1. In which circumstances is a minor EU citizen forced to leave the territory of the EU as a whole if the right of residence is refused to a third country national parent? This is the essence of the preliminary questions referred to the Court of Justice of the European Union (CJEU) in the Chavez-Vilchez case. The judgment follows the Ruiz Zambrano ruling and offers further guidance in situations in which one of the parents of the minor EU citizen is a third country national while the other parent holds the nationality of the Member State of which the child is a national (CJEU 8 March 2011, Case C-34/09, Ruiz Zambrano). In this annotation I fill first discuss the reasoning of the CJEU in Ruiz Zambrano. Afterwards I will sketch the context, facts and ruling of the Court in Chavez-Vilchez. After that, I will analyse the implications of the ruling for the restrictive approach that was adopted in the jurisprudence of the Dutch Council of State, the court of highest instance in immigration law in the Netherlands. Finally, I will discuss the Chavez Vilchez ruling from the perspective of abuse of rights.

2. Before the Ruiz Zambrano ruling, the CJEU traditionally held that persons who did not make use of their free movement of persons found themselves in a purely internal situation not covered by EU free movement of persons law. For that reason, a Dutch national living in the Netherlands could not rely on free movement of persons law to be reunited with a third country national spouse (see CJEU, 27 October 1982, Joined Cases 35 and 26/82, Morson and Jhanjan). In Ruiz Zambrano, the CJEU adopted a different approach. The Court established that refusing the right of residence to the parents of a minor EU citizen may not result in a situation in which the minor EU citizen is forced to leave the territory of the EU as a whole. The case concerns the Colombian national parents without lawful residence in Belgium who got two children while living in Belgium. Because of a Belgian nationality law on the prevention of statelessness at birth – which has since been amended – the children obtained Belgian nationality and therefore acquired EU citizenship as well. The Court held that refusing the right of residence to their Colombian parents would have the effect of forcing the children to follow their parents to a place outside the territory of the EU, which goes against their right to live and reside freely within the territory the EU, laid down in Article 20 TFEU. According to the Court, this would deprive the children of the genuine enjoyments of the rights conferred upon them by the status of EU citizens. The Ruiz Zambrano case concerned a situation in which both parents were third country nationals. One of the open questions after the Ruiz Zambrano ruling was how the reasoning should be applied to situations in which one of the parents is a third country national while the other parent shares the nationality of one of the EU Member States with the child.

3. After the Ruiz Zambrano ruling, the Dutch Council of State adopted a restrictive interpretation concerning situations in which one of the parents is a Dutch national. According to the Council of State, the decisive element is whether the Dutch parent was able to take care of the child in the Netherlands, thereby preventing the situation that the child
would be forced to leave the territory of the EU as a whole (see, for instance, Council of State 7 March 2012, AB 2012/88 m.nt. Rodrigues). In the reasoning of the Council of State, the right to respect for family life and the best interests of the child did not play an explicit role in this assessment. The Council of State never referred a question for a preliminary ruling to the CJEU in order to find out whether this was a correct interpretation of EU law.

4. A preliminary reference to the CJEU was made by the Administrative High Court, the court of highest instance in social security matters, in a dispute considering entitlement to certain social benefits, including child allowances. In order to establish eligibility for such benefits, it was necessary to establish whether the persons concerned had lawful residence in the Netherlands. The preliminary questions concern eight different cases, in which a Dutch parent is not able to take care of a Dutch child for different reasons. Based on these cases, the question arises whether there is a derived right of residence for the third country national parent. In Chavez-Vilchez, the third country national mother and the Dutch child live in an emergency shelter, whereas the Dutch father did not contribute to the upbringing of his child. In Nikolic, the Dutch child cannot live with the Dutch father, because the father lives in a special care facility. In Garcia Perez, the third country national mother has sole custody over her Dutch child; the whereabouts of the Dutch father are unknown. In Uwituz, the Dutch father does not contribute to upbringing of his child and has declared that he is not able and willing to take of his child. In Wip, the Dutch father is in frequent contact with his children, but he does not contribute financially to their upbringing. In Énowassam, the parents share custody over their child and the father has an active role in his upbringing. However, the Dutch father has declared that he is not able to take care of his child because he has a full-time job. In Guerrero Chavez, the Dutch father has daily contact with his child, however, the third country national mother has full custody and the farther has declared that he is not willing to be the sole caregiver for his child.

The referring Court asks the CJEU in a preliminary reference whether in these situations there is a derived right of residence for the third country national parent and what the role of the best interests of the child – laid down in Article 24(2) of the Charter of Fundamental Rights of the EU – is in the assessment of whether the child would be forced to leave the territory of the EU as a whole.

5. The CJEU rules that the dependence between the minor EU citizen and the third country national parent is decisive in the assessment of whether the minor EU citizen would be forced to leave the territory of the EU if the third country national parent would be denied a derived right of residence (para. 69). To determine whether this would be the case, the referring court should, in each of the situations sketched above, determine which parent is the primary caregiver and whether there is in fact a relationship of dependence between the child and the third country national parent. In this context, the right to respect for family life enshrined in Article 7 Charter, read in conjunction with the best interests of the child principle, should be taken into account (para. 70). In this assessment, the circumstance that the Dutch national parent is able and willing to take care of the child is a relevant factor. However, this is not sufficient to rule that the child is not dependent on the third country national parent as well. In order to determine the dependence between the child and the third country national parent, the CJEU refers to the age of the child, the child’s physical and emotional development, the extent of his emotional ties to both parents and the risks which separation from the third country national parents might entail for the child’s equilibrium as relevant factors (para. 71). In principle, the third country national parent should provide evidence that the refusal of a derived right of residence would force the minor EU citizen to leave the territory of the EU (para. 75). However, the national authorities must ensure that the burden of proof would not
undermine the effectiveness of the rights of the minor EU citizen. In this context, the national authorities need to determine the EU citizen parent is able and willing to assume the sole responsibility of the daily care of the minor EU citizen and whether there is such a relation of dependency between the child and the third country national parent that would be forced to leave the territory of the EU as a whole in case the third country national parent would be denied a derived right of residence (para. 76-77).

6. The ruling of the CJEU provides clarity on the application of the derived right of residence of a parent based on the EU citizenship of a minor child in case one of the parents shares the EU citizenship with the child. The ruling goes against the restrictive approach of the Council of State, focussing on the bond between the child and the third country national parent rather than on the bond between the child and the EU national parent. Only in cases in which the child is not dependent on the third country national parent, a right of residence can be denied, as the child would not be forced to leave the territory of the EU if the derived right of residence is denied to a parent on which the child is not dependent.

7. Creating a derived right of residence for a third country national parent of an EU citizen creates the situation in which being the parent of an EU citizen can significantly enhance the legal protection of the residence of a third country national parent, opening the door for possible abuse of rights. In Butt v. Norway, the European Court of Human Rights has accepted “that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children.” (para. 79) That case concerned the regularisation of irregular migrants with a long history of unlawful residence in Norway. A direct consequence of the ruling of the CJEU in Chavez-Vilchez, is the risk that third country national parents, who otherwise would not have qualified for lawful residence in the host state, will make use of the EU citizenship of a child to qualify for residence for themselves. It is clear that the CJEU finds the right of a minor EU citizen to move and reside freely within the territory of the EU so fundamental that the Member States have to put up with the risk of abuse of rights by third country national parents.