municipality explicitly stated that it also accepts families considered to be self-reliant, for emergency shelter facilities. The moment a parent *de facto* cannot offer their child an adequate standard of living, including safe housing, the State must take appropriate measures and

³⁹ Kinderrechtencollectief and Defence for Children, '*Kinderrechtenkader voor kinderrechtsscan Amsterdam*' (2020).

⁴⁰ *Ibid*, p 23.

⁴¹ *Ibid*, p 24.

⁴² ECSR, 10 November 2014, No 86/2012, *FEANTSA v the Netherlands* Complaint.

⁴³ *Ibid*, para 169.

⁴⁴ *Ibid*, para 35.

⁴⁵ *Ibid*, para 171.

assume its (secondary) responsibility. Since the refusal of emergency shelter inevitably led to homelessness for the mother and her son, despite the right to alternative financial social assistance, the State disregarded its responsibility to protect the rights of the child and failed to act in his best interest as is required by Article 3 UNCRC.

As a final note, it can be reiterated that according to Dutch law, the condition of self-reliance (*zelfredzaamheid*) cannot be applied to the provision of *emergency* shelter as the provision of emergency shelter is a general provision (*algemene voorziening*) under the Wmo.⁴⁶ General provisions need to be accessible without prior investigation to the needs, personal characteristics and possibilities of its users.⁴⁷ Importantly, this was confirmed by the Amsterdam District Court in its judgment of 8 June 2021.⁴⁸

2.6 Sub-conclusion

As a Union citizen, the minor Dutch child should be able to genuinely enjoy the substance of the rights conferred by Article 20 TFEU. The genuine enjoyment of those rights would be deprived when the child is forced to leave the territory of the EU. This section mainly focussed on clarifying that *any* national measure (including but not limited to a refusal of residence permits, work permits, social assistance and child benefits), which has this effect is precluded by Article 20 TFEU.

Section 2.4 outlined why the decision not to grant emergency shelter would result in an indirect forced return to Morocco. The question whether the Amsterdam municipality made access to the emergency shelter conditional upon the applicants returning to Morocco is not relevant in this respect. Moreover, there is no evidence in EU case law to support the idea, as seems to have been accepted by the Dutch Appeal Court,⁴⁹ that a ‘temporary’ forced return to the TCN parent’s country of origin would be permissible under Article 20 TFEU. Again, any national measure that has the effect of compelling a child with Union citizenship to *leave* the EU territory is precluded by Article 20 TFEU.

Finally, section 2.5 argued that this is true regardless of the responsibility of the parent, which is not relevant to this assessment. It addressed the argument of the municipality that the TCN parent is primarily responsible for ensuring adequate living conditions for their child and that in the case at hand the mother was able to do so. First, it was demonstrated that international law requires the State to take appropriate measures to assist parents to ensure adequate living standards for their child and to provide material assistance in case of need. Secondly, it was argued that in the case at hand the municipality could not refuse emergency shelter because the mother was self-reliant, since it was clear that such refusal would lead to homelessness of her and child.

⁴⁶ *Kamerstukken II 2013/14 33841, nr 64 and Nadere regels maatschappelijke ondersteuning Amsterdam* (‘Additional rules for social support Amsterdam 2021’ (2021) p 12.

⁴⁷ *Kamerstukken II 2013/14 33841, nr 64.*

⁴⁸ District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978, para 5.1.1.

⁴⁹ Appeal Court The Hague 8 November 2019, ECLI:NL:GHDHA:2019:3008, para. 14.

3 The region connection requirement for accessing shelter: the infringement of free movement rights under Article 21 TFEU

3.1 Introduction

In the present case, the applicant was refused access to emergency shelter on the basis of several conditions set out by the municipality of Amsterdam. Indeed, since the implementation of the Wmo, municipalities have gained the competence to implement measures for social care and support in the Netherlands. Derived from this legal framework,⁵⁰ the municipality of Amsterdam has set out minimum conditions for access to emergency shelter, one of which is the region connection requirement, which entails that applicants need to have lived in the municipality of Amsterdam for at least two years before being eligible for emergency shelter.⁵¹ This requirement is also referred to as region connection.

This section will first discuss the history and objectives of the region connection requirement and its legal basis. This is followed by a description of the rights set out in Article 21 TFEU and the obligations derived from relevant CJEU case law. It will be demonstrated that the region connection criteria is not in conformity with the principle of free movement under EU law.

3.2 Definition of the region connection requirement

The region connection requirement is a condition set by the municipality of Amsterdam in order to access emergency shelter. The municipality derives this competence from the Wmo,⁵² which forms the basis of the system of social care and support in the Netherlands.⁵³ The Wmo seeks to align social support more closely to the needs that exist in people's everyday lives and increase citizen participation.⁵⁴ It is posited that municipalities are most suited to pursue these objectives, since this is where people will receive care if needed.⁵⁵ With this in mind, the Dutch government assigns greater responsibilities and tasks to municipalities than prior to the implementation of the Wmo.⁵⁶

Under the Wmo, municipalities have primary responsibility for the provision of social support.⁵⁷ As argued above, excluding persons from general provisions (such as emergency shelter) is not possible.⁵⁸ Access to emergency shelter in Amsterdam is subject to the requirements stipulated in the 'Additional rules', according to which persons are eligible for emergency shelter if the following conditions are met:

- they have lived in the Netherlands for the last two years, Amsterdam being the most recent place of residence;
- they have registered with *Woningnet*⁵⁹ and renewed their registration on time;
- they respond to *Woningnet* weekly;

⁵⁰ District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978, para 5.1.1.

⁵¹ While the applicant is also said to be 'self-reliant', this is criterion is not applicable to emergency shelter, therefore this will be left outside the scope of the analysis.

⁵² District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978, paras 2.2.1, 5.1.1.

⁵³ *Kamerstukken II* 2004/05 30131, nr 3, p 7.

⁵⁴ Marianne Potting, 'Changing Social Responsibilities: The Role of Advocacy Organisations in the Construction of the Social Support Act in the Netherlands' (2009) 12 *European Journal of Social Work*, p 169.

⁵⁵ *Ibid.*, p. 169.

⁵⁶ *Ibid.*, p. 171.

⁵⁷ Art 2.1.1 Wmo (2015).

⁵⁸ *Kamerstukken* 20113/4 33841, nr 64.

⁵⁹ *Woningnet* is website on which one can search for social housing offered by the housing corporations in the Amsterdam region.

- they are prepared to move to a municipality outside of Amsterdam;
- they accept the offered house after signing the agreement for mediation to suitable housing.⁶⁰

In the present case, the applicant has been refused emergency shelter in Amsterdam because she had not fulfilled the first requirement, i.e. she had not stayed in the Netherlands for at least 24 months with Amsterdam being the most recent place of residence.⁶¹ It must be noted that the municipality has recently tightened its region connection policy. Currently, emergency shelter is only available to those who have resided and have been registered in *Amsterdam* for at least *four* years.⁶²

There are various reasons why municipalities introduce region connection as a requirement for (emergency) shelter. These reasons are of a care-related, organisational or financial nature.⁶³ Since 2010, municipalities have been financing social housing solely from their own resources.⁶⁴ One of the objectives of region connection is to prevent municipalities from having to provide shelter to homeless people from other municipalities and countries,⁶⁵ something that the District Court of Amsterdam has explicitly recognised as one of the objectives of region connection for emergency shelter.⁶⁶ Research by the *Trimbos Instituut* shows that municipalities have chosen to restrict emergency shelter to their citizens in the region in the first place, as this would significantly reduce the costs of social care.⁶⁷

However, the region connection may have consequences for the right to freedom of movement of Union citizens. The rationale for conditioning access to emergency shelter upon the fulfilment of a two-year (or four-year) region connection should therefore be read in light of the provision safeguarding freedom of movement in EU law.

3.3 Article 21 TFEU and its scope of application

Article 21 TFEU provides:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

Article 21 TFEU prohibits national measures which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement within the European Union. Such measures, even if they apply without regard to the nationality of the individuals concerned, constitute restrictions on the fundamental freedoms guaranteed by Article 21 TFEU.⁶⁸ In *Kraus*, the CJEU held that measures ‘liable to hamper or to render less attractive the exercise by [EU] nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty’ also came within the scope of Community law’.⁶⁹

⁶⁰ *Nadere regels maatschappelijke ondersteuning Amsterdam* [2021], 25.

⁶¹ Appeal Court The Hague 8 November 2019, ECLI:NL:GHDHA:2019:3008, para 2.8.

⁶² Gemeente Amsterdam, ‘Hulp en opvang regelen als u dakloos bent’, <https://www.amsterdam.nl/veelgevraagd/?productid=%7BC738AF8B-6C7C-4C93-BEEB-5B5EC0BB5747%7D#case_%7B590A06A7-CEB1-47FB-BAAA-878560C04933%7D> accessed 23 December 2021.

⁶³ J. J. Westert, ‘Eigen daklozen eerst?’ (Master thesis, University of Groningen 2014), p 40.

⁶⁴ *Kamerstukken II* 2008/09 31700 VII, nr 40, p 4.

⁶⁵ M Tuynman, C Muusse and M Planije, *Opvang landelijk toegankelijk?* (Trimbos-instituut, 2013) p. 19.

⁶⁶ District Court Amsterdam 10 August 2021, ECLI:NL:RBAMS:2021:5878, para 10.

⁶⁷ J. J. Westert, ‘Eigen daklozen eerst?’ (Master thesis, University of Groningen 2014), 40; M Tuynman, C Muusse and M Planije, *Opvang landelijk toegankelijk?* (Trimbos-instituut, 2013) p. 19.

⁶⁸ CJEU Joined Cases C-197/11 and C-203/11 *Libert and others* [2013] ECLI:EU:C:2013:288, para 38.

⁶⁹ CJEU Case C-19/92 *Kraus* [1993] ECLI:EU:C:1993:125, para 32.

The free movement right under Article 21 TFEU traditionally applies to nationals of an EU Member State who have moved to another Member State. However, the interpretation of the provision that requires cross-border movement, has evolved to a more inclusive approach over the years, as explained through the *Zambrano* and *Chavez-Vilchez* case law analysis in section 2.3 of this expert opinion.

The CJEU has increasingly associated the genuine enjoyment of the substance of the rights of Union citizenship under Article 20 TFEU with the rights of free movement and residence under Article 21 TFEU.⁷⁰ In *Iida*, the Court held that Article 20 TFEU situations have an 'intrinsic connection with the freedom of movement of a Union Citizen'.⁷¹ The Court reiterates this in *Rendon Marin* where it says that 'the purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with the Union citizen's freedom of movement'.⁷²

It is settled case law that a person whose ability to move within the EU is 'hampered' or made 'less attractive', even by the Member State of nationality, can rely on Treaty rights.⁷³ As Advocate General Sharpston puts it, 'it is the idea of *movement* (even if that movement is hypothetical) that serves as the key to the rights granted by the fundamental freedoms'.⁷⁴ Moreover, as follows from the interpretation in *Libert*, situations arising from national measures, that may have an effect on both nationals of the Member State implementing the legislation and nationals from other Member States, may fall under the scope of Article 21 TFEU even in cases which entail no cross-border element.⁷⁵

Therefore, if the genuine enjoyment of Union citizenship entails a right to enjoy freedom of movement, Article 21 TFEU can be applied to purely internal situations. In that regard, it is necessary to establish whether, and to what extent, Article 21 TFEU precludes practice such as that at issue in the main proceedings.⁷⁶

3.4 Region connection: a restriction on the right to freedom of movement under EU law

The practice in question regarding the right to emergency shelter applies to both Dutch nationals and to citizens of other Member States, thus it also falls under the scope of EU law. However, it should first be established whether the current practice of the municipality of Amsterdam amounts to a restriction of the right to freedom of movement under Article 21 TFEU.

The CJEU has issued an important ruling in the *Libert* case on the permissibility of restrictive requirements.⁷⁷ It concerned a case brought by associations and companies against the Flemish government. The central question was whether Articles 21 and 45 TFEU and Article 24 of the Union Citizens Directive precluded a Flemish Region Decree on land and buildings area (hereinafter: the Decree). The Decree made the transfer of land subject to the requirement that the acquiring person has a 'sufficient connection' with the commune concerned, which could be demonstrated amongst others by a period of six years of residence 'in the commune or in a neighbouring commune'.⁷⁸

⁷⁰S Coutts, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights' (2019) 21 *Cambridge Yearbook of European Legal Studies*, p 324.

⁷¹ CJEU Case C-40/11 *Iida* [2012] ECLI:EU:C:2012:691 para 72.

⁷² CJEU Case C-165/14 *Rendón Marín* [2016] ECLI:EU:C:2016:675, para 73.

⁷³ See, inter alia, CJEU Case C-55/94 *Gebhard* [1995] ECLI:EU:C:1995:411, para 37; CJEU Case C-285/01 *Burbaud* [2003] ECLI:EU:C:2003:432, para 95; CJEU Case C-299/02 *Commission v the Netherlands* [2004] ECLI:EU:C:2004:620, para 15; CJEU Case C-249/04 *Allard* [2005] ECLI:EU:C:2005:329, para 32; and Case C-389/05 *Commission v France* [2008] ECLI:EU:C:2008:411, para 56.

⁷⁴ CJEU Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, Opinion of AG Sharpston, para 132.

⁷⁵ See, to that effect, CJEU Joined Cases C-197/11 and C-203/11 *Libert and others* ECLI:EU:C:2013:288C-197/11, para 34 and the case-law cited.

⁷⁶ *Ibid.*, para 38.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para 19.

The CJEU examined the Belgian requirement in its entirety in relation to freedom of movement and Union citizenship.⁷⁹ It observed that Articles 21 and 45 TFEU and Article 24 of the Union citizens Directive prohibit measures, which prevent or discourage a citizen of a Member State from making use of their freedom of movement within the Union. The CJEU observed that the requirement restricts the freedom of movement since persons who do not have a sufficient connection cannot acquire land. It is irrelevant whether the measure applies irrespective of the nationality of citizens. The CJEU does not only reason that the requirement is ‘undoubtedly’ a restriction of movement from the perspective of immigrants,⁸⁰ but also notes that the provisions ‘deter Union citizens who own or rent a property in the target communes from leaving them to reside in another Member State or pursue a professional activity there’.⁸¹

An analysis of the legality of region connection to emergency shelter leads to similar conclusions. As stated above, Article 21 TFEU prohibits national measures which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement within the EU. In that regard, region connection amounts to a restriction of the right to freedom of movement under Article 21 TFEU. Region connection is in principle applicable to everyone seeking shelter in Amsterdam.⁸² It therefore does not distinguish on grounds of nationality. In reality, however, it functions as a prohibition on access to shelter for those who do not meet a regional connection to any municipality in the Netherlands because they come from abroad or have moved abroad and return.

Moreover, it should be noted that, despite its seemingly neutral formulation, the requirement has larger consequences for Union citizens from another EU Member State. As these persons are less likely to have stayed in the Netherlands for a long period of time, they have less chances to meet the two-year requirement than national citizens.

Furthermore, minor Dutch children with TCN parents are also much less likely to meet the conditions set out by the municipality. As is the situation in the present case, these children might have moved with their parents to a third country for a certain period of time and will therefore not meet the region connection requirement. Now that the policy has tightened to the requirement of having been registered in Amsterdam for four years, it is even more difficult for this category of people to meet the requirement. In this way, the region connection should be seen as a restriction to their freedom of movement and Union citizenship rights.

Finally, reasoned from the perspective of national citizens, the policy can have the effect that citizens do not make use of their right to freedom of movement, because they have not lived in the region for at least two years. In particular with the change of the requirement to residence of at least four years in Amsterdam, those citizens who have not stayed in the region for a certain period of time, will not necessarily have a sufficient connection anymore to the region if they move to a different Member State. It effectively deters them from leaving their current municipality and settling elsewhere in the EU for fear of being unable to fulfil the region connection requirement in the future.

It follows that the region connection requirement constitutes a restriction to the fundamental freedoms guaranteed by Article 21 TFEU.

3.5 Insufficient justification of the restriction to the right of freedom of movement

It should be borne in mind that national measures, which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the TFEU may nevertheless be justified, provided that they pursue an objective in the public interest, are appropriate for attaining that objective and

⁷⁹ CJEU Joined Cases C-197/11 and C-203/11 *Libert* [2013] ECLI:EU:C:2013:288C-197/11), paras 37-41.

⁸⁰ *Ibid*, para 41.

⁸¹ *Ibid*, para 40.

⁸² *Nadere regels maatschappelijke ondersteuning Amsterdam* [2021], p. 25.

do not go beyond what is necessary to attain the objective pursued.⁸³ Those restrictions and conditions must be proportionate,⁸⁴ necessary,⁸⁵ objective,⁸⁶ non-discriminatory,⁸⁷ and must be known in advance,⁸⁸ in such a way as to adequately circumscribe the exercise of the municipality's discretion.⁸⁹ Further, Article 21 TFEU is recognised as a fundamental freedom, and as such any restrictions and conditions which restrict it must be interpreted restrictively.⁹⁰ Therefore, it has to be established whether the region connection requirement imposed by the municipality of Amsterdam fulfills these requirements in order to justify the measure.

It must first be established which objective is being pursued with the region connection requirement. The objectives or justifications of the region connection requirement are not established in any publicly available document nor are they set out in law, which goes against the general principle of legal certainty. According to settled case law of the CJEU, the principle of legal certainty aims to ensure that situations and legal relationships governed by EU law remain foreseeable and to safeguard the effectiveness of provisions of EU law. It requires that legal rules be clear and precise.⁹¹ The lack of clarity on why and how region connection is being applied is therefore not in line with the CJEU's case law on effective implementation, in that the measure is not known in advance.

Moreover, the CJEU has stated that 'where it is a question of securing the effective protection of a right conferred by European Union law, interested parties must be able to defend that right under the best possible conditions'.⁹² The lack of elaboration on the aims of the region connection requirement therefore negatively impacts effective access to justice. Without more information being available to the applicant on the 'what, how and why', challenging the decision by the municipality is made excessively difficult. Finally, without knowledge of the objectives, a proportionality assessment cannot be carried out and therefore the exercise of the municipality's discretion cannot be delineated.

Even if we were to assume, as suggested by the District Court of Amsterdam⁹³ and researchers⁹⁴, that the objective of the region connection requirement is to reduce costs for the municipality of Amsterdam, this would be an inappropriate justification. As stated by the CJEU, aims of a purely economic nature, cannot justify a barrier to freedom of movement.⁹⁵ Moreover, ensuring the availability of emergency shelter for those connected to the municipality, is inconsistent with the other requirement for emergency shelter stipulated in the Additional rules of 'being prepared to move to a municipality outside Amsterdam'⁹⁶. The fact that on the one hand, applicants are required to have

⁸³ See, inter alia, CJEU Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and others* [1993] ECLI:EU:C:1993:333, para 15; CJEU Case C-200/02 *Zhu and Chen* [2004] ECLI:EU:C:2004:639, para 32; and CJEU Case C-135/08 *Rottmann* [2010] para 56.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ CJEU Joined Cases C-197/11 and C-203/11 *Libert and others* [2013] ECLI:EU:C:2013:288C-197/11, para 57.

⁸⁷ *Ibid.*, para. 57.

⁸⁸ *Ibid.*

⁸⁹ CJEU Case C-413/99 *Baumbast and R* [2002] ECLI:EU:C:2002:493, para 90; CJEU Joined Cases C-197/11 and C-203/11 *Libert and others* [2013] ECLI:EU:C:2013:288, para 57.

⁹⁰ CJEU Case C-413/99 *Baumbast and R* [2002] ECLI:EU:C:2002:493, para. 91; Case CJEU Case C-200/02 *Zhu and Chen* [2004] ECLI:EU:C:2004:639, para 32; CJEU Case C-408/03 *Commission v Belgium* [2006] ECLI:EU:C:2006:192, para 39; CJEU Case C-162/09 *Lassal* [2010] ECLI:EU:C:2010:592, paras 29-31; and CJEU Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565, para. 70.

⁹¹ CJEU Case C-63/93 *Duff and others* [1996] ECLI:EU:C:1996:51, para 20; CJEU Joined Cases C-197/11 and C-203/11 *Libert and others* [2013] ECLI:EU:C:2013:288C-197/11, para 57.

⁹² CJEU Case C-182/10 *Solvay and others* [2012] ECLI:EU:C:2012:82, para 59.

⁹³ District Court Amsterdam 10 August 2021, ECLI:NL:RBAMS:2021:5878, para 10; M Tuynman, C Muusse and M Planije, *Opvang landelijk toegankelijk?* (Trimbos-instituut, 2013) pp 19 and 24.

⁹⁴ J. J. Westert, 'Eigen daklozen eerst?' (Master thesis, University of Groningen 2014), p 40. M Tuynman, C Muusse and M Planije, *Opvang landelijk toegankelijk?* (Trimbos-instituut, 2013) p 19.

⁹⁵ CJEU Case C-158/96 *Kohll* [1998] ECLI:EU:C:1998:171.

⁹⁶ *Nadere regels maatschappelijke ondersteuning Amsterdam* (2021), p 25.

a connection to Amsterdam, but on the other hand may be required to move to another municipality for housing, raises questions as to the necessity of the region connection requirement.

Furthermore, as stated by the CJEU in *Libert*, the measure interfering with the right to freedom of movement must be objective and non-discriminatory.⁹⁷ In that regard, the region connection exceeds the objective of reducing costs and is indirectly discriminatory towards EU citizens with a right of residence or Dutch nationals making use of their free movement rights. In addition, there are categories of people who are less likely to fulfil the criterion (such as Roma, Sinti and travelers) because they have not lived in any region for two years. In addition, persons who cannot prove that they have resided in a certain municipality because they have not been registered there⁹⁸, are less likely to fulfill the criterion.

3.6 Sub-conclusion

To conclude, the two-year region connection requirement, a measure implemented by the municipality of Amsterdam in the framework of the Wmo, is contrary to the rights conferred by Article 21 TFEU on the freedom of movement. By imposing this requirement, the freedom of movement of Dutch *and* Union citizens is restricted. As the Amsterdam District Court noted in its judgment, since the applicants do not have a sufficient connection with any region in the Netherlands, the application of the residence requirement by Amsterdam would negate their right of residence in practice.⁹⁹ The requirement cannot be justified as the measure is not laid down clearly in law or policy. Moreover, the municipality, despite being responsible for the care and support of vulnerable people in the city of Amsterdam, is excluding many of them through the implementation of the region connection requirement – thereby exceeding the goal pursued and being indirectly discriminatory in nature.

⁹⁷ CJEU Joined Cases C-197/11 and C-203/11 *Libert and others* [2013] ECLI:EU:C:2013:288, para 57.

⁹⁸ There are signs that municipalities are reluctant to provide postal addresses to the homeless. M Tuynman, C Muusse and M Planije, *Opvang landelijk toegankelijk?* (Trimbos-instituut, 2013) pp 75-78.

⁹⁹ District Court Amsterdam 10 August 2021, ECLI:NL:RBAMS:2021:5878, para 5.5.6. This was also concluded by the District Court The Hague in the civil procedure, District Court The Hague, 7 October 2019, ECLI:NLRBDHA:2019:10632, para. 4.5.

4 Conclusion

The objective of this expert opinion was to examine whether the decision by the municipality of Amsterdam to refuse (prolonged) access to emergency shelter to a lawfully residing TCN mother and her dependent minor child with Dutch nationality is in conformity with EU law. This decision was based on two grounds: first, that the applicants had not lived for at least two years in the municipality of Amsterdam as their most recent place of residence (the region connection requirement) and second, that they had not accepted a return scheme to Morocco offered by the municipality of Amsterdam. Given the minor child's status as a Union citizen and the possible consequences the refusal of access to emergency shelter might have for his rights under Article 20 TFEU, the first research question was formulated as follows:

1. Is the municipality of Amsterdam acting in line with Article 20 TFEU by refusing to provide emergency shelter to a TCN mother and her minor Union citizen child?

Chapter 2 of this expert opinion concluded that the answer to this question should be negative. Due to his status as a Union citizen, a Dutch child should be able to genuinely enjoy the substance of the rights conferred by Article 20 TFEU. The genuine enjoyment of those rights would be deprived as a whole when such a child is forced to leave the territory of the EU. The opinion found that *any* national measure, including but not limited to residence permits, work permits, social assistance and child benefits, which has this effect is precluded by Article 20 TFEU. Moreover, it contended that this includes measures, which lead to a temporary forced return of the Union citizen child to the country of origin of their TCN parent. There is no evidence in the CJEU's case law to support the idea, put forwarded by the municipality, that a 'temporary' forced return from the EU territory would be permissible under Article 20 TFEU.

It was subsequently argued that the denial of emergency shelter rendered the TCN mother and her Union citizen child homeless, indirectly forcing them to leave the EU territory on which they have the right to reside. This was also acknowledged by the municipality of Amsterdam.¹⁰⁰ The refusal of emergency shelter thus constitutes a restriction of the Union citizens' rights guaranteed by Article 20 TFEU and the municipality has not substantiated if it did so on grounds of public policy or public security. Therefore, the refusal to provide emergency shelter is precluded by Article 20 TFEU.

It was secondly considered relevant to review the legality of the region connection requirement to Union citizen applicants who are not able to meet such a requirement anywhere in the Netherlands. As the substance of the rights of Union citizenship under Article 20 TFEU is increasingly associated with the rights of free movement and residence under Article 21 TFEU in EU case law, it was considered necessary to formulate the second research question as follows:

2. Is the municipality of Amsterdam acting in line with Article 21 TFEU by setting a two-year residence requirement (region connection) for emergency shelter?

Chapter 3 concluded that the answer to this question should also be considered negative. It is first important to establish that the applicants do not have the required region connection with any Dutch region. As was pointed out by the District Court of Amsterdam, this by itself would already factually undermine the enjoyment of the right of residence of the applicants in the Netherlands.¹⁰¹ In addition, the region connection policy has significant consequences in light of free movement rights under Article 21 TFEU. With region connection as a requirement, non-Dutch Union citizens are likely to be discriminated, because they are less likely to fulfil this requirement than Dutch nationals. Moreover,

¹⁰⁰ Appeal Court The Hague 8 November 2019, ECLI:NL:GHDHA:2019:3008, para. 12. See also Supreme Court, Opinion of Procureur Generaal Valk of 18 December 2020, ECLI:NL:PHR:2020:1189, para. 3.18.

¹⁰¹ District Court Amsterdam 8 June 2021, ECLI:NL:RBAMS:2021:2978, para 5.5.6.

Dutch citizens will be discouraged from use of their free movement rights, as they may no longer exercise existing rights upon return. Moreover, Dutch children of TCN parents are less likely to meet the requirement than other Union citizens, since they may have moved to a third country with their parents, as is the situation in the present case.

The region connection requirement cannot be justified as the policy is not clearly stipulated in any law or policy document. Moreover, its necessity and proportionality are insufficiently demonstrated by the municipality. All in all, it can therefore be concluded that a residence requirement for emergency shelter, under the conditions applied by the municipality of Amsterdam, violates Article 21 TFEU.