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The Impact of Union Citizenship upon  
Rights to Family Reunification:

An Analysis of the Residence Rights of  
Family Members within the UK

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Submitted for the degree of:

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Department of Law

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## **Abstract**

This thesis explores the link between the residence rights of Union citizens and their family members and the Court of Justice of the European Union's development of the concept of Union citizenship. The Court has not approached this development in a predictable or linear fashion, and the cementing of Union citizenship as a status capable of leading to residence rights in the form of Directive 2004/38 made the continuation of a flexible and expansive approach more difficult.

This thesis examines the UK's implementation of both the Citizens' Directive and other EU sources of rights of residence and compares the rights of UK citizens with links to EU law to those without any possibility of relying on EU provisions within the UK. It is contended that Union citizenship has had a greater impact upon rights of residence for Union citizens and their family members than would have been anticipated from either the Treaty provisions or Directive 2004/38.

The importance of EU rights of residence is particularly high in the UK, given the stringent requirements of the Immigration Rules concerning non-EU immigration. Treaty rights can circumvent restrictive UK provisions, and the approach of the UK judiciary in applying EU concepts in cases concerning the UK Immigration Rules is important in this respect.

The fundamental rights implications of the Lisbon Treaty are assessed, and it is argued that the Court's continuing activism in relation to family rights is only in respect of Treaty rights, and that this has not been applied to the new Charter of Fundamental Rights. As such, the Court has failed to link Union citizenship and the Charter, which could have made for a more coherent sense of citizenship within the EU, but instead separates the application of fundamental rights from the unique concept of Union citizenship.

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## Abbreviations

AIT	Asylum and Immigration Tribunal
BverfG	<i>Bundesverfassungsgericht</i> – German Federal Constitutional Court
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CPAS	<i>Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve</i>
EAT	Employment Appeals Tribunal
ECHR	European Convention on Human Rights
ECO	Entry Clearance Officer
ECtHR	European Court of Human Rights
EEA	European Economic Area
HRA	Human Rights Act
IAC	Immigration and Asylum Chamber
OFM	‘other family member’ as defined in Article 3(2)(a) of Directive 2004/38
SIAC	Special Immigration Appeal Commission
TCN	Third Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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**Chapter One**  
**Union Citizenship and Residence Rights:**  
**Directive 2004/38**

This chapter introduces the concept of Union citizenship as well as the ‘Citizens’ Directive,’ Directive 2004/38.<sup>1</sup> At national level, citizenship and residence rights are inherently linked: if you possess the citizenship of a country, it can generally be assumed you have the right to live there.<sup>2</sup> At EU level, the situation is not so simple. To explore the links which have been established between Union citizenship and rights to reside under EU law, this chapter is split into two main sections. The first section introduces the concept of Union citizenship and considers its impact upon the rights of Union citizens and their family members: it assesses the judicial approach to the concept and highlights some of the controversy it has provoked. This section shows that, far from being simply an ‘added extra’, Union citizenship can be of fundamental importance and determinative of rights.

The second section assesses rights of residence for Union citizens and their family members found within Directive 2004/38,<sup>3</sup> and the restrictions Member States can place upon these. Its focus is also upon the influence of the Court of Justice of the European Union (CJEU) in shaping these rights, and on the institutional balance in determining the rights of Union citizens in relation to residence. It considers the impact of the Directive upon pre-existing rights of residence and demonstrates that the Directive made important changes both in substantive law and in the approach which has to be taken by Member States: the Directive granted residence rights to ‘citizens’ rather than workers or students in particular, and thus indelibly linked Union citizenship with residence rights under EU law. The reason for which the Directive, a piece of secondary legislation, is considered prior to rights of residence derived from primary Treaty rights which the Directive restricts is for purely

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<sup>1</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJL 158, 30.4.2004, 77–123*

<sup>2</sup> See Article 3 Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No. 11, (Strasbourg, 16.IX.1963) ETS 46

<sup>3</sup> There is no automatic right to live in any given Member State – it is necessary to qualify for residence, as discussed in this chapter

practical reasons.<sup>4</sup> In order to apply for residence rights in a Member State, Union citizens and their family members will not turn to the Treaty or seek information on its provisions: instead, they need to know their exact entitlements under secondary legislation, and the hurdles they must pass in order to have their rights recognised. To understand the residence rights Union citizens and their families are likely to rely upon, the Directive is thus essential to understand.

## **1. Union Citizenship: A Meaningful Status**

Long before its introduction by the Maastricht Treaty,<sup>5</sup> there was discussion of various forms of European citizenship,<sup>6</sup> though the creation of a citizenship was not inevitable for a supranational community originally concerned with ensuring peace and prosperity.<sup>7</sup> Union citizenship is somewhat separate from the internal market developments which took place within the development of the early EU: it has its own section in the Treaty,<sup>8</sup> and its very purpose is different from that of the four fundamental freedoms.<sup>9</sup> Union citizenship is not intended to link Member States economically, but instead to strengthen the bonds between the EU and its people.<sup>10</sup> This section will highlight the rights of Union citizens under EU law, explore how Union citizenship is established and what control the EU has over its removal, and will also discuss the impact of Union citizenship upon the recognition of an individual's rights contained in secondary legislation so as to enable analysis of rights to family reunification in later chapters. It does not adopt what Dougan refers

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<sup>4</sup> Article 21 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), *OJ C 83*, 30.3.2010, 47–403

<sup>5</sup> Then Article 8 Treaty on European Union (TEU), *OJ C 191*, 29.07.1992, 1-59

<sup>6</sup> See, *inter alia*, David O'Keeffe, 'Union Citizenship' in David O'Keeffe and Patrick M. Twomey (eds), *Legal issues of the Maastricht Treaty* (Chancery 1993) 87-88; Andrew Evans, 'European citizenship' (1982) 45 *The Modern Law Review* 497; Walter H.M. Frölich, 'Towards a United States of Europe' (1973) 64 *Current History* 172, 177; Ernst-Otto Czempiel, 'The Citizens' Society: Lessons from Europe' (1974) 41 *Social Research* 746, 749; Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage Publications 1995) 58. Shaw noted that just as there are many accounts of the past of EU Citizenship, there were many suggested futures for it, too- Jo Shaw, 'The many pasts and futures of citizenship in the European Union' (1997) 22 *European Law Review* 554, 560

<sup>7</sup> Preamble to the Treaty Establishing the European Economic Community, 298 U.N.T.S. 11, signed on 25 March 1957, entered into force on 1 January 1958

<sup>8</sup> Part II TFEU

<sup>9</sup> Freedom of Movement for Workers, Article 45 TFEU; the Right of Establishment, Article 49 TFEU; Freedom of Services, Article 56 TFEU, and the Free Movement of Capital, Article 63 TFEU

<sup>10</sup> Preamble to the Consolidated Version of the Treaty on European Union (TEU), *OJ C 83*, 30.3.2010, 13-46; the role of the Court in taking into account Union citizens' interests is discussed in Part I of Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012)

to as ‘the traditional critique’ that the Court simply frames its preferred judgment in terms of Treaty provisions,<sup>11</sup> but recognises that the Court is an institutional actor and its decisions are limited by the political environment in which it finds itself. That said, the role of the Court in forging a meaning for Union citizenship is undeniable, and how it has done - and continues to do this - in relation to the rights of family members to reside with a Union citizen forms the basis of much discussion in this thesis.

### **a. The Rights of Union Citizens**

There are few specific provisions on the rights of Union citizens in the Treaty: ‘Non-Discrimination and Citizenship of the Union’ forms Part II of the Treaty, containing Articles 18-25 TFEU. The current Treaty provision establishing Union citizenship is contained in Article 20 TFEU: Union citizenship is different from national citizenship,<sup>12</sup> is additional to national citizenship, and dependent upon it.<sup>13</sup> Article 18 TFEU prohibits discrimination on grounds of nationality; Article 19 TFEU gives the European Council the right to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; Article 21(1) TFEU gives every Union citizen the right to move and reside within the EU, subject to limitations and conditions within the Treaty and secondary legislation; Article 22 TFEU gives Union citizens resident in a host Member State the right to vote and stand as a candidate in municipal/European Parliament elections on the same conditions as nationals of the host; Article 23 TFEU entitles Union citizens to diplomatic/consular protection on the same grounds as host state nationals; Article 24 TFEU entitles Union citizens to petition the European Parliament; and Article 25 TFEU states that the Commission must report to the European Parliament, Council and Economic and Social Committee on the application of the provisions in

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<sup>11</sup> Michael Dougan, ‘The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 128

<sup>12</sup> Andrew Evans, ‘Nationality law and European integration’ (1991) 16 *European Law Review* 190 and Elizabeth Meehan, ‘Citizenship and the European Community’ (1993) 64 *The Political Quarterly* 172. For discussion of the historical development of national citizenship see Brian S. Turner, ‘Outline of a Theory of Citizenship’ (1990) 24 *Sociology* 189

<sup>13</sup> Article 20(1) TFEU: “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.”

Part II.<sup>14</sup> Article 20 TFEU is echoed in Article 9 TEU, in relation to the EU's democratic principles:

“In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”<sup>15</sup>

The Treaty provisions on citizenship do not give Union citizens equal rights to domestic citizens; noticeably the right to vote in national elections does not come under EU law, regardless of the length of residence within the host state.<sup>16</sup> O'Leary has argued that the Treaty provisions should have gone further, and included fundamental rights protection in the citizenship provisions.<sup>17</sup> However, the Treaty emphasis on equality of citizens in Article 9 TEU and the Article 18 TFEU principle of non-discrimination are important in reducing O'Leary's concerns in relation to discrimination to some degree.<sup>18</sup> The importance of the Part II rights contained in Articles 20-21 TFEU<sup>19</sup> in relation to residence cannot be underestimated. It is from them that the fundamental status of Union citizenship is recognised, and the link between free movement of persons and residence is established.

The insertion of Union citizenship into the Treaty has been symbolically important: it brought the rights of the economically inactive to move and reside within the Treaty text.<sup>20</sup> However, despite their importance, the Article 18-25 rights are not seen as the ultimate rights of Union citizens - O'Keefe emphasised the “promise

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<sup>14</sup> ‘Non-Discrimination and Citizenship of the Union,’ is Part II of the Treaty, containing Articles 18-25 TFEU

<sup>15</sup> Article 9 TEU

<sup>16</sup> Voting rights are discussed by Shaw in Jo Shaw, 'EU Citizenship and Political Rights in an Evolving EU' (2007) 75 *Fordham Law Review* 2549 and Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007)

<sup>17</sup> Siofra O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *Common Market Law Review* 519

<sup>18</sup> Fundamental rights protection within the EU is discussed in greater detail in Chapter 6

<sup>19</sup> Article 21 TFEU treats the right “to move and reside freely” as one right, but the approach of Advocate General Sharpston in her Opinion for Case C-34/09, *Ruiz Zambrano*, delivered on 30 September 2010, para 55 raised the issue of whether it could be split into two rights- “a right to move and a free-standing right to reside – or whether it merely confers a right to move (and then reside)” with the Advocate General in para 100 suggesting that “(although in practice the right to reside is, in the vast majority of cases, probably exercised after exercise of the right to move) Article 21 TFEU contains a separate right to reside that is independent of the right of free movement.”

<sup>20</sup> Steve Peers and Nicola Rogers 'Union Citizenship' in Nicola Rogers, Rick Scannell and John Walsh, *Free Movement of Persons in the Enlarged European Union* (2nd edn, Sweet & Maxwell 2012) 65

they hold out for the future,” declaring that “[t]he concept [of Union citizenship] is a dynamic one, capable of being added to or strengthened, but not diminished...”<sup>21</sup> This anticipation of greater rights for citizens has been partially vindicated, given that the teleological approach of the Court of Justice of the European Union has continued since the Directive’s implementation in some respects, with reliance upon Union citizenship being capable of determining rights to residence,<sup>22</sup> though notably not in relation to access to social security.<sup>23</sup>

## **b. Determining Union Citizenship**

Member States have absolute discretion in conferring their own citizenship, and hence Union citizenship too.<sup>24</sup> Union citizenship is not a status conferred upon residents of the EU by the Union, which disappointed some commentators, who favoured residence as a test for citizenship over Member State nationality.<sup>25</sup> Bhabba, for instance, focussed on the lack of uniformity in Member States’ approaches to giving their citizenship, and the negative effects of these differences being echoed at Union level; she thought the EU missed an opportunity to link the “new Europe and its population” rather than continuing a focus on “ethnicity or civic status that European states traditionally have displayed in establishing their laws.”<sup>26</sup> As the law

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<sup>21</sup> David O’Keeffe, 'Reflections on European Union Citizenship' (1996) 49 *Current Legal Problems* 347, 373; Shaw viewed the emergence of citizenship “as a preoccupation” for the post-Maastricht EU, suggesting its impact on the interpretation of law is immense- Jo Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 *The Modern Law Review* 293, 294

<sup>22</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177

<sup>23</sup> Case C-158/07 *Förster* [2008] ECR I-08507 can be seen as a step backwards from the Court strengthening Union citizens’ rights and enabling flexible consideration of integration.

<sup>24</sup> Declaration on Nationality of a Member State, annexed to the Final Act of the Maastricht Treaty *OJ C 191, 29.07.1992, I-59*: “...wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.” Case C-369/90 *Micheletti* [1992] ECR I-4239; Case C-192/99 *Kaur* [2001] ECR I-1237; Case C-200/02 *Chen* [2004] ECR I-9925; see also Case C-135/08 *Rottmann* [2010] ECR I-1449 discussed in Theodore Konstadinides, ‘La fraternite europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship’ (2010) 35 *European Law Review* 401

<sup>25</sup> See Peo Hansen and Sandy Brian Hager, *The Politics of European Citizenship: Deepening Contradictions in Social Rights and Migration Policy* (Berghahn Books 2010), 131; Jacqueline Bhabba, “‘Get Back to Where You Once Belonged’: Identity, Citizenship, and Exclusion in Europe’ (1998) 20 *Human Rights Quarterly* 592, 605. However, O’Keeffe was initially pro-residence as a criterion of Union citizenship, but changed his opinion on this- see David O’Keeffe, 'Reflections on European Union Citizenship' (1996) 49 *Current Legal Problems* 347, 359

<sup>26</sup> Jacqueline Bhabba, “‘Get Back to Where You Once Belonged’: Identity, Citizenship, and Exclusion in Europe’ (1998) 20 *Human Rights Quarterly* 592, 604-5

stands, Union citizenship is determined at national level and the EU cannot control who is, or is not, a Union citizen;<sup>27</sup> there is no EU harmonization of Member State conditions for this: “[t]he exclusive gate-keepers remain the member states”.<sup>28</sup>

The *Rottmann* decision of the CJEU has impacted upon the Member States’ ability to remove citizenship from their nationals.<sup>29</sup> Dr Rottmann, an originally Austrian citizen, acquired German nationality (causing the loss of his Austrian nationality) without informing the German authorities of proceedings against him for serious fraud in Austria. When the Austrian municipal authorities informed the city of Munich that there was a warrant for Dr Rottmann’s arrest which had been issued before the naturalisation proceedings commenced, naturalisation was withdrawn with retrospective effect, as Dr Rottmann obtained German nationality by deception. The German revocation of German citizenship was thus the issue: it would have left Dr Rottmann stateless, and hence also removed his Union citizenship, as Article 20(1) TFEU states that Union citizenship is dependent upon nationality of a Member State of the EU so it cannot exist following the removal of that national citizenship. The German Court considered whether Austria might be required to grant Dr Rottmann Austrian citizenship to prevent his statelessness, but stayed the proceedings and asked the CJEU for a ruling whether it was contrary to EU law for the withdrawal of naturalisation obtained by deception if this has the effect of making an applicant stateless.<sup>30</sup>

Both the Advocate General and the CJEU thought the situation fell within the scope of EU law. Advocate General Maduro gave the Opinion for *Rottmann*,<sup>31</sup> and, while he rejected that the issues fell outside the scope of EU law and that it was a purely internal situation, he relied on what was termed ‘the presence of a foreign element’<sup>32</sup> to explain why the issue fell within the scope of EU law:

“though a situation concerns a subject the regulation of which comes within the competence of the Member States, it falls within the scope *ratione*

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<sup>27</sup> Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917

<sup>28</sup> J. H. H. Weiler, 'To be a European citizen- Eros and Civilization' (1997) 4 *Journal of European Public Policy* 495, 497

<sup>29</sup> *Rottmann*, n24 above

<sup>30</sup> *ibid* para 35

<sup>31</sup> Case C-135/08 *Rottmann* Opinion of Advocate General Poiares Maduro delivered on 30 September 2009

<sup>32</sup> *ibid* para 11

*materiae* of Community law if it involves a foreign element, that is, a cross-border dimension. Only a situation which is confined in all respects within a single Member State constitutes a purely internal situation.”<sup>33</sup>

The foreign element present was not elaborated upon by the Advocate General, and the Court did not follow his approach, but found that “by reason of its nature and consequences”,<sup>34</sup> the factual situation came within the scope of EU law and therefore that the decision to withdraw naturalisation has to observe the principle of proportionality in light of EU law.<sup>35</sup> Mengozzi suggested that the CJEU did not engage with what happened before Dr Rottmann achieved German citizenship<sup>36</sup> - the move from Austria to Germany - but instead was able to disregard the lack of cross-border element. In finding that the situation in *Rottmann* fell within the scope of EU law, and in its requirement for the principle of proportionality to be observed by Member States in taking decisions affecting individuals’ citizenship,<sup>37</sup> the CJEU has affected Member States’ abilities to control when they remove their own citizenship.

The *Rottmann* decision was not based upon wholly unusual facts,<sup>38</sup> but its importance lies mostly in that the CJEU found a link to EU law based on the ‘nature and consequences’ of the effect the national decision would have upon Dr Rottmann’s Article 20 TFEU status and attached rights.<sup>39</sup> In this way, the Court specifically linked the ‘fundamental status’ of Union citizenship<sup>40</sup> with the finding of a trigger for EU law, and thus CJEU jurisdiction. This seminal decision demonstrates a major part of the potential of Union citizenship – not only does it give Union citizens a unified status under EU law, but there is a potential it can make EU law applicable to them in situations which otherwise might have had difficulty demonstrating a cross-border link.<sup>41</sup>

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<sup>33</sup> *ibid* para 10

<sup>34</sup> *Rottmann*, n24 above, para 42

<sup>35</sup> *ibid* paras 55, 58-59

<sup>36</sup> Paolo Mengozzi, 'Zambrano, An Unexpected Ruling' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 235

<sup>37</sup> *Rottmann*, n24 above, paras 55-59

<sup>38</sup> Whether statelessness will be a result of the removal of an acquired citizenship will determine on whether that acquisition caused the loss of the applicant’s previous citizenship under domestic law

<sup>39</sup> *Rottmann*, n24 above, para 42

<sup>40</sup> *ibid* para 43; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82

<sup>41</sup> Discussed in Hans Ulrich Jessurun d’Oliveira, 'Court of Justice of the European Union Decision of 2 March 2010, Case C-315/08 *Janko Rottman v. Freistaat Bayern*; Case Note 1 Decoupling Nationality and Union Citizenship?' (2011) 7 *European Constitutional Law Review* 138; Robin

### c. The Impact of Union Citizenship upon Individuals' Rights

The Treaty did not make clear whether Union citizenship was 'supposed' to bring additional substantive rights to Union citizens, or whether it was a merely symbolic flourish.<sup>42</sup> The Court of Justice has been criticised for failing to fully harness Union citizenship's potential, and for relying upon unwritten rules: "the presumption that EU citizenship is not supposed to affect the material scope of EU law, and that a good citizen is mobile and economically active."<sup>43</sup> The presumptions Kochenov and Plender described are not contained within the Treaty text. The Court's approach to interpreting the scope of EU law has not traditionally been so restrained - its definition of 'worker', for instance, was expansive in *Levin*, where all 'effective and genuine'<sup>44</sup> work fell within the definition, even where this was supplemented by social assistance or did not meet the minimum wage. This interpretation was adopted in subsequent cases,<sup>45</sup> though the Court's approach in relation to Union citizenship rights did not echo this broad rights-giving approach in early case law where Union citizenship was present: Kochenov and Plender suggested that "the *Grzelczyk/Martínez Sala* case law largely applied the pre-Maastricht paradigm of using a Treaty-based pretext, be it services or citizenship, for moving a particular situation within the scope of the Treaty, based on the purely market-oriented cross-border logic."<sup>46</sup>

Though its decisions did not immediately revolutionise the way Union citizens' rights were identified under EU law, the Court of Justice has emphatically demonstrated that Union citizenship is not a meaningless rhetorical Treaty

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Morris, 'European Citizenship: Cross-Border Relevance, Deliberate Fraud and Proportionate Responses to Potential Statelessness' (2011) 17 *European Public Law* 417; Gerard Rene De Groot and Anja Seling, 'Case Comment: Court of Justice of the European Union decision of 2 March 2010, Case C-315/08 *Janko Rottman[n] v Freistaat Bayern* case note 2: The Consequences of the Rottmann judgment on Member State autonomy - the European Court of Justice's avant-gardism in nationality matters' (2011) 7 *European Constitutional Law Review* 150

<sup>42</sup>See: Catherine Jacqueson, 'Union citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 *European Law Review* 260; Stephan Wernicke, 'Au nom de qui? The European Court of Justice between Member States, Civil Society and Union Citizens' (2007) 13 *European Law Journal* 380; Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *European Public Law* 533; Norbert Reich, 'Union citizenship- Metaphor or Source of Rights?' (2001) 7 *European Law Journal* 4

<sup>43</sup> Dimitry Kochenov and Richard Plender, 'EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text' (2012) 37 *European Law Review* 369, 370

<sup>44</sup> Case 53/81 *Levin* [1982] ECR 1035, para 17

<sup>45</sup> See Case 66/85 *Lawrie-Blum* [1986] ECR 212, and Case 139/85 *Kempf* [1986] ECR 1741, etc.

<sup>46</sup> Dimitry Kochenov and Richard Plender, 'EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text' (2012) 37 *European Law Review* 369, 376



addition.<sup>47</sup> Spaventa found that the impact of Union citizenship upon bringing individuals within the personal scope of the Treaty was such that “nationality alone [wa]s sufficient”<sup>48</sup> and that the consequences of this meant that the CJEU only had to consider whether the question fell within the material scope of the Treaty in order to apply EU law. As the cases referred to the Court determine its ability to develop doctrine in any area, Nic Shuibhne usefully reminds us that “EU citizenship would not exist without the Member States; and it would be meaningless if their nationals (and their lawyers, courts and tribunals) had not engaged with its possibilities.”<sup>49</sup> The willingness of Advocates General and the Court to recognise Union citizenship as a potentially meaningful status dispelled the criticism that it was no more than a ‘false prospectus’.<sup>50</sup> For Kochenov and Plender, the Court only escaped from the shackles of pre-Maastricht thinking with its decision in *Rottmann*.<sup>51</sup> where a “new non-market rights-based paradigm of EU citizenship law emerged”.<sup>52</sup> They view this, and subsequent decisions, as a move closer to the text of the Treaty, and therefore towards fulfilling the potential of Union citizenship, though this view fails to fully engage with the huge steps taken by the Court in decisions such as *Martínez Sala*, as discussed by Spaventa.<sup>53</sup> In relation to residence rights, this chapter will attempt to dispel the view that it was only since *Rottmann* that the CJEU moved past Maastricht - market focussed - thinking.

## 2. Residence Rights for Union Citizens and Family Members

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<sup>47</sup> See: Case C-85/96 *Martínez Sala* [1998] ECR I-2691; *Grzelczyk*, n40 above; *Baumbast* n40 above; Case C-209/03 *Bidar* [2005] ECR I-2119, and, *inter alia*, Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13; Michael Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 *European Law Review* 613; Siofra O'Leary, 'Case Comment: Putting flesh on the bones of European Union citizenship' (1999) 24 *European Law Review* 68; and Francis G. Jacobs, 'Citizenship of the European Union- A Legal Analysis' (2007) 13 *European Law Journal* 591

<sup>48</sup> Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13, 22

<sup>49</sup> Niamh Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009)

<sup>50</sup> Discussed in Francis G. Jacobs, 'Citizenship of the European Union- A Legal Analysis' (2007) 13 *European Law Journal* 591, 592

<sup>51</sup> *Rottmann*, n24 above

<sup>52</sup> Dimitry Kochenov and Richard Plender, 'EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text' (2012) 37 *European Law Review* 369, 371

<sup>53</sup> Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13

This section discusses Directive 2004/38's provision for residence rights of Union citizens and their family members in order to assess the legislative basis upon which most Union citizens in Member States other than their own must base their rights of residence. The Directive is important because it is the first piece of secondary legislation to link the concept of Union citizenship with the idea of residence. The purpose of this discussion is to enable later exploration of the rights of TCN family members to join their Union citizen relative, as these rights are derivative upon the Union citizen's right of residence.

This section then assesses the mid-term right of residence in detail: Directive 2004/38 provides three different length terms of residence, up to three months,<sup>54</sup> residence for more than three months, and the right of permanent residence,<sup>55</sup> and focus upon the requirements for the right to reside for more than three months is appropriate as there is greater opportunity for this to be relevant to rights to family reunification than the other periods of residence. The Court's approach to restrictions to residence rights is considered in relation to both the requirement of sufficient resources and sickness insurance as this was modified by the introduction of Union citizenship. Next, the right to equal treatment when residing in a host Member State is discussed, in order to demonstrate when Union citizens have access to certain benefits during their period of residence within another Member State, and to explore the effect of Directive 2004/38 upon the CJEU's decisions.

#### **a. Directive 2004/38 and Rights to Move and Reside Freely**

Directive 2004/38 aimed at simplifying and strengthening citizens' rights, reviewing the separate legislation relating to workers, self-employed persons, and the economically inactive.<sup>56</sup> The Directive overhauled much of the pre-existing secondary legislation in the area of free movement and residence, amending one regulation and repealing nine directives.<sup>57</sup> In addition to the secondary legislation it

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<sup>54</sup> Or 6 months – the CJEU decision in Case C-292/89 *Antonissen* [1992] ECR I-04265 in relation to jobseekers was incorporated in Article 14(4)(b) Directive 2004/38

<sup>55</sup> Articles 6, 7 and 16 Directive 2004/38 respectively

<sup>56</sup> Preamble Directive 2004/38 para 3

<sup>57</sup> Amending Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community *OJ L 257, 19.10.1968, 2–12*, and repealing Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families *OJ L 257, 19.10.1968, 13–16*, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and

affects in its title, the Directive replaced a further regulation, Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State,<sup>58</sup> which was in fact repealed by Regulation 635/2006 which took effect on the same day as Directive 2004/38 had to be implemented.<sup>59</sup> The Directive thus brings together provisions which were previously disparate: the repealed and amended legislation had been introduced over four decades,<sup>60</sup> and, as such, developments within the EU, including the impact of successive enlargements,<sup>61</sup> the creation of the Single market,<sup>62</sup> and the introduction of Union citizenship, which had taken place over this time could be reflected in Directive 2004/38.

The Directive's focus is upon Union citizens' rights to free movement in general, rather than upon those of workers, self-employed persons, work-seekers, the self-sufficient, students, or retirees in particular. However, Directive 2004/38 does not aim to create uniformity of rights. The Directive neither entitles all persons to the same rights under its own provisions,<sup>63</sup> nor does it remove the possibility for individuals to rely upon rights of residence which it does not codify, such as the rights of job-seekers to remain within a Member State for longer than three months without qualifying for residence under Article 7.<sup>64</sup> Restrictions upon rights to reside derived from the Treaty could be modified by their codification into Directive

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residence within the Community for nationals of Member States with regard to establishment and the provision of services *OJ L 172*, 28.6.1973, 14–16, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L 180*, 13.7.1990, 26–27; and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, *OJ L 180*, 13.7.1990, 28–29; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, *OJ L 317*, 18.12.1993, 59–60

<sup>58</sup> Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, *OJ L 142*, 30.06.1970, 24–26

<sup>59</sup> Article 1 Commission Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, *OJ L 112*, 26.4.2006, 9

<sup>60</sup> Directive 64/221 is the earliest piece of legislation Directive 2004/38 repeals, and Directive 93/96 the most recent

<sup>61</sup> In 1964, when Directive 64/221 was introduced, the Community was composed of only the six original Member States; in 2004 there were 15, but soon to be 24 Member States of the European Union. [http://europa.eu/about-eu/member-countries/index\\_en.htm](http://europa.eu/about-eu/member-countries/index_en.htm)

<sup>62</sup> Single European Act, *OJ L 169*, 29.6.1987, 1–23

<sup>63</sup> See the different Article 7 requirements for rights of residence for workers (Article 7(1)(a)); those with sufficient resources (Article 7(1)(b)); students (Article 7(1)(c)); and family members (Article 7(1)(d))

<sup>64</sup> See Preamble Directive 2004/38, para 9 on the right of residence for up to three months: this is applied “without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case law of the Court of Justice.”

2004/38, though ‘acquired rights’, such as those of workers or self-employed persons and their family members in relation to the acquisition of the right of permanent residence under Regulation 1251/70,<sup>65</sup> are maintained by the Directive.<sup>66</sup>

In addition to updating and amending secondary EU legislation, Directive 2004/38 codified case law of the Court of Justice of the European Union into its provisions.<sup>67</sup> In recognising that Union citizens are entitled to rights *as Union citizens*,<sup>68</sup> the Directive presents itself as part of a community of law in which the emphasis is not exclusively upon economic status or contribution.<sup>69</sup> Kostakopoulou considered that citizenship had ‘matured as an institution’<sup>70</sup> due to both case law developments and legislative initiatives, including Directive 2004/38. The Directive’s statement in its preamble that Union citizenship should be the ‘fundamental status’ of Member State nationals *when they exercise their right of free movement and residence*<sup>71</sup> corresponds to the traditional requirement of EU law needing a ‘trigger’ of cross-border movement in order to be relevant.<sup>72</sup> The requirement of exercise of free movement rights is emphasised within the definition of host Member State- “the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.”<sup>73</sup> This has meant that domestic nationals have been

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<sup>65</sup> Articles 2(1) or 3(1)-(2) Regulation 1251/70

<sup>66</sup> Preamble Directive 2004/38, para 19

<sup>67</sup> Such as the Case C-413/99 *Baumbast* [2002] ECR I-7091 primary carer rights which now may be found in Article 12(3) Directive 2004/38. See Peter Starup and Matthew J. Elsmore, 'Taking a logical step forward? Comment on Ibrahim and Teixeira' (2010) 35 *European Law Review* 571, 575-576, discussion of Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723 and proposals for Article 12(3) Directive 2004/38. Case law forms part of the ‘piecemeal’ developments which the Directive aims to remedy (Preamble Directive 2004/38, para 4)

<sup>68</sup> *Qua citizen*, rather than *qua mover*- see Eleanor Spaventa, ‘From *Gebhard* to *Carpenter*: Towards a (Non-) Economic European Constitution’ (2004) 41 *Common Market Law Review* 743, 744

<sup>69</sup> Development of ‘citizenship rights’ from a market background is considered in: Michelle Everson, ‘The legacy of the market citizen’ in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995)

<sup>70</sup> Dora Kostakopoulou, ‘European Union Citizenship: Writing the Future’ (2007) 13 *European Law Journal* 623

<sup>71</sup> Preamble Directive 2004/38, para 3

<sup>72</sup> See Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Judgment of the Court, 12 March 2014, nyr, para 39: “Accordingly, Directive 2004/38 establishes a derived right of residence for third country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national...” Also: Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G*, Judgment of the Court, 12 March 2014, nyr, para 34

<sup>73</sup> Article 2(3) Directive 2004/38

unable to rely upon the Directive to find a right of residence for their family members.<sup>74</sup>

Residence is not defined in the Directive and Guild *et al.* viewed this as indicating that the term must be interpreted in accordance with the terms of the Directive, rather than by individual Member States.<sup>75</sup> There are three distinct terms of residence rights available to Union citizens and family members in Directive 2004/38: these are for up to three months,<sup>76</sup> for a duration of longer than three months,<sup>77</sup> and a right of permanent residence.<sup>78</sup> Short-term residence is permitted for Union citizens and their family members without any conditions other than showing an accepted form of identification.<sup>79</sup> Only the Article 7 rights of residence for longer than three months are discussed in this section as the right of permanent residence is acquired through the Directive<sup>80</sup> after five years of legal residence, which is likely to be under Article 7 of the Directive,<sup>81</sup> so the ‘medium’ length term residence is more important to rights of family reunification than the later status which can be acquired following exercise of the right to reside for a period of five years.<sup>82</sup>

#### **b. The Right of Residence for more than Three Months**

Article 7 of Directive 2004/38 contains the right of residence for periods longer than three months. This Article places the right to reside of the economically inactive,<sup>83</sup> which was introduced with the Residence Directives in 1990,<sup>84</sup> alongside the right to

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<sup>74</sup> See Case C-434/09 *McCarthy* [2011] ECR I-3375, paras 30-35; also Case C-87/12 *Ymeraga and Others*, Judgment of the Court, 8 May 2013, nyr, para 33

<sup>75</sup> Elspeth Guild, Steve Peers, Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014) 109

<sup>76</sup> Article 6 Directive 2004/38

<sup>77</sup> Article 7(1) Directive 2004/38

<sup>78</sup> Article 16 Directive 2004/38

<sup>79</sup> Article 6(1)-(2) Directive 2004/38

<sup>80</sup> Or in reliance upon an exemption as detailed in Article 17 Directive 2004/38

<sup>81</sup> Although the Court has considered whether residence prior to accession of a new Member State (and thus not under the Directive) can count as legal residence for the acquisition of permanent residence: In Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, Judgment of the Court, 21 December 2011, nyr, it found that residence under national law which was in compliance with the Directive could be considered towards the five year legal residence period.

<sup>82</sup> The right of permanent residence can be obtained prior to five years in certain circumstances outlined in Article 17 of Directive 2004/38. For Analysis of the Right of Permanent Residence see Elspeth Guild, Steve Peers, Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014) Ch 4

<sup>83</sup> Article 7(1)(b)-(c) Directive 2004/38

<sup>84</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L 180, 13.7.1990, 26–27*; and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, *OJ L 180, 13.7.1990, 28–29*;

reside of workers and self-employed persons,<sup>85</sup> and the right of family members of Union citizens satisfying the conditions in Articles 7(1)(a)-(c).<sup>86</sup> Economically active Union citizens qualifying for residence rights under Article 7(1)(a) need not demonstrate anything further than their economic activity: being a worker or self-employed person qualifies them for the right to reside. The economically inactive Union citizen qualifying for residence rights under Article 7(1)(b) must possess sufficient resources so that they and any family members would not “become a burden on the social assistance system of the host Member State” alongside comprehensive sickness insurance; similarly, students qualifying for residence rights under Article 7(1)(c) must show they are enrolled “on a course of study”, that they have comprehensive sickness insurance and “assure” the host Member State’s national authority that they possess sufficient resources so that they and family members<sup>87</sup> would not become a burden on the social assistance system of the host Member State.

Economically active Union citizens have never had to meet the sufficient resources or comprehensive sickness insurance requirements; demonstrating that they fell within the broad definition of worker, or self-employed person, sufficed, without focus on whether they earned enough money to support themselves.<sup>88</sup> Though residence rights are available to Union citizens in reliance upon the Directive, this is not under any circumstances, and there remains an obvious financial requirement for eligibility for residence.<sup>89</sup> As such, it seems that ‘market citizenship’ still has a hold over free movement rights,<sup>90</sup> though this has been reduced by the CJEU in its

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Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, *OJ L 317, 18.12.1993, 59–60*, which replaced the repealed Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students *OJ L 180, 13/07/1990, 30-31*

<sup>85</sup> Article 7(1)(a) Directive 2004/38

<sup>86</sup> Article 7(1)(d) Directive 2004/38

<sup>87</sup> Article 7(4) Directive 2004/38 restricts the scope of the Article 2(2) definition of “family member” for students

<sup>88</sup> See *Levin*, n44 above, *Lawrie-Blum* and *Kempf* n45 above

<sup>89</sup> There have been criticisms that the EU aids the movement of the wealthy- see Christopher Vincenzi, ‘Welcoming the Well and the Wealthy: Implementing Free Movement Rights in the United Kingdom,’ in Terence Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Institute of Advanced Legal Studies 1996) and Roderic O’Gorman, ‘The ECHR, the EU and the Weakness of Social Rights Protection at the European Level’ (2011) 12 *German Law Journal* 1833 in relation to the free movement of patients

<sup>90</sup> Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *Common Market Law Review* 1597

decisions. For instance, the Court's approach<sup>91</sup> to the requirements of sufficient resources and sickness insurance contained in the Residence Directives and repeated in Directive 2004/38 has been to not enable restrictions of the general Article 21 TFEU right of residence to apply in a disproportionate manner.<sup>92</sup> O'Leary doubted the compatibility of the Residence Directives' requirements with the principle of equal treatment and with the spirit of the Directives, to encourage free movement,<sup>93</sup> and her concern about the strict requirements was to be proven right by the Court: while the Residence Directives contained clear conditions in relation to residence, these were mitigated to some extent by the CJEU in the groundbreaking decisions of *Grzelczyk* and *Baumbast and R*.<sup>94</sup> These cases had a great impact upon the way the Residence Directives were to be applied,<sup>95</sup> and the Court was able to demonstrate the impact of Union citizenship.

### **c. Sufficient Resources, Comprehensive Sickness Insurance and Union Citizenship**

*Grzelczyk* declared Union citizenship to be the fundamental status of migrant Member State nationals,<sup>96</sup> which echoed in subsequent case law,<sup>97</sup> and was codified by Directive 2004/38.<sup>98</sup> The case reduced the stringency of the application of the requirement of sufficient resources to entitle economically inactive citizens to a right to reside within a host Member State.<sup>99</sup> The facts of *Grzelczyk* are well known – the case concerned a French student studying in Belgium who, after working to support his studies for three years, applied for a 'minimex' (loan) to support himself in his

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<sup>91</sup>Michael Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 *European Law Review* 613, 615

Michael Dougan and Eleanor Spaventa, 'Educating Rudy and the non English patient: a double bill on residency rights under Article 18 EC' (2003) 28 *European Law Review* 699, 703

<sup>92</sup> See discussion of *Grzelczyk* and *Baumbast* below.

<sup>93</sup> Siofra O'Leary, 'The Social Dimension of Community Citizenship' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage Publications 1995) 175

<sup>94</sup> *Grzelczyk* and *Baumbast*, n40 above

<sup>95</sup> Michael Dougan and Eleanor Spaventa, 'Educating Rudy and the non English patient: a double bill on residency rights under Article 18 EC' (2003) 28 *European Law Review* 699, 700

<sup>96</sup> *Grzelczyk*, n40 above, para 31

<sup>97</sup> Case C-224/98 *D'Hoop* [2002] ECR I-1619, para 28 ; *Baumbast*, n40 above, para 82; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 22; *McCarthy*, n75 above, para 47; Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, para 60; Case C 503/09 *Stewart* [2011] ECR I-6497, para 80

<sup>98</sup> Preamble Directive 2004/38, recital 3

<sup>99</sup> *Chen*, n24 above, para 33 showed that the Union citizen need not hold the resources themselves, repeated in Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, para 51

final year.<sup>100</sup> The Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (CPAS)<sup>101</sup> proceeded on the assumption that Mr Grzelczyk did not fall within the definition of worker in his fourth year, and the minimex which had been granted to Mr Grzelczyk was subsequently withdrawn, and reimbursement was sought for the amount paid. Mr Grzelczyk submitted that the minimex was a social advantage within the meaning of Article 7(2) of Regulation 1612/68,<sup>102</sup> and the Court agreed.<sup>103</sup> As the minimex would have been granted to a Belgian student in the same position as Mr Grzelczyk, the only bar was his nationality, and the decision to withdraw it was discrimination based solely on grounds of nationality.

The Court in *Grzelczyk* followed *Martínez Sala* in finding that the principle of non-discrimination applies across the scope *ratione materiae* of the Treaty,<sup>104</sup> and deviated from *Brown*,<sup>105</sup> where student maintenance was not found to fall within the scope of EU law *at that stage* of development of Community law.<sup>106</sup> This suggests that *Brown* recognised the potential for future developments bringing student maintenance and training within the scope of the Treaty. The Court in *Grzelczyk* noted that *Brown* was decided before the Maastricht Treaty, and before the introduction of Union citizenship.<sup>107</sup> As the scope of EU law was found to include student maintenance since the introduction of Union citizenship, this led to the finding that a principle of 'financial solidarity' had been accepted by Member States.<sup>108</sup>

Article 14(3) Directive 2004/38 takes *Grzelczyk* into account, stating that: "An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State," so some reliance upon social assistance is permitted, and grounds of nationality cannot be the sole access criterion. Furthermore, Article 8(4) of the Directive requires Member States to take the personal situation of an individual into

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<sup>100</sup> *Grzelczyk*, n40 above

<sup>101</sup> Public Social Assistance Centre for Ottignies-Louvain-la-Neuve

<sup>102</sup> Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ L 257, 19.10.1968, 2–12*

<sup>103</sup> *Grzelczyk*, n40 above, paras 27-29

<sup>104</sup> *ibid* para 32

<sup>105</sup> Case 197/86 *Brown* [1988] ECR 3205

<sup>106</sup> *ibid* para 18

<sup>107</sup> *Grzelczyk*, n40 above, para 35

<sup>108</sup> *ibid* para 44



account, and forbids using a fixed amount to represent sufficient resources.<sup>109</sup> In this way, the *Grzelczyk* approach of financial solidarity influences the application of the Directive, and requires a lack of rigidity in a Member State's approach.

In addition to the requirement of sufficient resources, economically inactive Union citizens are required to have comprehensive sickness insurance for themselves and their family members.<sup>110</sup> *Baumbast* considered the application of this requirement under the (now repealed) Article 1(1) of Directive 90/364 and essentially found that it was disproportionate to not allow Mr Baumbast to reside with his family within the UK given that the only way in which he did not fulfil the requirements of the repealed directive was in lacking emergency medical cover within the UK.<sup>111</sup> The case is discussed in greater detail in relation to rights of residence dependent upon the direct effect of the Article 21 TFEU in Chapter 4, but the Court's approach to the restrictions contained in secondary legislation – the requirement of comprehensive sickness insurance under Directive 90/364 – is relevant to consideration of Directive 2004/38's similar restriction in Article 7(1)(b)-(c). The Court's assessment considered the reasons for the restrictions in secondary legislation: the protection of legitimate interests of Member States,<sup>112</sup> and the requirement of the resident not becoming an 'unreasonable burden' on the host Member State's finance. The CJEU found that the limitations must be proportionate, which meant that "national measures adopted on that subject must be necessary and appropriate."<sup>113</sup> Under the circumstances, it was found to be disproportionate to refuse to allow Mr Baumbast to exercise his right of residence under Article 21 TFEU.<sup>114</sup>

*Baumbast* was by no means the first case to utilise a concept of proportionality to determine the outcome of a case,<sup>115</sup> but it was unique in that the proportionality assessments essentially pertained to EU secondary legislation, rather than simply domestic law implementing the EU legislation, thus the significance of finding that

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<sup>109</sup> Article 8(4) Directive 2004/38

<sup>110</sup> Article 7(1)(b)-(c) Directive 2004/38

<sup>111</sup> *Baumbast*, n40 above. This case is discussed below as it demonstrates the Court of Justice's willingness to find rights of residence for Union citizens who almost qualify under the secondary legislation

<sup>112</sup> *ibid* para 90

<sup>113</sup> *ibid* para 91

<sup>114</sup> *ibid* para 93

<sup>115</sup> See Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and others* [1993] ECR I-04309, para 15 where the Court found that proportionality assessments were necessary in relation to the application of national legislation

the requirements were disproportionate was greater. While the Court phrased its proportionality assessment in terms of the ‘national measures’ having to be necessary and appropriate, these transpose the requirements of comprehensive sickness insurance from the secondary legislation, so could be the same as undertaking a proportionality assessment of the secondary legislation and the circumstances of the individual case which were being considered, rather than the national measures as such, as these can just be a vessel of achieving the requirements of the secondary legislation.

However, the Court did not say that the Residence Directives’ conditions were disproportionate in themselves, nor did it question their applicability.<sup>116</sup> The novel “interpretative technique” utilised in *Baumbast* enabled assessment of the facts of the case, rather than of the content of the law in question.<sup>117</sup> Dougan found that cases such as *Grzelczyk* and *Baumbast* established the principle that, due to the demands of Union citizenship, Member States’ authorities must not simply apply ‘legislative blunt tools,’ but instead must undertake ‘individual administrative evaluations.’<sup>118</sup> The introduction of Union citizenship therefore strengthened residence rights, and means that Union citizens may continue benefitting from the Court’s approach building upon this established case law. However, legal certainty could suffer if the Court’s interpretation of ‘proportionate’ or ‘necessary’ meant that secondary legislation cannot be understood as providing clear rules. Hailbronner suggested in 2005 that “Union citizenship and the principle of proportionality are used to rewrite the rules laid down in secondary Community law”.<sup>119</sup> If true, this would make provisions adaptive at best, or ignored and irrelevant at worst. Since the introduction of Directive 2004/38, the CJEU has been less willing to disregard the limitations on Union citizens’ rights to reside in other Member States, and this is notable in the Court’s approach to the restriction on the right to equal treatment under the Directive.

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<sup>116</sup> Michael Dougan and Eleanor Spaventa, ‘Educating Rudy and the non English patient: a double bill on residency rights under Article 18 EC’ (2003) 28 *European Law Review* 699, 704

<sup>117</sup> Eleanor Spaventa, ‘The Constitutional Impact of Union Citizenship,’ in Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry (eds), *The Role of Courts in Developing A European Social Model-Theoretical and Methodological Perspectives* (DJØF Publishing 2010) 149

<sup>118</sup> Michael Dougan, ‘Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?’ in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 162

<sup>119</sup> Kay Hailbronner, ‘Union Citizenship and Access to Social Benefits’ (2005) 42 *Common Market Law Review* 1245, 1251

#### **d. The Right to Equal Treatment under EU Law**

Member States are not required to support all nationals of other EU Member States who choose to reside within their territory; access to social security is determined by Directive 2004/38, and affects the entitlements of Union citizens enjoying residence rights within a host Member State, as well as the entitlements of any family members joining them. The provision relating to social security assistance is Article 24(2), which states that Member States are not obliged to give Union citizens from other Member States access to social assistance within the first three months of residence,<sup>120</sup> or to “grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families”<sup>121</sup> prior to the acquisition of permanent residence. Article 165(2) TFEU aims at “encouraging mobility of students and teachers”, which restrictions on student grants permitted under Directive 2004/38 does not further. In order to understand when a Union citizen can be denied residence rights on the grounds of requiring social security, it is necessary to consider legal developments predating the Directive.

The Directive does not make entirely clear the circumstances in which reliance upon social assistance does not affect a Union citizen’s right of residence- Article 24(1) gives a general right to equal treatment, but the risk of expulsion exists if Union citizen residents and family members become an ‘unreasonable burden’.<sup>122</sup> Directive 2004/38 is clearer than the Residence Directives were about when reliance upon social assistance may be refused. The discretionary restrictions<sup>123</sup> upon Article 24(1) permitted under Article 24(2) are based upon the length of residence of the Union citizen, and equal treatment cannot be derogated from once the right of permanent residence has been acquired.

The Court has adhered to the strict interpretation of the Article 24(2) derogation before the acquisition of permanent residence in relation to student maintenance aid:

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<sup>120</sup> Or for the longer period provided for in Article 14(4)(b) Directive 2004/38

<sup>121</sup> Article 24(2) Directive 2004/38

<sup>122</sup> Article 14(2) states that residents under Article 7 may continue to reside if they set out the conditions contained in Article 7- i.e. sufficient resources- but expulsion cannot be an automatic consequence of recourse to the social security system of the host state- Article 14(3) and Preamble para 6 Directive 2004/38. However, see Case C-456/02 *Trojani* [2004] ECR I-75731

<sup>123</sup> Preamble Directive 2004/38, para 21

this means that for five years, economically inactive Union citizens may not be able to claim equal treatment in relation to maintenance grants unless domestic law is more generous. While this would not lead to the expulsion of the Union citizen, it could make their residence, and that of any dependants, far more difficult than had there been an entitlement to equal treatment. The Court's acceptance of the appropriateness of the five year rule, in terms of achieving legitimate aims, is evidenced in *Förster*,<sup>124</sup> where the Court's decision has been criticised as countering integration,<sup>125</sup> though it was consistent with the Directive's requirements.<sup>126</sup>

Ms Förster was a German national settled in the Netherlands and enrolled for primary school teacher training then for a bachelor's degree course from 1 September 2001 at the Hogeschool van Amsterdam. She undertook a variety of paid employment in the course of her studies, and undertook a placement in a school from October 2002 to June 2003 after which she did not work. She completed her degree in mid-2004, and accepted a post as a social worker in an institution for people with psychiatric problems on 15 June 2004. From September 2000, the IB-Groep granted Ms Förster a periodically renewed maintenance grant. The IB-Groep initially took the view that Ms Förster was to be regarded as a 'worker' within the meaning of Article 45 TFEU and should be treated in the same way as a student of Netherlands nationality in relation to maintenance grants, under Article 7(2) of Regulation 1612/68.

In March 2004, the IB-Groep decided that, as Ms Förster had not been employed between July 2003 and December 2003, she was no longer a worker, was not entitled to the maintenance grant during that period and should repay the excess sums.<sup>127</sup> Ms Förster brought an action against this decision, then appealed the district court's decision to the Centrale Raad van Beroep claiming 1) she was sufficiently integrated

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<sup>124</sup> *Förster*, n23 above

<sup>125</sup> Siofra O'Leary, 'Case Comment- Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34 *European Law Review* 612; Moritz Jesse, 'The Value of 'Integration' in European Law- The Implications of the *Förster* Case on Legal Assessment of Integration Conditions for Third-Country Nationals' (2011) 17 *European Law Journal* 172

<sup>126</sup> Directive 2004/38 was not applicable on the facts; the earlier Regulation 1251/70 and Directive 93/96 applied, although the Court of Justice referred to Directive 2004/38's provisions, *Förster*, n23 above, paras 54-55; Elaine Fahey, 'Case Comment: Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance": Comment on Cases C-22/08 and C-23/08 Vatsouras and Koupatantze' (2009) 34 *European Law Review* 933, 943

<sup>127</sup> *Förster*, n23 above, para 21

into Dutch society to claim the maintenance grant for July –December 2003 under EU law and, in the alternative, 2) that she should be regarded as a worker for the whole of 2003.<sup>128</sup> The Centrale Raad van Beroep stayed proceedings and referred questions to the CJEU.

The Court found that Ms Förster’s situation did not come under Regulation 1251/70 which entitles a worker who has ceased employment to remain permanently within a Member State and to continue to be entitled to equality of treatment with that Member State’s citizens.<sup>129</sup> The Court then examined whether/when Article 18 TFEU enabled students to obtain a maintenance grant and whether a five year residence requirement is compatible with the Article 18 TFEU. It found that Article 18 TFEU applies across the material scope of EU law, and that a Union citizen who goes to another Member State to pursue secondary education exercises the freedom to move guaranteed by Article 21 TFEU. The Court stated that:

“With regard to social assistance benefits... a citizen of the Union who is not economically active may rely on the first paragraph of Article [18 TFEU] where he or she has been lawfully resident in the host Member State for a certain time”<sup>130</sup>

The CJEU referred to its decision in *Bidar*,<sup>131</sup> where it said the requirement placed upon students to be eligible for maintenance grants was to be ‘established’ in the host state, and made it impossible for students from other Member States to become established and therefore precluded their access to maintenance grants;<sup>132</sup> this decision was distinguished. The CJEU considered that, while Member States must show financial solidarity with Union citizens from other Member States, “it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden”,<sup>133</sup> and that it was therefore permissible to require students to have achieved a ‘certain degree of integration’ into the host Member State. The Court held that five years’ continuous residence could not be held to be excessively restrictive to achieving the legitimate aims of the host Member State in relation to

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<sup>128</sup> *ibid* paras 22-23

<sup>129</sup> *ibid* paras 28 - 32

<sup>130</sup> *ibid* para 39

<sup>131</sup> *Bidar*, n47 above

<sup>132</sup> *Förster*, n23 above, para 47

<sup>133</sup> *ibid* para 48

integration.<sup>134</sup> The CJEU emphasised that the criteria in this case were clear and known in advance as evidence that they were proportionate criteria: the principles of legal certainty and transparency were important to the Court's decision, though the fundamental status of Union citizens was not mentioned.

The CJEU agreed with the Dutch law that a residence requirement of five years to entitle students who were not working to the grant was proportionate. The finding that five years' residence was not disproportionate in relation to access to maintenance is hardly surprising, given Directive 2004/38's coming into force since the facts of the case took place, though the Directive was not applicable in *Förster*. The five year rule in Article 24(2) of the Directive thus effectively sets a fixed term to represent sufficient integration of a Union citizen, despite other links including residence of less than five years must, logically, be capable of demonstrating integration and a strong financial link to a host Member State. For a young person, five years' continuous residence is a large proportion of their lifetime, so makes integration in a lesser period seem more likely for young persons, and they are the likely beneficiaries of student maintenance grants.

What is also difficult about the *Förster* decision is that the CJEU did not consider whether Ms Förster could still be a worker; although this could ultimately be determined by the referring court, the CJEU lack of guidance on how to approach whether the status of worker continued to attach to Ms Förster in the second half of 2003 while she studied before commencing full-time employment was not in line with the previous 'expansive' approach to identifying worker status.<sup>135</sup> The Court did not choose to assess whether Ms Förster's worker status was capable of continuing during the period when she was only a student engaged in studies arguably related to her previous employment,<sup>136</sup> rather than both a worker and a

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<sup>134</sup> *ibid* para 54

<sup>135</sup> See *Levin*, n44 above

<sup>136</sup> Unlike in Case C-46/12 *LN v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, Judgment of 21 February 2013, nyr, paras 39-41. The Court found in para 29 that "There is no provision of the Treaty to suggest that when students who are citizens of the Union move to another Member State to study there, they lose the rights which the Treaty confers on citizens of the Union, including the rights conferred on those citizens when they are in employment in the host Member State"

student, despite its power to provide clarification on terms to guide national courts in interpreting EU law.<sup>137</sup>

Skovgaard-Petersen reminded us that, in *Morgan and Bucher*,<sup>138</sup> the Court indicated that “in order to stand up to the proportionality test, national measures must allow for some degree of flexible or individualised assessment of the requisite degree of integration into society”.<sup>139</sup> The individual assessment is seemingly the missing element in both *Förster* and the Directive, which sets a strict requirement from which there is no derogation for economically inactive students. In the recently decided *Prinz and Seeberger*,<sup>140</sup> there was a requirement of three years residence in Germany to entitle students to an education grant, which had to be completed immediately before the student moved abroad to study. In this case, it was a single condition – the residence requirement immediately before study – which enabled a student to benefit from the maintenance grant: such a condition “barring an assessment of individual attachment, falls short of the necessity test”,<sup>141</sup> and thus was not proportionate.<sup>142</sup> Unlike in *Prinz and Seeberger*, the Directive’s five year requirement is not the single criterion for eligibility: economically active Union citizens cannot be barred from access to maintenance grants on the same conditions as nationals of the host Member State, and those host Member State nationals are not subject to a five year residence requirement under the Directive, hence the difference in approach.

The Court did not miss the opportunity to remind the referring court of the broad EU definition of ‘worker’ in the *Vatsouras* decision,<sup>143</sup> where it took a different approach to job seekers seeking benefits than to students seeking maintenance grants. Article 24(2) states that Member States are not obliged to confer entitlement to social assistance during the first three months of residence, or longer period of job-seeking.<sup>144</sup> However, the Court focussed upon the Treaty right to work in other

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<sup>137</sup> Case C-424/97 *Haim* [2000] ECR I-5123, para 58

<sup>138</sup> Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-09161

<sup>139</sup> Henrik Skovgaard-Petersen, 'There and back again: portability of student loans, grants and fee support in a free movement perspective' (2013) 38 *European Law Review* 783, 797

<sup>140</sup> Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger*, Judgment of the Court, 18 July 2013, nyr

<sup>141</sup> Skovgaard-Petersen, n139 above, 798

<sup>142</sup> *Prinz and Seeberger*, n140 above, para 40

<sup>143</sup> Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-04585, paras 23-30

<sup>144</sup> Article 24(2) Directive 2004/38

Member States –Article 45 TFEU – and the right to equal treatment this right ensures, as well as the finding in *Ioannidis* that work seekers fall within the scope of Article 45 TFEU.<sup>145</sup> As such, financial assistance was found to be within the reach of job-seekers: the Court found that “[b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.”<sup>146</sup> The *Vatsouras* decision was criticised as too ‘fact specific’ and difficult for national courts to follow as it “inadequately addresses the distinction drawn therein between work-seekers’ allowance and social assistance”<sup>147</sup> which was key to the decision.

#### e. The Court’s Approach to Restrictions to Equal Treatment

Though the claimants in *Grzelczyk* and *Baumbast* met with happy results due to the Court’s mitigating the requirements of the Residence Directives,<sup>148</sup> in relation to the Citizens’ Directive, there has been no ‘interpretation’ of the five year rule as a derogation from the right to equal treatment contained in Article 24(2) Directive 2004/38. In *Förster*,<sup>149</sup> ‘citizenship’ and solidarity arguments were insufficient to go against the text of the incoming Directive: in this case, the status of ‘worker’ would have been far more advantageous to Ms Förster than evidence of her obvious integration within the host state. In a sense, this is a set-back for the development of Union citizenship rights,<sup>150</sup> but had the Court applied a proportionality test and found that a five year residence requirement was disproportionate would have been to go against the changed institutional balance in relation to Union citizens’ rights which Directive 2004/38 represented. The Directive aimed “to capture and demarcate the

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<sup>145</sup> Case C-258/04 *Ioannidis* [2005] ECR I-8275, para 21

<sup>146</sup> *Vatsouras*, n143 above, para 45

<sup>147</sup> Elaine Fahey, 'Case Comment: Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance": Comment on Cases C-22/08 and C-23/08 *Vatsouras* and *Koupatantze*' (2009) 34 *European Law Review* 933, 938

<sup>148</sup> Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, *OJ L 317*, 18.12.1993, 59–60, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L 180*, 13.7.1990, 26–27

<sup>149</sup> *Förster*, n23 above

<sup>150</sup> Though the Court’s interpretative competence was never capable of being described as neatly linear – see Michael Dougan, ‘Judicial activism or constitutional interaction? Policymaking by the ECJ in the field of Union citizenship’ in Hans W. Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) 112



rights- and the limits- of EU citizenship law”,<sup>151</sup> and the Court cannot rewrite or ignore EU secondary legislation, but must interpret and apply it.<sup>152</sup> According to Dougan, this decision marked the end of the Court’s “previously clear and consistent case law”, leading to more confused and unpredictable decisions.<sup>153</sup> This thesis agrees with Horsley’s view that the Court itself should be seen as an institutional actor,<sup>154</sup> and further recognises that courts act within what was termed by Stone Sweet as a ‘strategic environment’.<sup>155</sup> Both the introduction of Union citizenship and of Directive 2004/38 thus represented an alteration in the Court’s strategic environment: Union citizenship gave it an entirely new concept to interpret, and the Directive reduced the flexibility in the Court’s interpretative scope.<sup>156</sup>

Article 24(2) of Directive 2004/38 (and hence the Council, and European Parliament) stated that five years was an appropriate length of time to recognise economically inactive Union citizen students as integrated into the host Member State and as eligible for equal treatment in relation to student maintenance. The rigidity introduced by the Directive in this provision may have served to assuage Member State fears of having to support Union citizen students within their borders, but, given the Court’s approach in relation to other rights of residence discussed in Chapters Four and Five, following it seems to be out of line with its more generous approach in relation to more fundamental rights. Nonetheless, given the new institutional input into defining rights the Directive represented, it is understandable, taking into account the non-legislative role of the Court, and the importance of deference to the other EU institutions, that the Court has applied the unambiguous text of the Directive in a literal way in relation to Article 24(2).

Weatherill discussed the fluctuating activism and restraint in the approach of the Court, noting the increased constitutional and institutional complexity since the birth

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<sup>151</sup> Niamh Nic Shuibhne, ‘The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?’ in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 167

<sup>152</sup> Article 19(3) TFEU

<sup>153</sup> Dougan, n11 above, 140

<sup>154</sup> Thomas Horsley, ‘Reflections on the Role of the Court of Justice as the “Motor” of European Integration: Legal Limits to Judicial Lawmaking’ (2013) 50 *Common Market Law Review* 931

<sup>155</sup> Alec Stone Sweet, ‘The European Court of Justice and the judicialization of EU governance’ (2010) 5 *Living Reviews in European Governance* 5, 15

<sup>156</sup> Stone Sweet discussed the CJEU’s role in developing EU law in: Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004)

of the EU;<sup>157</sup> this is partially what the ‘restraint’ shown since the introduction of the Citizens’ Directive demonstrates – respect for the legal order of the EU, and an institutional shift in clarifying the law. However, as discussed in Chapters Four and Five, the Court has been able to rely upon its interpretations of the Treaty since the introduction of the Citizens’ Directive in order to help families in need of rights of residence. There is no Treaty right to equal access to social assistance, and the right at stake in *Förster* was less important to Ms Förster’s enjoyment of her rights as a Union citizen than her right of residence within the Netherlands itself. Her right of residence was not in danger, though her finances would have benefitted from allowing access to the funds, the ‘core’ right of residence was not at stake in the case. The Court’s ‘activism’, as discussed in later chapters, is more focussed upon interpreting Treaty-based rights, rather than reducing the restrictions imposed upon these rights in relatively straightforward secondary legislation.

### 3. Conclusions

Union citizenship has developed since its introduction by the Maastricht Treaty and is more than a rhetorical treaty addition - it has a meaningful status, and has added to the free movement rights of Union citizens and their family members. The acquisition of Union citizenship is still determined by Member States according to their nationality law, yet the Court indicated that EU law may be relevant to its loss.<sup>158</sup> The Citizens’ Directive recognises that citizens are rights-holders within the EU and aimed to strengthen Union citizens’ rights and repealed pre-existing legislation in relation to residence and movement rights of citizens and their families. The Directive does not create uniformity of rights, but does grant rights to Union citizens as citizens, rather than to them under whatever occupational capacity they may fall. The Directive states that Union citizenship is the ‘fundamental status’ of Member State nationals when they exercise their rights of free movement and residence, confirming the approach of the Court of Justice in its case law.

Directive 2004/38 continued the approach of the Residence Directives through not requiring an economic activity to grant a right of residence: Article 7 contains the

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<sup>157</sup> Stephen Weatherill, 'Activism and restraint in the European Court of Justice' in Patrick Capps, Malcolm Evans, and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Approaches* (Hart 2003) 280

<sup>158</sup> *Rottmann*, n24 above

right of residence of more than three months, and this requires sufficient resources and comprehensive sickness insurance if the Union citizen is economically inactive. The *Grzelczyk* and *Baumbast*<sup>159</sup> approaches of applying financial solidarity and proportionality assessments remain relevant to the application of these requirements, but the potential degree of uncertainty caused by such assessments was reduced by Directive 2004/38, which clarified in its Article 24(2) when Member States are not obliged to allow Union citizens to benefit from the right to equal treatment. Economically inactive Union citizens are not entitled to equal access to work-seekers allowances for the first three months of residence, or to student maintenance awards in Article 24(2), until they have a right of permanent residence.

The Court of Justice did not limit the application of Article 24(2) Directive 2004/38 in *Förster*,<sup>160</sup> which emphasised the importance of the acquisition of the right of permanent residence prior to access to student maintenance grants for the economically inactive. The Court did not try to use the link of Union citizenship to interpret the five year residence requirement to a lesser period. The Court respected the approach of the Directive, despite its non-applicability on the facts of the case. The restriction is open to criticism and reduces the Court's ability to find real integration on the part of an economically inactive Union citizen. Allowing only an arbitrary term of five years to demonstrate integration in a host state allows that state to treat nationals of other Member States differently from their own nationals for a substantial period of time, despite these residents having real links to the host state.

However, in *Vatsouras*, the Court did find that financial benefits “intended to facilitate access to the labour market” did not fall within the Article 24(2) restriction on equal access to social assistance within the first three months of residence,<sup>161</sup> which potentially shows a willingness to mitigate the restrictions contained within the Directive in relation to the would-be economically active Union citizen, but not in relation to the economically inactive student.

The Court's ability to extend the rights of Union citizens as it did prior to Directive 2004/38 in an obviously expansive manner, taking every opportunity to interpret restrictions upon rights to equal treatment, has slowed in some respects. The

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<sup>159</sup> *Grzelczyk*, n40 above, *Baumbast*, n40 above

<sup>160</sup> *Förster*, n23 above

<sup>161</sup> *Vatsouras*, n 142 above, para 45

Citizens' Directive both incorporated elements of the Court's case law, such as *Antonissen*,<sup>162</sup> thus making rights more accessible without legal knowledge, and made other areas more rigid, such as access to student maintenance. This thesis argues that the CJEU's efforts to reduce restrictions to rights such as access to benefits have been restricted by the introduction of Directive 2004/38, but that its interpretative ability in relation to rights of residence of Union citizens and their family members has not been so restricted.

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<sup>162</sup> *Antonissen*, n54 above

## Chapter Two

### The UK approach to the residence of Family Relatives of Union citizens under Directive 2004/38

Article 21(1) TFEU does not give an absolute freedom for a Union citizen to move and reside within the EU, and Directive 2004/38 provides some of the restrictions to which the article refers.<sup>1</sup> Directives are unique to EU law,<sup>2</sup> and Directive 2004/38 is implemented in the UK by the Immigration (European Economic Area) Regulations,<sup>3</sup> so the Regulations are to be examined for their accuracy in relation to the requirements of the Directive. Exercise of a Union citizen's right to move can rely, in practice, upon whether members of their family are able to move with the Union citizen. Thence, determining the rights of family relatives within the UK also determines the likelihood that Union citizens can exercise their rights effectively.

This chapter aims to show how the introduction of Union citizenship and the Citizens' Directive has been able to positively impact upon the ways families are able to claim rights of residence within the UK, though the UK has not always responded positively to the requirements placed upon it. It assesses the correctness of the UK Regulations in implementing the Directive, and aims to highlight areas in which Union citizens' rights are not fully guaranteed within the UK. It further aims to show where the introduction of Union citizenship has had greatest impact upon rules in relation to family residence: the Citizens' Directive has highlighted that individuals within the EU may be granted rights of residence due to their status as citizens of the Union.

This chapter is divided into three main sections: in the first section, the UK Implementing Regulations are introduced. The UK has a dualist system of law, so directives need to be transposed into national law. This means that the UK implementing Regulations are relied upon by Union citizens and family members to enforce their rights under Directive 2004/38 within the UK.

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<sup>1</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, 77–123

<sup>2</sup> They are defined in Article 288 TFEU, and discussed in Sacha Prechal, *Directives in EC law* (2nd edn, Oxford University Press 2005)

<sup>3</sup> Immigration (European Economic Area) Regulations 2006, S.I. 2006/1003

Member State have a duty under Article 19(1) TEU to provide sufficient remedies to ensure effective legal protection in the fields of EU law, and the effectiveness of the UK provisions are considered throughout this chapter.

The second section assesses the Regulations' approach to family members as defined in Article 2(2) Directive 2004/38 in detail – in order to demonstrate the broad definition under EU law, and to contrast this with the UK immigration rules for non-EU immigration considered in Chapter Three. Those falling within the definition in Directive 2004/38 are automatically entitled to join their Union citizen family member, so the reverse discrimination which UK law creates in its more restrictive approach to UK nationals' family members will become apparent. Section three considers the Directive's concept of other family members (OFMs) as defined in Article 3(2) Directive 2004/38. The status of OFMs is more precarious than that of close family members, and this chapter aims to clarify when OFMs may rely upon a right of residence based on the Directive within the UK, as case law and Regulation-changes have made this difficult to ascertain with certainty since the Directive came into force in 2006. The difficulties family members face in ascertaining their rights and enforcing them within the UK is discussed throughout this chapter: without knowledge of rights, Union citizens cannot successfully navigate the complex UK legislation.

The Commission has the role of checking implementation of directives in general, and Directive 2004/38 in particular under the Directive's Article 39. It has opened cases against the UK for poor implementation, though these have since closed.<sup>4</sup> The Commission also acted in its checking capacity in producing its 2008 Report on the Implementation of Directive 2004/38;<sup>5</sup> this Report found that overall transposition was "rather disappointing."<sup>6</sup> The Report is useful as a starting point for looking at the implementation of Directive 2004/38 in the UK; it does not go into great detail, but highlights that the Member States did not successfully implement the whole of Directive 2004/38 initially. The Report is vague and lacks detailed assessments of the failure or successes in implementation of each Member State in particular, but indicates that the UK was not alone in misunderstanding or mis-implementing various

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<sup>4</sup> For example, Case C-122/08 *Commission v the United Kingdom* removed from the register 17 December 2008

<sup>5</sup> Commission of the European Communities, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,' Brussels, COM(2008) 840/3, 2-13

<sup>6</sup> *ibid* n3

provisions: “Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.”<sup>7</sup> In examining solely the UK’s implementation in detail, this Chapter will be able to add more substance to the information contained in the Report, and will track whether the areas highlighted by the Commission have been successfully addressed by the updates to the UK Implementing Regulations, or whether further Commission action may yet be required. This will enable consideration of the sources upon which Union citizens and their family members are able to rely to enjoy their rights under Directive 2004/38.

### **1. The Immigration (EEA) Regulations 2006**

The UK implemented Directive 2004/38 with its Immigration (European Economic Area) Regulations 2006.<sup>8</sup> The UK Regulations did not incorporate the Directive’s articles in a linear fashion - for instance, Article 2(1) defines a Union citizen, and this was implemented by Regulation 2(1); but Article 2(2) which defines family members was implemented by Regulation 7. The different arrangements of the Regulations and Directive means that assessing the success of the UK’s implementation requires understanding of the content of each article, in order to properly locate the corresponding rights within the implementing Regulations. The following section considers the UK’s implementation of the Directive’s definitions of family member and OFMs. In addition to the Regulations, the UK also issued an Explanatory Memorandum<sup>9</sup> and Note,<sup>10</sup> both of which give further guidance as to the application of the implementing Regulations, and to the UK government’s understanding of Directive 2004/38 and its interpretation thereof. The European Casework Instructions (ECIs) also serve to add context to understanding the UK’s approach to implementation, and clarified how the UK Border Agency was likely to approach some uncertain or ambiguous points in the Regulations,<sup>11</sup> and how the Border Force and UK Visas and Immigration now will in its stead.

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<sup>7</sup> *ibid*

<sup>8</sup> Immigration (European Economic Area) Regulations 2006, S.I. 2006/1003

<sup>9</sup> Explanatory Memorandum to The Immigration (European Economic Area) Regulations 2006, S.I. 2006/1003, at [http://www.legislation.gov.uk/ukxi/2006/1003/pdfs/uksiem\\_20061003\\_en.pdf](http://www.legislation.gov.uk/ukxi/2006/1003/pdfs/uksiem_20061003_en.pdf)

<sup>10</sup> Immigration (European Economic Area) Regulations 2006, S.I. 2006/1003, Explanatory Note

<sup>11</sup> Helen Toner, 'Legislative Comment: New Regulations implementing Directive 2004/38' (2006) 20 *Journal of Immigration Asylum and Nationality Law* 158

The Regulations have been regularly updated,<sup>12</sup> with further memoranda and notes to guide interpretation, but with no official consolidated version available, so confusion is likely to arise.<sup>13</sup> It becomes apparent very quickly that the UK legislation is spread out over a number of documents, and is not at all user friendly. The difficulties which Union citizens and their family members face in navigating these cumbersome rules represent an inauspicious start to a potential period living within the UK. However, entry into the UK is assured under Article 5(1) of Directive 2004/38 to Union citizens with a valid ID card or passport, and the same applies to TCN family members possessing valid passports.<sup>14</sup> Assuming that entry is granted to a mobile Union citizen without difficulty, family members who are not also Union citizens may face more difficult tasks, which can be some of the first hurdles to overcome to establish a right of residence within the UK. Who is classified as a family member under the Directive and UK Regulations is thus of paramount importance to establish, as holding an EEA family permit can ensure easy entry to the UK for TCN family members.

#### **a. Union Citizens and TCN Family Members**

Thym suggests that the legal status of TCN family members “has become the new battleground,” or frontier, for the CJEU in its development of the concept of Union citizenship,<sup>15</sup> and it does pose many challenges, especially to Member States’ autonomy. TCN rights are derivative: in order for family members/other family members to be able to rely upon a right of residence derived from Directive 2004/38, there must be a Union citizen residing legally within the UK. The UK terms such a person “a qualified person”, and this means a Union citizen qualifying under the Regulations. The 2012 updates to the Regulations insert the additional criterion that qualifying Union citizens must not be nationals of the United Kingdom.<sup>16</sup> The Regulations define a qualifying person as “a person who is an EEA national and in the United Kingdom as- (a) a jobseeker; (b) a worker; (c) a self-employed person; (d) a

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<sup>12</sup> Most recently by Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, S.I. 2013/3032, bringing changes into force 1 January 2014

<sup>13</sup> ‘EEA Regulations’ on <http://www.eearegulations.co.uk/versions/latest.php> provides a consolidated version, but this is not managed by the UK government

<sup>14</sup> Implemented by Regulation 11 Immigration (EEA) Regulations 2006, as amended

<sup>15</sup> Daniel Thym, ‘Towards ‘Real’ Citizenship? The Judicial Construction of Union Citizenship and its Limits’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 165

<sup>16</sup> Regulation 2(1)(d) Immigration (European Economic Area) (Amendment) Regulations 2009, S.I. 2012/1547



self-sufficient person; or (e) a student”,<sup>17</sup> and outlines ways in which the status of worker may be retained.<sup>18</sup> Union citizens who are “qualified persons” are entitled to reside within the UK for so long as they remain qualified persons under Regulation 14(1). The Regulation’s definitions of self-employed person, self-sufficient person and student all comply with the Directive’s definitions.<sup>19</sup> The definition of worker, however, has just been restricted. The Department for Work and Pensions recently published a ‘minimum earnings threshold’ policy requiring EEA workers to £149 a week for at least three months,<sup>20</sup> with the aim of reducing access to benefits, but the application of which may be too stringent to comply with the EU’s flexible definitions of genuine and effective work.<sup>21</sup> This has not been incorporated into the EEA Regulations, and there has been no time for judicial consideration of the policy, but the fact that it was introduced shows how important appearing to be strict on access to social security is to the current government.

Worker and self-employed status can be retained after the cessation of a Union citizen’s work or self-employment under Article 7(3) Directive 2004/38, including where there is a temporary inability to work as a result of illness or accident; where the individual is involuntarily made unemployed after employment for more than one year and has registered with the relevant employment office; where the individual is involuntarily unemployed after completing a fixed-term contract of less than a year and having registered with the relevant employment office; where the individual embarks upon vocational training - which must be linked to the previous employment unless this was lost involuntarily.<sup>22</sup> In the UK Court of Appeal *Tilianu*<sup>23</sup> case, the involuntary employment referred to in Article 7(3)(b) of the Directive was interpreted as only applying to persons who are ‘employed’ rather than self-employed, which technically fits with the Directive’s terminology, though strongly favours workers over self-employed persons. The directives regarding self-employed persons, which Directive 2004/38 repealed,<sup>24</sup> did not contemplate retention of the status of self-

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<sup>17</sup> Regulation 6(1) Immigration (EEA) Regulations 2006

<sup>18</sup> Regulation 6(2) Immigration (EEA) Regulations 2006

<sup>19</sup> Regulation 4(1)(a)-(d) Immigration (EEA) Regulations 2006

<sup>20</sup> Department of Work and Pensions, ‘Minimum earnings threshold for EEA migrants introduced’ 21 February 2014, Press Release, at <https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced> last accessed 29 March 2014

<sup>21</sup> Case 53/81 *Levin* [1982] ECR 1035

<sup>22</sup> Article 7(3)(a)-(d) Directive 2004/38

<sup>23</sup> *Tilianu v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397

<sup>24</sup> Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a

employed person, merely retention of the right to reside within the host Member State,<sup>25</sup> and there is no CJEU case law applying Article 7(3)(b) of Directive 2004/38 to self-employed persons.

A 'jobseeker' is a qualified person under the UK Regulations, though the status is kept distinct in the Directive, where jobseekers are not automatically given the Article 7 right of residence, unlike under the Regulations where they are entitled, as qualified persons, to this right of residence beyond three months. Under the Directive, Article 14(4)(b) instead grants a jobseeker protection against expulsion for a longer period, incorporating the *Antonissen* decision of the Court of Justice,<sup>26</sup> if the jobseeker can show that they "entered the territory of the host Member State in order to seek employment..." and "can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged." The UK Regulations require that a jobseeker must not be an unreasonable burden on the finances of the UK, and the jobseeker is normally only entitled to reside for up to 6 months, though this may be extended if "they are able to provide compelling evidence of seeking work and having a genuine chance of being engaged."<sup>27</sup> Obviously, the period in which they can seek work as a matter of practicality would be limited by their resources and ability to support themselves within the UK, and implementation is in line with the requirements of Article 14(4)(b).

## **b. Domestic Citizens and the Directive**

While UK citizens are also Union citizens,<sup>28</sup> they are not normally entitled to rely upon Union law in their home states despite being workers or self-employed, etc. - EU law does not apply to purely internal situations.<sup>29</sup> The rule has been subject to criticism,<sup>30</sup>

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self-employed capacity, *OJ L 14*, 20.01.1975, 10-13; Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive No 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, *OJ L 14*, 20.01.1975, 14-14

<sup>25</sup> Article 2 Directive 75/34

<sup>26</sup> Case C-292/89 *Antonissen* [1992] ECR I-04265

<sup>27</sup> Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 S.I. 2013/3032

<sup>28</sup> Article 20 TFEU

<sup>29</sup> Case 175/78 *Saunders* [1979] ECR 1129, para 11

<sup>30</sup> Niamh Nic Shuibhne, 'Free movement of persons and the wholly internal rule: Time to move on?' (2002) 39 *Common Market Law Review* 731; Cyril Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 *European Law Review* 690; Alina Tryfonidou, 'Reverse discrimination in purely internal situations: An incongruity in a Citizens' Europe'

and is particularly open to attack in relation to the right of an individual to live with their family in exercising their fundamental freedoms under EU law, as this does not apply to domestic citizens. It is the responsibility, and entitlement, of Member States to determine the laws in relation to family reunification for their own citizens. While there have been instances where individuals have been able to rely on rights under EU law against their home state, these situations are not the norm, and are discussed in much greater detail in Chapter Four.<sup>31</sup>

## **2. Union Citizens' Family Members and the Regulations**

This section discusses the Directive's definition of 'family member', in order to demonstrate that the movement of a family member is respected under EU law and is at the heart of ensuring the movement of a Union citizen. As Advocate General Sharpston said, "when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families... If family members are not treated in the same way as the EU citizen exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning."<sup>32</sup> The approach of EU law is to protect the rights of family members to move with a Union citizen automatically: other than requiring the family member to fall within the Article 2(2) definition and the Union citizen to be eligible to live within a Member State, few conditions can be imposed,<sup>33</sup> and virtually none if the Union citizen is a worker or self-employed.<sup>34</sup> This is in contrast to the approach of the UK Immigration Rules discussed in Chapter Three, where TCN family members' rights are far from automatic.

### **a. Who is a Family Member?**

Family members are defined in Article 2(2) of Directive 2004/38 and include spouses, registered partners "with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the

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(2008) 35 *Legal Issues of Economic Integration* 43; Anne Walter, *Reverse Discrimination and Family Reunification* (Wolf Legal Publishers 2008)

<sup>31</sup> One such example was in Case C-370/90 *Surinder Singh* [1992] ECR I-04265

<sup>32</sup> Advocate General Sharpston in her Opinion for Case C-34/09 *Ruiz Zambrano*, delivered on 30 September 2010, para 128

<sup>33</sup> The rules relating to registered partners depend on the legislation of the intended host Member State, as not all Member States recognised registered partnerships (Article 2(2)(b) Directive 2004/38. Article 27 Directive 2004/38 states that public policy, public security or public health may provide grounds to restrict the freedom of movement and residence of Union citizens and their family members

<sup>34</sup> Sufficiency of resources is not required by Article 7(1)(a) Directive 2004/38, but is by Article 7(1)(b)-(c) Directive 2004/38

host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State”, direct descendants who are under the age of 21 or are dependants of the Union citizen or spouse or partner, dependent direct relatives in the ascending line of the Union citizen or spouse or partner.

Family members benefit from the right of equal treatment,<sup>35</sup> and, for family members in Article 2(2)(a)-(b),<sup>36</sup> and (c) for under 21 year olds, entrance and residence rights are automatic, and require only proof of the familial relationship and valid ID.<sup>37</sup> As emphasised in the preamble: those who have already obtained a residence card do not need to obtain an entry visa,<sup>38</sup> though this requirement remains for TCN family members who have not yet acquired a residence card. For descendants over 21, and for ascending line relatives, dependency<sup>39</sup> must be shown to demonstrate family member status. In addition to entry and residence rights, family members are entitled to work,<sup>40</sup> and this must be in the same state as the one in which the Union citizen is residing.<sup>41</sup> Regulation 7(1) of the Immigration (EEA) Regulations 2006,<sup>42</sup> successfully transposed the family member definitions. Some general requirements of family members are discussed below, prior to more detailed consideration of the actual statuses of family members, which will be divided into two sections: the first, focusing on the partners (spouse or registered partner) of Union citizens, and the second focusing on the dependent direct descending or ascending line relatives who qualify as family members under Article 2(2)(c)-(d) of the Directive.<sup>43</sup>

## **b. Requirements Placed on Family Members**

Directive 2004/38 does not require that Union citizens’ family members have lawfully resided in the EU prior to their joining the Union citizen. The CJEU decision of *Metock* rejected Member State submissions that TCNs must have legally resided legally within the EU before being able to claim a right to reside as a family member

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<sup>35</sup> Article 24(1) Directive 2004/38

<sup>36</sup> Subject to Member State recognition of registered partnerships

<sup>37</sup> Article 7(1)(d) Directive 2004/38 and 7(2) for TCN family members; and Article 8(5)(a)-(d) on administrative formalities for Union citizen family members, Articles 9-10 on TCN family members and residence cards

<sup>38</sup> Preamble to Directive 2004/38, para 8

<sup>39</sup> Discussed below

<sup>40</sup> Article 23 Directive 2004/38

<sup>41</sup> Case C-10/05 *Matter and Cikotic* [2006] ECR I-03145

<sup>42</sup> Immigration (European Economic Area) Regulations 2006, S.I. 2006/1003

<sup>43</sup> Regulation 7(1)(c) Immigration (EEA) Regulations 2006

of a Union citizen.<sup>44</sup> This requirement was not found in secondary legislation, and the Court found it was irrelevant whether the TCN had become established in the host state before or after founding a family with a Union citizen.<sup>45</sup> The case effectively overruled *Akrich* on this point,<sup>46</sup> and removed the restriction of prior lawful residence within the EU which had been placed upon TCN family members.<sup>47</sup> *Metock* concerned the rights of residence of the TCN spouses of Union citizens who were lawfully residing in Ireland, but its reasoning applies beyond the spousal relationship to all close family members<sup>48</sup> no distinction is made between the rights of spouses and the other Article 2(2) family members by Directive 2004/38. The case thus showed that EU law had reduced governmental migration control,<sup>49</sup> though this was not new. In *MRAX*,<sup>50</sup> the CJEU found that where family members lacked the required visas or documents, the Member State had to give them the opportunity to obtain these documents, or to prove their right by other means, as it would be disproportionate not to accept other proof.<sup>51</sup> *Metock* strengthened Union citizens' rights and rejected that governments had 'exclusive competence' over first entry to the territory of the EU.<sup>52</sup> Rights to move and reside with their family members ought not to depend on the legality of residence of those family members prior to the relationship with the Union citizen- this would distinguish between Union citizens' rights unfairly, and be likely to discriminate against Union citizens with TCN family members.

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<sup>44</sup> Case C-127/08 *Metock* [2008] ECR I-06241, affirmed in Case C-551/07 *Sahin* [2008] ECR I-10453, and discussed in: Peter Starup and Matthew J. Elsmore, 'Introductory Note to *Metock and others*' (2008) 47 *International Legal Materials* 858; Cathryn Costello, '*Metock*: Free Movement and "Normal Family Life" in the Union' (2009) 46 *Common Market Law Review* 587; Samantha Currie, 'Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in *Metock*' (2009) 34 *European Law Review* 310

<sup>45</sup> *Metock*, n44 above, paras 90-92

<sup>46</sup> Case C-109/01 *Akrich* [2003] ECR I-09607, para 61. The scope of the decision was unclear, however: see Anja Lansbergen, '*Metock*, implementation of the Citizens' Rights Directive and lessons for EU citizenship' (2009) 31 *Journal of Social Welfare and Family Law* 285, 287

<sup>47</sup> Elaine Fahey, 'Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*: Case C-127/08, *Metock & others v. Minister for Justice, Equality & Law Reform*, Judgment of the European Court of Justice of 25 July 2008, nyr' (2009) 36 *Legal Issues of Economic Integration* 83

<sup>48</sup> *Metock*, n44 above, paras 49-50

<sup>49</sup> Lisa Pilgram, 'Tackling "sham marriages": the rationale, impact and limitations of the Home Office's "certificate of approval" scheme' (2009) 23 *Journal of Immigration Asylum and Nationality* 24, 29.; Robin C.A. White, 'Conflicting competences: free movement rules and immigration laws' (2004) 29 *European Law Review* 385, 391; Cathryn Costello, '*Metock*: Free Movement and "Normal Family Life" in the Union' (2009) 46 *Common Market Law Review* 587

<sup>50</sup> Case C-459/99 *MRAX* [2002] ECR I-06591

<sup>51</sup> *ibid* paras 61-62

<sup>52</sup> *Metock*, n44 above, para 66

The Directive requires Member States to issue a registration certificate immediately upon application by a Union citizen,<sup>53</sup> and within six months of an application for a residence card being submitted by a Union citizen's family member, with a certificate of application for the residence card being issued immediately;<sup>54</sup> Regulation 17(3) correctly transposes these time limits. As the Court emphasised in *MRAX*, the issue of a permit does not give rise to rights, but instead serves to prove the individual's position under Union law.<sup>55</sup> The UK does not require the registration of Union citizens, so technically puts fewer burdens upon family members. This meant that Article 8(2) of the Directive did not have to be fully transposed into the EEA Regulations, although Union citizens may choose to register and are entitled to a certificate immediately upon application.<sup>56</sup> For many TCNs, this is essentially a requirement, and the UK issues more registration certificates than all but three Member States, with only Spain, Belgium and Austria issuing more certificates. However, the UK rejects more than 15% of applications, which is a high proportion and reflects the rigidity of the process: forms must be complete and correctly filled in or they are rejected.<sup>57</sup> Regulation 17 transposes the law in relation to residence cards of TCN family members, and requires production of a valid passport and proof of the applicant's family member status.<sup>58</sup>

### **c. Spouses and Registered Partners**

Spouses and civil partners are defined in the UK Regulations in Regulation 7(1)(a), and individuals can only be party to one such partnership at any given time.<sup>59</sup> 'Spouse' may be a deceptively complicated term: the meaning is not the same across Member States, for instance Belgium, France, the Netherlands, Denmark, Norway, Portugal, Spain and now the UK recognise same-sex marriage, while other EU states either recognise non-marriage partnerships, or do not recognise same-sex relationships as equivalent to marriage at all. In the UK, same-sex partners in a relationship

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<sup>53</sup> Article 8(2) Directive 2004/38

<sup>54</sup> Article 10(1) Directive 2004/38

<sup>55</sup> *MRAX*, n50 above, para 74

<sup>56</sup> Regulation 16(1) Immigration (EEA) Regulations

<sup>57</sup> Astrid Henningsen, Maylis Labayle, Camino Mortera and Rossella Nicoletti, *Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation* (2013) at [http://ec.europa.eu/justice/citizen/document/files/evaluation\\_of\\_eu\\_rules\\_on\\_free\\_movement\\_final\\_report.pdf](http://ec.europa.eu/justice/citizen/document/files/evaluation_of_eu_rules_on_free_movement_final_report.pdf) last accessed 29 March 2014

<sup>58</sup> Regulation 17(1)(a)-(b) Immigration (EEA) Regulations

<sup>59</sup> The UK Regulations were recently amended so as to exclude coterminous civil partnerships and marriages: Immigration (European Economic Area) (Amendment) Regulations 2012, S.I. 2012/1547 update to Regulation 2(1)

contracted in another Member State have been allowed to enter and reside as family members due to the UK's recognition of civil partnerships. Since 29 March 2014, same sex marriage has also been permitted within the UK.<sup>60</sup> In other Member States, same-sex spouses who have lawfully contracted a partnership or marriage in one country would be unable to have their relationship recognised within a host state. The difficulties faced by same-sex couples in being recognised as family members for the purposes of EU law are due to the non-harmonisation of family law in relation to same-sex partnerships, and therefore to its dependence on the domestic law of two Member States.

Under the Directive, a registered partner of a Union citizen must be recognised as a family member if the relationship was contracted on the basis of law within a Member State, and if the host Member State “treats registered partnerships as equivalent to marriage”.<sup>61</sup> Article 2(2)(b) does not mention the sex of registered partners, only that the two partners must have contracted a partnership and partnerships must be recognised as equivalent to marriage within the host state. There is no requirement that any combination of genders be able to enter a partnership within a host state under EU law, but it would ease free movement between Member States if countries which recognise civil partnerships agreed to recognise all forms of civil partnership concluded within other Member States.

In addition to the registered partnerships which the UK is required to recognise under the Directive due to its recognition of civil partnerships within the UK as equivalent to marriage,<sup>62</sup> there is no restriction in the UK Regulations matching that of Article 2(2)(b) in limiting the partnerships to be recognised to those concluded within another Member State. This means that the UK definition is broader than the Directive's, and more likely to recognise partnerships including TCN partners, as these would be more likely to have been concluded outside the EU. The UK Regulations do not mention where a registered partnership must have taken place, merely that it must be valid, monogamous and not coterminous with a marital relationship.<sup>63</sup> In this way, the UK

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<sup>60</sup>Section 1 Marriage (Same Sex Couples) Act 2013 (Chapter 30) extends the right to marry to same sex couples

<sup>61</sup> Article 2(2)(b) Directive 2004/38

<sup>62</sup> The ‘equivalence’ of civil partnerships is discussed further below

<sup>63</sup> Regulation 2(1) following the amendments by the Immigration (European Economic Area) (Amendment) Regulations 2012, S.I. 2012/1547

eases the entry and residence of a TCN registered partner, if they fulfil the other requirements of entry.<sup>64</sup>

There is no attempt by the Directive to harmonise the law in relation to recognition of registered partnerships: the EU lacks competence to harmonise in this area. In the UK, only registered partnerships between same-sex couples are recognised, following the definition in the Civil Partnership Act 2004.<sup>65</sup> Article 1(1) states that a civil partnership “is a relationship between two people of the same sex”, and, following Regulation 2(1), this is the definition which is applied in relation to the UK European Economic Area (Immigration) Regulations. This definition means that there is no possibility for a man and a woman who have entered into a civil partnership, for instance in France, where *le pacte civil de solidarité* is a contract between two persons above the age of majority, of the same or of different sex, to organise their life together.<sup>66</sup> For a heterosexual *pacte*, the UK is not, following the Civil Partnership Act definition, obliged to recognise the relationship within the UK, or to treat such a partner as a family member for the purpose of the Regulations. This has the greatest potential impact upon TCN partners, though they could potentially find a right of residence as an OFM under Article 3(2)(b) of Directive 2004/38.<sup>67</sup> This seems to be contrary to the general principles of non-discrimination on grounds of sex and sexual orientation contained in Articles 10 and 19 TFEU, as the differentiations drawn between civil partnerships which are and are not recognised within the UK are wholly on the sex of the partners. However, these provisions are not directly effective, so cannot be relied upon to obtain recognition of a partnership which the Member State has not chosen to recognise as equivalent to marriage.

Factors which can potentially mitigate the result of this include the potential of entry to a Member State as a beneficiary under the Directive – a partner in a long-term relationship, or, depending on national law, the principle of equal treatment as applied in *Reed*<sup>68</sup> could assist civil partners. Here, the Court required that a Member State which permits the unmarried companions of its nationals, who are not themselves nationals of that Member State, to reside in its territory, cannot refuse to grant the same

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<sup>64</sup> Which are discussed below

<sup>65</sup> Civil Partnership Act 2004 (Chapter 33)

<sup>66</sup> “un contrat. Il est conclu entre deux personnes majeures, de sexe différent ou de même sexe, pour organiser leur vie commune” from <http://vosdroits.service-public.fr/N144.xhtml>, last accessed 29 March 2014

<sup>67</sup> Though this would not entitle the TCN partner to work

<sup>68</sup> Case 59/85 *Reed* [1986] ECR 01283



benefit to migrant workers who are nationals of other Member States.<sup>69</sup> The Directive's recognition of registered partnerships as family is an important development within EU free movement law: same-sex partners have often encountered difficulty in relation to having their rights recognised for immigration and residence purposes,<sup>70</sup> and while the Directive was unable to harmonise the substance of the law within each Member State, it at least ensured that Member States cannot discriminate against registered partnerships contracted in other Member States if they themselves recognise registered partnerships within their national law thereby enhancing the scope of *Reed*.

The requirement that partnerships be treated as 'equivalent to marriage' in Article 3(2)(a) of the Directive is potentially open to different interpretations: though the UK implemented the civil partnership relationship in its Regulations as that of registered partners, this is not a 'marriage' relationship: other Member States have same-sex marriage, as the UK has since 29 March 2014, and while the UK's registered partnership grants many of the same rights to the couple as to a married couple, the UK does not distinguish between those same-sex relationships in other Member States which do not accord same-sex couples anything which could be considered similar to marital rights, and which are not truly equivalent to marriage.

Saez divides countries recognising same-sex relationships into three groups- those granting:

“(1) Full equality of rights between same- and opposite-sex couples but no access to a marriage certificate.

(2) Recognition of same-sex couples as partners with ample recognition of material rights and a narrow access to building family ties.

(3) Recognition of same-sex couples as a lawful association between two individuals, narrow or no access to family ties, and limited material rights”<sup>71</sup>

The UK civil partnership falls into the first group, and is still an option for same-sex couples to formalise their relationship, despite the availability of same-sex marriage. The UK's civil partnership offers equivalent rights to marriage, in relation to the

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<sup>69</sup> For further judicial consideration of the principle of non-discrimination, see Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981

<sup>70</sup> For example Zvi Triger, 'Fear of the wandering gay: some reflections on citizenship, nationalism and recognition in same-sex relationships' (2012) 8 *International Journal of Law in Context* 268

<sup>71</sup> Macarena Saez, 'Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World: Why 'Same' Is So Different' (2011) 19 *European Review of Private Law* 631, 640

‘material consequences, parental consequences and other consequences’, as categorised by the ECtHR in *Schalk v Austria*,<sup>72</sup> though this is not the case for all Member States recognising civil partnerships. For instance, Austria recognises same-sex couples as ‘almost equal’ to married couples,<sup>73</sup> but lacking rights in certain important areas- notably family law in relation to essentially parental, or adoptive rights.<sup>74</sup>

The Directive does not state whether ‘equivalent to marriage’ means in relation to the partner, or in relation to broader family rights. McGlynn discussed the contradictions in the EU’s approach to marriage and partnerships,<sup>75</sup> highlighting the disparity between the lack of recognition of same sex partnerships as familial relationships and the ‘right to marry’ as a fundamental right.<sup>76</sup> She highlighted the difficulty between the CJEU respecting a traditional ideology of family and the transformed modern approach to relationships including cohabitation and same-sex partnerships not having been responded to as quickly as necessary.

As family rights under the Directive are derivative rights, dependent upon the existence and qualification (worker/other qualifying status) of a Union citizen, rather than rights accorded to a family unit containing a Union citizen within a host Member State, howsoever that family may be construed, there is always the difficulty of showing entitlement. Third-country nationals are not automatically entitled to reside in a given Member State under EU law: in order to derive residence rights due to their relationship with a Union citizen they must provide proof of their relationship with a Union citizen who has a right to reside in that state. For same-sex partners, this proof is doubly complex: in addition to demonstrating a duly contracted relationship, the

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<sup>72</sup> *Schalk v Austria* (Application no. 30141/04) (2010) ECHR 995, paras 31-34: “32 Material consequences cover the impact of registered partnership on different kinds of tax, health insurance, social security payments and pensions. In most of the States concerned registered partners obtain a status similar to marriage. This also applies to other material consequences, such as regulations on joint property and debt, application of rules of alimony upon break-up, entitlement to compensation on wrongful death of partner and inheritance rights. 33 When it comes to parental consequences, however, the possibilities for registered partners to undergo medically assisted insemination or to foster or adopt children vary greatly from one country to another. 34 Other consequences include the use of the partner’s surname, the impact on a foreign partner’s obtaining a residence permit and citizenship, refusal to testify, next-of-kin status for medical purposes, continued status as tenant upon death of the partner, and lawful organ donations.”

<sup>73</sup> Saez, n71 above, 641

<sup>74</sup> *ibid* 642

<sup>75</sup> Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) Chapter 5

<sup>76</sup> *ibid* 112

partners may be required to show this is equivalent to marriage, without much guidance as to the meaning of that requirement.

It is unclear whether the CJEU follows the ECtHR's approach in *Schalk*, or whether same-sex unions recognised by Member States for tax-purposes, inheritance, etc., can suffice. Saez discussed France's PACS and identified that it provided "rights and obligations similar but not equal to marriage"<sup>77</sup>, so while, for the purposes of UK law, a French *pacte* relationship is sufficient to recognise partners as family members, it is not necessarily clear that this would be compulsory under the Directive- the 'equivalent to marriage' criterion is unmentioned by the UK Regulations,<sup>78</sup> so as long as there is a civil partnership, the UK recognises partners as family members. The lack of harmony between states' approach to same-sex relationships is difficult- unlike with a marriage lawfully concluded within the UK, there is no guarantee that a civil partnership so concluded will be recognised outside the UK and the partners available to rely upon their rights as partners, unless a host Member State of the EU recognises that the UK recognises such partnerships as equivalent to marriage.

For Tobin, the key feature to establish whether a civil partnership can be equivalent to marriage is in relation to whether "the partners are afforded the opportunity to jointly apply to adopt children".<sup>79</sup> If this test were to be applied, under the Adoption and Children Act,<sup>80</sup> the UK's registered partnership would pass the 'equivalent' test- as rights of adoption are granted equally to couples of the same or opposite sex: an "enduring family relationship" is determinative. If civil partnerships must be equivalent to marriage, as the Directive suggests, do same-sex couples need to be able to adopt under national law? This raises the question whether Member States are able to assess the civil partnerships of another Member State, or whether the fact that a partnership exists sufficient to allow an assumption of equivalence of the relationship to marriage.

The relevance of the Citizens' Directive recognising same-sex partners as family members can be seen as an important step towards Member States realising that they, too, should, and can recognise such partnerships as indicative of family rights.

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<sup>77</sup> Saez, n71 above, 648

<sup>78</sup> Regulation 7(1)(a) Immigration (EEA) Regulations

<sup>79</sup> Brian Tobin, 'Same-sex couples and the law: recent developments in the British Isles' (2009) 23 *International Journal of Law, Policy and the Family* 309, 321

<sup>80</sup> Adoption and Children Act 2002 (Chapter 38)

However, despite resolutions such as the Council Resolution on Equal Rights for Homosexuals and Lesbians,<sup>81</sup> and the Council of Europe Resolution on Discrimination on the Basis of Sexual Orientation and Gender Identity,<sup>82</sup> the EU cannot require recognition of same-sex relationships. As *Hofmann*<sup>83</sup> made clear long ago: EU law “is not designed to settle questions concerned with the organization of the family”.<sup>84</sup>

#### **d. Dependent Family Members**

The concept of direct descendants under 21 or dependants under Article 2(2)(c) of the Directive has been transposed by Regulation 7(1)(b), and ascending line relatives/dependants are incorporated by Regulation 7(1)(c). Just as the Directive does not define dependency, the UK implementing Regulations do not impose a definition upon UK law which means that guidance for this term must be found in case law. In *Lebon*, the Court of Justice determined that dependency was a question of fact:

“the status of dependent member of a worker's family, to which Article 10(1) and (2) of Regulation No 1612/68 refers, is the result of a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support.”<sup>85</sup>

This is a broad definition and enables national courts to determine whether family members are actually dependent, without consideration of whether they need to be dependent, or whether they have any right to be dependent, which, being stricter tests, would have the potential to restrict the rights of free movement of Union citizens and their dependent family members. *Jia*<sup>86</sup> emphasised that the need for support must exist within the state of origin, or state from which the application to join the Union citizen was made.<sup>87</sup> According to guidance issued by the European Commission, to determine dependency, individuals must be assessed, *inter alia*, with regard to their “need for material support to meet their essential needs in their country of origin or the country from which they came at the time when they applied to join the EU citizen (*i.e. not in*

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<sup>81</sup> Council Resolution on equal rights for Homosexuals and Lesbians, A3, *OJ C 61*, 28.2.1994, 40

<sup>82</sup> Council of Europe Parliamentary Assembly resolution 1728 of 29 April 2010 on discrimination on the basis of sexual orientation and gender identity, at [www.coe.int/t/dghl/standardsetting/hrpolicy/Other\\_Committees/DH-LGBT\\_docs/AP\\_Resolution\\_1728\\_2010\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/DH-LGBT_docs/AP_Resolution_1728_2010_en.pdf), last accessed 29 March 2014

<sup>83</sup> Case 184/83 *Hofmann* [1984] ECR 3047

<sup>84</sup> *ibid* para 24

<sup>85</sup> Case 316/85 *Lebon* [1987] ECR 2811, para 24

<sup>86</sup> Case C-1/05 *Jia* [2007] ECR I-00001

<sup>87</sup> *ibid* para 37

the host Member State where the EU citizen resides)...”<sup>88</sup> The reference to needing support for ‘essential needs’ makes it seem that the Commission invoked a dependency of necessity rather than of fact in its guidance, although it states elsewhere that dependency is a question of fact.<sup>89</sup> The usefulness of the Commission’s approach to dependency is reduced by its failure to distinguish between dependency for the purposes of Article 2(2)(c)-(d) and Article 3(2)(a) of the Directive, which will be discussed further below.

Logically, dependency must arise somewhere and at some time: Article 2(2)(c)-(d) does not specify when the dependency has to have arisen, nor does it require dependency in a particular place, so requiring dependency prior to the movement/joining of the Union citizen and family member may be in excess of the requirements of the Directive, so the Commission guidance appears to be inappropriate in this regard. In *Metock*, the CJEU held that family members need not have been family members at the time of the Union citizen’s exercise of their right of free movement,<sup>90</sup> which was potentially hugely important for Union citizens’ rights to family reunification.<sup>91</sup> This was not followed in the recent CJEU decision of *O and B*,<sup>92</sup> where the Court diverged from its normal, generous path. Here, the TCN fiancé of a Union citizen who had lived with him in one Member State tried to rely upon this residence as ‘family members’ in order to acquire residence rights in the Union citizen’s home Member State. This, however, was rejected by the Court, which adhered to Directive 2004/38’s definition of family members,<sup>93</sup> despite the situation being one which fell outside the scope of the Directive.<sup>94</sup> Potentially the more restrictive approach was due to the ‘movement’ under EU law being before the familial relationship: rather than a move to a Member State to exercise Treaty freedoms with a

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<sup>88</sup> Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2009) 313, 2.1.4, emphasis in original

<sup>89</sup> *ibid*

<sup>90</sup> *Metock*, n44 above, para 90

<sup>91</sup> Elaine Fahey, 'Case Comment: Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance": Comment on Cases C-22/08 and C-23/08 Vatsouras and Koupatantze' (2009) 34 *European Law Review* 933, 947: “The importance of the *Metock* decision cannot be underestimated in terms of its constitutional re-enforcement of the centrality of free movement and the individual”

<sup>92</sup> Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Judgment of the Court, 12 March 2014, nyr

<sup>93</sup> *ibid* para 62

<sup>94</sup> Discussed further in Chapter Four

Union citizen, *O and B* relied upon previous movement in an attempt to trigger residence rights in a home Member State.<sup>95</sup>

Family members have a privileged position under the Directive - the facilitation of their movement is seen as vital to encourage and facilitate the exercise of the Union citizen's rights to move and reside within the territory of other Member States. This is not something the Court of Justice is likely to restrict without good reason,<sup>96</sup> and a family member not having been dependent prior to joining a Union citizen would not seem like a good enough reason, as fear of an elderly parent being unable to provide for themselves in the near future may prevent a Union citizen from moving to another Member State if that parent would be unable to join them had there not been a relationship of dependency in the state of origin. Chapter 2 of the European Casework Instructions clarifies dependency- to some extent- for the purposes of UK law, stating the reasons for recourse to financial support do not need to be determined, and the potential for the family member to take up work is also not to be considered. The Instructions only include material support in the dependency definition, rather than emotional, and interpret financial dependency as needing the support of the Union citizen to meet 'essential needs in the country of origin – not in order to have a certain level of income.'<sup>97</sup>

The assessments of dependency carried out in UK courts are in line with the case law of the Court of Justice: in *Pedro*,<sup>98</sup> the Secretary of State argued that Mrs Pedro- an ascending-line relative who was not dependent on her Union citizen son prior to his move to the UK- could not be counted as dependent for the purposes of Article 2(2)(d) of the Directive, but the Court of Appeal disagreed:

“if the Secretary of State is right, were Mrs. Pedro to have become dependent upon her son in Portugal and he to have supported her, she could have come to the United Kingdom to join him as a dependent and enjoy her derived benefits, yet if she becomes dependent in the United Kingdom she cannot. It is difficult to see a principled distinction between the two situations.”<sup>99</sup>

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<sup>95</sup> The UK also does not recognise the rights of fiancé(e)s or proposed civil partners of its citizens: the most recent amendment to the Immigration Rules removed the right to reunification of such partners for UK citizens: the relevant provisions were deleted from Appendix FM – 7.33, Statement of Changes in Immigration Rules, 13 March 2014, HC 1138, discussed further in Chapter Three

<sup>96</sup> See Case C-60/00 *Carpenter* [2002] ECR I-06279

<sup>97</sup> European Casework Instructions, Chapter 2: 2.3.2

<sup>98</sup> *Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358

<sup>99</sup> *Ibid*, para 60

The Court of Appeal rejected guidance issued by the European Commission that to determine dependency, individuals must be assessed, *inter alia*, with regard to their “need for material support to meet their essential needs in their country of origin or the country from which they came at the time when they applied to join the EU citizen (*i.e. not in the host Member State where the EU citizen resides*)...”<sup>100</sup> The Court of Appeal instead applied a more generous assessment in relation to family members,<sup>101</sup> which though not required according to the text of the Directive, is very much in line with its aims of ensuring that Union citizens’ movement is facilitated.<sup>102</sup>

As dependent family members fall within the Article 2(2) definition, they are entitled to work.<sup>103</sup> For ascending line relatives, this right might not be of great use, but for descending line dependants capable of work, it could be extremely important. There is no CJEU, or UK, case law on whether a dependent-descendant over the age of 21 must remain dependent for the duration of his/her residence in the UK with a Union citizen. Obviously, if the descendant was an EU citizen, they would be entitled to work under Article 7(1)(a) Directive 2004/38. However, if the dependent-descendant is a TCN citizen, their right to work due to their ‘family member’ status is potentially more complex. It is unclear whether once-proven, dependency enables TCN dependants to work and reside for as long as the Union citizen has a right to reside under the Directive, or whether the dependant must remain dependent so that they qualified as a family member.

In its recent *Reyes* judgment,<sup>104</sup> the CJEU made a determination on the interpretation of Article 2(2)(c) Directive 2004/38 regarding what may be required to show dependency of descendants over the age of 21. This is important because such dependent descendants are close family members and thus entitled to work, so the issue of dependency and relevancy of later work-intentions had to be considered. In this case, an over 21 year old daughter of a Filipina married to a Norwegian man residing in Sweden applied for a residence permit as a family member in Sweden. The

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<sup>100</sup> Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF> last accessed 29 March 2014, 2.1.4, emphasis in original

<sup>101</sup> *Pedro* [2009] EWCA Civ 1358, para 70 “It follows that in my view the guidance promulgated by the European Commission is incorrect, at least in so far as it concerns facts such as the present.”

<sup>102</sup> Preamble to Directive 2004/38, para 3

<sup>103</sup> Article 23 Directive 2004/38

<sup>104</sup> Case C-423/12 *Reyes*, Judgment of the Court, 16 January 2014, nyr

daughter had evidence of money which her mother and her stepfather sent her, but her application for a residence permit as a family member was refused due to the fact that she had not proved that the money had been used to supply her basic needs in the Philippines prior to her travel to Europe. Ms Reyes appealed against this decision, and the subsequent appeal court's decision that she could support herself in her country of origin without support from her mother and stepfather. The referring court asked two main questions, concerning whether the person trying to show dependency could provide for their own basic needs, and whether an intention to gain work in the host Member State after benefitting from the status of dependent family member should have an effect on the assessment.<sup>105</sup>

The CJEU echoed *Jia* in its determination that the existence of a situation of real dependence must be established, that this is a factual situation, and that it must exist in the state of origin.<sup>106</sup> The Court found that there was no requirement for a national court to consider the reasons for dependence upon a Union citizen, in order to follow the principle that the Citizen's Directive should be broadly construed. As long as a Union citizen has regularly given support over a significant period to the descendant claiming to be a dependent family member in order for the latter to support themselves in their State of origin, that descendant is shown to be in a situation of real dependence. There is no additional requirement for the descendant to establish that he/she has tried without success to find work or obtain subsistence support from the authorities of the State of origin/elsewhere in order to support him/herself- such a requirement would be likely to "deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect."<sup>107</sup>

Regarding the question of likelihood of a descendant getting a job within the Member State, the CJEU found that job prospects do not affect the interpretation of a dependant for the purposes of Article 2(2)(c) of the Directive,<sup>108</sup> and agreed with the European Commission that the opposite would "in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*,

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<sup>105</sup> *ibid* para 18

<sup>106</sup> Case C-1/05 *Jia* [2007] ECR I-00001, para 37

<sup>107</sup> *Reyes*, n104 above, para 26

<sup>108</sup> *ibid* para 31



paragraph 20).”<sup>109</sup> While *Reyes* does clarify the financial requirements on a descendant over the age of 21 before they become a family member for the purpose of the Directive, it fails to address whether, or to what extent, a TCN dependant descendant is required to remain eligible to be a dependant under the Citizens’ Directive, which is likely to be a concern of Member States. The CJEU and Commission are correct that a denial of dependant status due to job prospects would be contrary to the right of family members to work under Article 23 of the Citizens’ Directive, but the purpose of the family member status for over 21 year olds – i.e. enabling the movement of their Union citizen relative – does not seem to be furthered by an indefinite recognition of a working over 21 year old descendant. Case law may need to clarify whether the status is to be an enduring one, as otherwise a temporary dependence could enable many adults otherwise ineligible to work in a given Member State, to join a Union citizen relative and potentially stay and work for the duration of that Union citizen’s residence, without any further dependency or potential to restrict the Union citizen’s exercise of their rights of free movement. This is particularly likely to be opposed within the UK due to existing attempts to reduce migration.

### **3. Other family members**

Article 3 of Directive 2004/38 defines beneficiaries, and Article 3(2)(a) includes what the Directive terms ‘other’ family members (OFMs), with Article 3(2)(b) extending beneficiary status to partners of a durable relationship. These persons do not fall within the close family member category, but may benefit under the Directive due to their relationship with the Union citizen, and Member States must ‘facilitate’ their entry and residence in accordance with national legislation, taking ‘an extensive examination of the personal circumstances’ and justifying any denial of entry or residence to such beneficiaries.

The OFM definition echoes Article 10(2) of Regulation 1612/68,<sup>110</sup> and is broad in scope; a wide range of relatives for whom the Union citizen provided, or shared a household with could fall within the scope of the Directive, despite not being part of the more limited close family. However, the broad definition is countered by the narrow entitlements of OFMs- this status does not entitle individuals to work: Article

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<sup>109</sup> *ibid* para 32

<sup>110</sup> Article 38 Directive 2004/38 repealed Articles 10 and 11 of Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ L 257, 19.10.1968, 2–12*

23 of the Directive is silent as regards the employment rights of other family members.<sup>111</sup> This presents a potential financial impediment to the free movement of a Union citizen- there would be no opportunity for a dependent OFM to become less dependent through working, unless the other family member was entitled to work in their own right, so a Union citizen would have to support the OFM throughout their stay. In addition, family members' enjoyment of equal treatment under Article 24(1) is not extended to OFMs.

This category of person has been much debated within the tribunals and courts of the UK,<sup>112</sup> and Article 3(2) was initially not correctly transposed by the UK. According to the 2008 Commission Report, the UK was one of thirteen Member States failing to transpose this Article,<sup>113</sup> which suggests there was general confusion about its requirements. Shaw's analysis of UK correspondence with the Directive also found that Article 3(2) was incorrectly implemented by the 2006 Regulations.<sup>114</sup> The Regulations required OFMs to have previously resided within an EEA state, which was more restrictive than the Directive allowed.<sup>115</sup> Despite the obvious incorrect transposition of requirements placed upon OFMs, the 2009 updates to the Regulations did not remove the prior lawful residence requirement.<sup>116</sup> The legislative failure to properly implement the Article 3(2) concept of extended family member/beneficiary correctly continued for a number of years. However, the judiciary of the UK refused to apply the incompatible requirements of the Regulations in 2009,<sup>117</sup> and the UK government responded. The Implementing Regulations were updated in 2011 in

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<sup>111</sup> Article 23 Directive 2004/38

<sup>112</sup> For instance, UK Tribunal cases *Moneke (EEA – OFMs) Nigeria* [2011] UKUT 00341(IAC); *Dauhoo (EEA Regulations – reg 8(2))* [2012] UKUT 79 (IAC)

<sup>113</sup> Commission Report 2008, 4: Austria, Belgium, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Poland, Slovenia, Spain, Sweden and the UK.

<sup>114</sup> Jo Shaw, 'Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member-States' October 2008, at [http://200438ecstudy.files.wordpress.com/2013/05/uk\\_table\\_of\\_correspondence\\_en.pdf](http://200438ecstudy.files.wordpress.com/2013/05/uk_table_of_correspondence_en.pdf), last accessed 29 March 2014, 4-6

<sup>115</sup> *ibid*

<sup>116</sup> Immigration (European Economic Area) (Amendment) Regulations 2009/1117

<sup>117</sup> *Bigia and Others v Entry Clearance Officer* [2009] EWCA Civ 79, para 41. *Bigia* also refers to pending Commission proceedings in para 45- "After the hearing it was brought to our notice that one of the unsuccessful appellants in KG has prompted the Commission to take the early steps towards possible enforcement proceedings against the United Kingdom for non-compliance with the Directive"; *MR and Others* (EEA extended family members) [2010] UKUT 00449, para 30

response to the courts' non-application of the Regulation 8 provision, and the incompatible requirement of prior EEA residence was removed.<sup>118</sup>

The updated Regulation 8 transposes the definition of beneficiaries, but uses the term 'extended family members' in its place, which was intended to reduce confusion caused by referring to persons as 'other' family members.<sup>119</sup> Relatives other than direct ascendants/descendants are included if they require the personal care of the Union citizen or the spouse or civil partner of the Union citizen,<sup>120</sup> if they are dependant relatives,<sup>121</sup> or if they are (non-civil) partners who can prove they are in a 'durable relationship' with the Union citizen.<sup>122</sup>

Other family members face a more difficult task of proving their relationship with the Union citizen than family members- their relationship with a Union citizen does not automatically derive a right to reside with that Union citizen. Instead, a right of residence has to be demonstrated. For OFMs without another entitlement to reside within the Member State, while registration certificates are not strictly compulsory for EU OFMs, it is clear that for an extended family member they represent one of the few means by which they can be recognised as a family member under Regulation 7(3) (along with the EEA family permit or the residence card).

The UK Regulations do not require documents in addition to those outlined in the Directive, but in practice, individuals have been asked to provide additional documents.<sup>123</sup> Carrera and Faure-Atger carried out a study on the implementation of Directive 2004/38, and found that the documents required by Member States to substantiate their dependency status varied greatly.<sup>124</sup> This makes it difficult for individuals to know what to send to ensure that applications are successful, and also makes the UK's implementation of the Directive difficult to assess: if the Regulations

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<sup>118</sup> The words "a country other than the United Kingdom" were substituted into Regulation 8 by Immigration (European Economic Area) (Amendment) Regulations 2011/1247 regulation.2(3) (June 2, 2011) and removed the requirement of previous EEA residence

<sup>119</sup> John McCarthy, 'Overarching policies? The continuing implementation of the Citizen's Directive' (2009) 23 *Journal of Immigration Asylum and Nationality Law* 371, 374

<sup>120</sup> Regulation 8(3) Immigration (EEA) Regulations 2006

<sup>121</sup> Regulation 8(4) Immigration (EEA) Regulations 2006

<sup>122</sup> Regulation 8(5) Immigration (EEA) Regulations 2006

<sup>123</sup> Anthony Valcke, 'Five years of the Citizens Directive in the UK - Part 2' (2011) 25 *Journal of Immigration Asylum and Nationality Law* 331, 332

<sup>124</sup> Sergio Carrera and Anaïs Faure Atger, 'Dilemmas in the implementation of Directive 2004/38 on the right of citizens and their family members to move and reside freely in the EU,' 2009, Briefing note, Policy Department C, Citizens' Rights and Constitutional Affairs, European Parliament, PE 410.669, at <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=24355> last accessed 29 March 2014

conform to its requirements on paper, but this is not being applied in practice, then the UK must resolve the discrepancies, as implementation of Directives on paper is insufficient: their aims must be achieved.

The requirement of a certificate from the country of origin proving the relationship is a requirement only of OFMs under the Directive,<sup>125</sup> close family members need not show such a certificate. Article 8(5) of the Directive is transposed by Regulation 16(5), which Shaw criticised for giving too much discretion to the Secretary of State.<sup>126</sup> The Regulation says the Secretary of State ‘may’ issue a registration certificate, when ‘in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate’.<sup>127</sup> The discretion here is not unbounded- the Secretary of State is required to ‘undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security’,<sup>128</sup> but perhaps allows for too much leeway in the decision.

#### **a. OFMs and Dependency**

The Court of Appeal in *Soares* determined that OFM dependency had to be on the Union citizen, rather than on a TCN spouse as is permitted for family members.<sup>129</sup> The criteria for being an ‘extended family member’ in Regulation 8(2)(a) and (c) did not extend to dependency on, or household membership of, a spouse or partner of an EEA national. Such dependency or household membership could only relate to the EEA national, unlike the status of family member dependants, who may be dependent upon the spouse of partner of a Union citizen.

#### **i. Prior Dependency**

For OFMs, unlike for close family members, the issue of whether dependency could arise within the host state was not met with an affirmative answer within the UK courts. The *Pedro* decision does not apply to OFMs- as the failed reliance in the

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<sup>125</sup> Article 8(5)(e) Directive 2004/38

<sup>126</sup> Shaw, n114 above, 22

<sup>127</sup> Regulation 16(5)(b) Immigration (EEA) Regulations 2006

<sup>128</sup> Regulation 16(6) Immigration (EEA) Regulations 2006

<sup>129</sup> *Soares v Secretary of State for the Home Department* [2013] EWCA Civ 575

Upper Tribunal *VN*<sup>130</sup> case shows, where the TCN brother-in-law of an Italian citizen residing within the UK failed to show dependence prior to his arrival within the UK, and the Upper Tribunal did not accept that dependency since arrival was sufficient to entitle the brother-in-law to a residence card as an extended family member.

In 2011 the Upper Tribunal made a referral to the CJEU from *MR*,<sup>131</sup> asking about the status of OFMs which became *Rahman* before the Court.<sup>132</sup> The CJEU decision underlined that Article 3(2)(a) does not give automatic rights of residence for OFMs who show they are dependants of a Union citizen;<sup>133</sup> the Court emphasised the distinction drawn between a close family member and an OFM, whose entry and residence has to be ‘facilitated’ by a host Member State, but is not automatic. As shown by the preamble to Directive 2004/38, the situation of relatives not falling within the definition of family member, “should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”<sup>134</sup> *Rahman* clarified that dependants need not have lived within the same state as the Union citizen, ties may exist where that had not been the case – but the circumstances would need to be examined.<sup>135</sup> This necessitated the removal of the requirement of dependency in the same state from the UK Regulations, which were updated accordingly.<sup>136</sup>

*Rahman* found that Article 3(2) was insufficiently precise to allow for direct reliance by potential beneficiaries upon the Article,<sup>137</sup> and found that Member States are “not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in accordance with Article 10(2) thereof, that they are dependants of that citizen.”<sup>138</sup> The wide discretion granted by the Directive in relation to ‘facilitating’ the entry and residence of OFMs was not curtailed in *Rahman*, though

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<sup>130</sup> *VN* (EEA rights – dependency) [2010] UKUT 00380 para 25 “the clear conclusion to be drawn from Pedro is that whilst financial dependency on the sponsor since arrival in the UK may suffice to benefit a family member as defined by Article 2.2(d), it will not benefit an OFM as defined by Article 3.2(a).”

<sup>131</sup> *MR and ors* (EEA extended family members) *Bangladesh* [2010] UKUT 449 (IAC)

<sup>132</sup> Case C-83/11 *Rahman*, Judgment of the Court, 5 September 2012, nyr

<sup>133</sup> *ibid* para 18

<sup>134</sup> Preamble Directive 2004/38, para 6

<sup>135</sup> *Rahman*, n132 above, para 33

<sup>136</sup> Immigration (EEA) (Amendment) (No.2) Regulations 2012, S.I. 2012/2560

<sup>137</sup> *Rahman*, n132 above, para 25

<sup>138</sup> *ibid* para 26

Member States need to ensure that their relevant national laws do perform an adequate examination of the personal circumstances of individual citizens, and there should be the possibility for judicial review of the relevant decision.

### **b. Partners of a Durable Relationship**

The inclusion of persons in a ‘durable relationship’ as beneficiaries in Article 3(2) of the Directive means that the Directive recognises relationships beyond those of marriage and civil partnerships as potentially giving rise to the possibility of being granted residence rights within Member States in order to facilitate the free movement of Union citizens. As for dependent OFMs, this is on the basis of national legislation rather than harmonised law. Regulation 8(5) places persons in a durable relationship with a Union citizen in the ‘extended family member’ category, and the relationship must have lasted for at least two years to qualify as ‘durable’.<sup>139</sup>

In *Rose*,<sup>140</sup> the Upper Tribunal found that persons in a durable relationship were not included in the definition of other family members by the Directive.<sup>141</sup> The Upper Tribunal is correct that OFMs are defined in Article 3(2)(a), and that partners in a durable relationship are separate in Article 3(2)(b), but both fall within the definition of beneficiary and placing Member States under the same obligations in relation to their entry and residence: Member States must “undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people”.<sup>142</sup> Persons in durable relationships with Union citizens wanting to rely upon their relationship to show rights of residence, therefore do so as beneficiaries, rather than OFMs. However, the UK Regulation 8 blurs this distinction, including Article 3(2)(a) OFMs and partners of a durable relationship.

The key distinction to be drawn, however, is between beneficiaries and close family members: as emphasised by the Court of Appeal in *FD*, “The construction of Articles 2 and 3 of the Directive makes it absolutely clear that a person who is an other family member, or a partner with whom the Union citizen has a durable relationship, is in a different position from a family member, because it is specifically envisaged that the Secretary of State will conduct an examination of his position before allowing him

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<sup>139</sup> ECI Chapter 2; 2.4: “Evidence of a “durable relationship” is based on the criteria set out in Chapter 8, Section 7 of the Immigration Rules”; Immigration Rules, Part 8, paras 295A and 295D, HC 395.

<sup>140</sup> *Rose* (Automatic deportation - Exception 3) Jamaica [2011] UKUT 00276(IAC)

<sup>141</sup> *ibid* para 18

<sup>142</sup> Article 3(2) Directive 2004/38

entry -- something he could not do if he had a substantive right to enter as a partner of a citizen of the Union.”<sup>143</sup> AG Bot in his Opinion for *Rahman*, found that:

“a Member State may not reduce the scope, either directly, by deciding, for example, to exclude from the facilitation measures family members in the direct line beyond a certain degree of relationship, or even collaterals, or the partner with whom the Union citizen has a durable relationship, or indirectly, by laying down conditions which have the purpose or effect of excluding certain categories of beneficiaries. It would not seem possible, for example, to make the rights accorded to the partner with whom the citizen has a durable relationship subject to a requirement of a registered partnership or to a condition of the partnership being treated as equivalent to marriage, as appears in Article 2(2)(b) of Directive 2004/38.”<sup>144</sup>

The UK has not tried to restrict the durable relationship to fiancé(e)s, or registered partnerships, so its interpretation is compatible with the Directive. Prior to Directive 2004/38, unmarried partners of Union citizens could potentially find a right of residence if the intended Member State recognised unmarried partners of domestic citizens to reside within its territory due to their relationship. The *Reed* judgment of the CJEU,<sup>145</sup> as discussed above, went some way to reducing the impact of a lack of harmonisation of law in relation to non-marital partners, but there are still many differences between national law which mean that the movement of TCN unmarried partners, and to some extent civil partners, is still uncontrolled by the EU, and is thus subject to change at Member States’ discretion.

### **c. Entitlements of OFMs**

There is also a degree of confusion as to the entitlements of OFMs under UK law: the UK transposed the family member definition in its Regulation 7;<sup>146</sup> Regulation 7(1)(d) includes extended family members (i.e. OFMs) satisfying the conditions in Regulation 8(2),(3),(4) or (5)<sup>147</sup> who have been issued with EEA family permits, or registration certificates or residence cards,<sup>148</sup> as family members. This represents an additional category of family members for the purposes of some elements of UK law,<sup>149</sup> and blurs

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<sup>143</sup> *FD v Secretary of State for the Home Department* [2007] EWCA Civ 981, para 9

<sup>144</sup> Case C-83/11 *Rahman*, Opinion of Advocate General Bot, delivered on 27 March 2012, para 67

<sup>145</sup> *Reed*, n68 above

<sup>146</sup> Regulation 7(1)(a)-(c) Immigration (EEA) Regulations 2006; Regulation 7(2) restricts the family members of students (in accordance with Article 7(4) of Directive 2004/38) to the spouse or civil partner, and dependent children

<sup>147</sup> Regulation 8 Immigration (EEA) Regulations 2006

<sup>148</sup> Regulation 7(3) – (4) Immigration (EEA) Regulations 2006

<sup>149</sup> Alison Hunter, 'Family members: an analysis of the implementation of the Citizens Directive in UK law' (2007) 21 *Journal of Immigration Asylum and Nationality Law* 191, 195

the boundaries between extended and family members. It seems that, if an OFM has had their entrance facilitated and been issued with the appropriate documentation, they are to be treated as family members of a Union citizen for the purposes of UK law, with rights to work, etc., which is not the Directive's approach. As the UK is more generous, its interpretation is compatible with the Directive, though its application of the distinction between the two categories in practice is more complex.

Directive 2004/38 itself is not consistent with its use of the term 'family member' either. Though it defines family members in Article 2(2), it does not consistently apply its own definition: for instance, Article 10 on the issue of residence cards states that residence rights of TCN family members shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen,' and goes on to discuss Article 2 and Article 3(2) relatives- thus mixing its own terminology through the use of 'family member' in a general way in Article 10.<sup>150</sup> While the 'various' uses of terms is not unique to Directive 2004/38, for instance- Regulation 1612/68 used several different conceptions of worker- as including work seekers at times, and actually employed people at others, it is not helpful for ensuring standardised application of the UK implementing Regulations, or for developing a full understanding of the different rights and obligations placed upon family members as defined in Article 2(2), and other/extended family members under Article 3(2)(a)-(b).

The most important right conferred upon Union citizens exercising their rights of free movement and residence, as well as that of any family members who move with them- is the right to be treated equally with the nationals of the Member States in which they reside. The Treaty does not allow discrimination on grounds of nationality, and the UK approach to family relative residents respects this important right of equality in its definition of family member as including extended family who qualify for a right of residence under the Regulations in Regulation 7(1)(d). This is because, if, an OFM has been granted the discretionary right of residence under the Regulations, she has fulfilled the conditions of entry and residence, and thus is able to move and reside with the Union citizen; but that is not all that is required to encourage the Union citizen to exercise their rights under EU law freely. The guarantee that the OFM will not be discriminated against on grounds of nationality is important, too.

#### **4. Conclusions**

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<sup>150</sup> Article 10 Directive 2004/38



The UK has had to amend its Immigration Regulations repeatedly in order to more accurately implement Directive 2004/38 as interpreted by the CJEU. The aims of the Directive of facilitating easy movement of Union citizens and their family members are not always met in practice, however. As eluded to above, complicated application processes and delays in assessing documents in relation to residence rights can jeopardise individuals' free movement.

The Directive's definition of family members has been successfully transposed into the UK Regulations- though the potential for discrimination against same-sex couples exists in other Member States, the UK recognises both same-sex marriage and civil partnerships in domestic law and therefore recognises same-sex partners as family members for the purposes of Article 2(2) of Directive 2004/38. It does so without quibbling about any equivalence to marriage or assessing the rights to which partners are entitled in the state of origin. The 'automatic family members' – the spouse, registered partner or dependent child concepts are successfully implemented within the UK. The concept of dependent family member above the age of minority was embraced by the UK courts in *Pedro*, where no prior dependency of a family member was required, which indicates that the UK does not always have to refer cases in order to give the most generous interpretation of EU law.

In relation to OFMs, the UK has faced greater difficulties in achieving compliance with the Directive. The incompatible requirement of previous lawful residence within an EU Member State was only removed from the EEA Regulations in 2011, despite case law highlighting the discrepancy much earlier. Despite the UK needing to amend its Regulations in order to meet the minimal requirements in relation to facilitating residence of OFMs under the Directive, once the UK recognises that an extended family member is entitled to residence under its Regulations, this individual is treated as a family member in relation to the important right of equal treatment.

In this way, the Regulations go beyond the requirements of the Directive in their provision for OFMs, while remaining true to its aims of facilitating free movement and residence of Union citizens, who remain key to all the derivative rights to which family members or OFMs are entitled. The *Rahman* judgment by the Court of Justice clarified the requirements under the Directive in relation to OFMs' rights, but the concept is not without difficulty: the facilitation of rights of residence, though not compulsory, must not give too much discretion to the Secretary of State. Facilitation

requires flexible guidance to be taken into account and individual circumstances to be considered, though, as Chapter Three discusses, the UK is not very willing to adopt flexible stances where rigid rules can be applied in relation to immigration.

## Chapter Three

### Residence Rights of TCN Family Members of UK Nationals: Reverse Discrimination and Restrictive Rules

While Union citizens relying upon rights contained in Directive 2004/38 to reside in a Member State other than their own can be joined by family members automatically, there is no corresponding right for UK citizens to be joined by their TCN family members in the UK. This is an obvious example of a situation in which reverse discrimination can arise, and the CJEU is unable to bring equal rights to family reunification to all Union citizens as the EU lacks competence.<sup>1</sup> The UK introduced newly restrictive rules for TCN immigration in June 2012,<sup>2</sup> so EU routes of immigration have become particularly important to UK citizens since the changes, as discussed in Chapters Four and Five. This chapter explores the reasons for the UK's newly restrictive approach, and demonstrates the difficulties which UK citizens with TCN family members face to bring their family to the UK.<sup>3</sup> This chapter also examines the important influence of the CJEU in relation to UK immigration - it shows that there is consideration of CJEU case law before national courts in relation to the UK rules on family reunification, despite the fact that the Family Reunification Directive was not adopted by the UK,<sup>4</sup> and the lack of competence on the part of the EU in what are wholly internal situations.

This chapter has three main sections, the first of which analyses the rights of UK nationals under the UK Immigration Rules to be joined by TCN partners – spouses or civil partners - and contrasts this with rights of family reunification in relation to settled TCN citizens under EU law. This section will show that UK judges have adopted the same considerations and approaches to UK citizens' rights as the CJEU does to protecting the exercise of free movement rights. The second section focuses upon the UK's efforts to limit family immigration through preventing abuse of its

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<sup>1</sup> Anne Walter, *Reverse Discrimination and Family Reunification* (Wolf Legal Publishers 2008); Peter Van Elsuwege and Dimitry Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 *European Journal of Migration and Law* 443

<sup>2</sup> Statement of Changes in Immigration Rules, 13 June 2012, HC 194

<sup>3</sup> The Immigration Bill 2013-14 is due to reach the Report Stage in the House of Lords on 1 April 2014. Its contents are not discussed in this chapter as they are not yet in force so application cannot be assessed

<sup>4</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification *OJ L 251, 3.10.2003*, 12–18; See Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice *OJ C 83, 30/3/2010*, 295-298. See discussion of the Directive in Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 459

laws, specifically through targeting marriages of convenience. This is an area in which the courts have effected a change of law in reliance upon the European principle of proportionality, and which, it is argued, has heralded the way forward to a more active scrutiny by the courts in relation to restrictive immigration law within the UK.

The final section of this chapter considers the potential for ‘Europeanisation’ of immigration law in the UK: there has been much discussion of the potential for harmonisation of family law by the EU, with strong arguments for and against such a move,<sup>5</sup> but each Member State still controls immigration law in relation to its domestic nationals, and, where Directive 2003/86 does not apply, in relation to TCNs, too. Whether a ‘citizenship-friendly’, or liberal, approach encouraging of free movement and a sense of unity across the EU, can be ascertained within the UK case law and the approach of the UK courts to applying UK legislation will be considered throughout the chapter.

### **1. The UK Immigration Rules: Domestic and TCN Family Reunification Rights**

Member States retain control over non-EU immigration within their territories: domestic citizens’ family members, and those of TCN residents within the UK represent “some of the few categories in respect of which... [the UK] can still exercise immigration powers”,<sup>6</sup> and as a consequence the individuals concerned may be treated less favourably than EU citizens. There is clearly the potential for reverse discrimination against domestic nationals, even in states where both Directives 2003/86 and 2004/38 apply:<sup>7</sup> as there is a vacuum left by the framework whereby static

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<sup>5</sup> Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003); Clare McGlynn, ‘A Family Law for the European Union?’ in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Oxford University Press 2000) 223 -241 and Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006); Clare McGlynn, ‘The Europeanisation Of Family Law’ (2001) 13 *Child and Family Law Quarterly* 35; Anne Walter, *Reverse Discrimination and Family Reunification* (Wolf Legal Publishers 2008); Nina Dethloff, ‘Arguments for the Unification and Harmonisation of Family Law in Europe’ in Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 37; Walter Pintens, ‘Europeanisation of Family Law’ in Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 3

<sup>6</sup> Sandra Mantu, ‘European Union citizenship anno 2011: Zambrano, McCarthy and Dereci’ (2012) 26 *Journal of Immigration Asylum and Nationality Law* 40, 51

<sup>7</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158, 30.4.2004, 77–123*

citizens do not benefit unless they meet the only partially explored potential of *Ruiz Zambrano*,<sup>8</sup> while the EU provides ascertainable rights for TCN residents under Directive 2003/86. Adam and Van Elsuwege suggest that “Further harmonisation of the European Union's common immigration policy under art.79 TEU might provide for a possible way out of this uncomfortable reality”,<sup>9</sup> but for now, the EU cannot even influence migration in relation to TCNs in all Member States, so harmonisation is unlikely to come quickly. Though Member States may choose to prevent it under national legislation,<sup>10</sup> reverse discrimination is not contrary to EU law, and the UK Immigration rules do not entitle UK citizens to equivalent rights to family reunification as their EU neighbours residing under Directive 2004/38.

Successive UK governments have had targets to cut immigration in order to be shown to be ‘taking a stand’ against excessive immigration; this has led to many changes in policy,<sup>11</sup> with the most recent update to the Immigration Rules being 10 March 2014, but with major changes being brought in from July 2012.<sup>12</sup> Family members of UK nationals/TCN residents who arrived prior to 9<sup>th</sup> July 2012 are treated under the old rules, while family members arriving on or after that date are subject to the new, more restrictive rules. Family members can be seen as easy targets by governments wishing to cut back numbers of non-EU immigrants: family ties are the most common reason for settling in the UK,<sup>13</sup> and, unlike workers or skilled immigrants, family members enter on the basis of a relationship with an existing resident, or move with a family member, and it is difficult for family members to lobby for rights of residence, as they are a disparate group. The most important reason for family members to enter the UK is not to work or to study, though these may be additional aims - the primary purpose is to join a family member.

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<sup>8</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; see also: Case C-256/11 *Dereci* [2011] ECR I-11315 and Case C-434/09 *McCarthy* [2011] ECR I-3375, discussed in Chapter Five

<sup>9</sup> Stanislas Adam and Peter Van Elsuwege, ‘Case Comment: Citizenship rights and the federal balance between the European Union and its Member States: Comment on *Dereci*’ (2012) 37 *European Law Review* 176, 190

<sup>10</sup> See Case C-321/94 *Pistre* [1997] ECR-I-2343 discussed in Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union law: Cases and Materials* (Cambridge University Press 2010) 756

<sup>11</sup> See Steve Symonds, ‘The numbers game’ (2012) 26 *Journal of Immigration Asylum and Nationality Law* 138

<sup>12</sup> Statement of Changes in Immigration Rules, 13 March 2014, HC 1138; Statement of Changes in Immigration Rules, 13 June 2012, HC 194

<sup>13</sup> Brenda Hale, ‘Families and the law: the forgotten international dimension’ (2009) 21 *Child and Family Law Quarterly* 413, 414

UK policy favours migrants who enter intending to make a financial contribution to the country - generally their visas are processed under the Points Based System,<sup>14</sup> though this, too, is subject to regular change, and requires arduous processes to be followed. As Symonds highlighted, migrant workers and students may have supporters in the business world or within universities and there is an obvious financial interest in their migration, but as a group, “migrant family members do not so obviously have friends in high places.”<sup>15</sup> This section firstly considers the requirements placed upon a sponsor to enable them to bring TCN family relatives into the UK, before considering the partners to whom the rights of family reunification may be granted under the Immigration Rules.

#### **a. Requirements placed upon a sponsor by the UK Immigration Rules**

In order to bring TCN family members to the UK, sponsors must be over the age of 18,<sup>16</sup> and have a right of residence within the UK. For TCN residents, they must have leave to remain within the UK,<sup>17</sup> or be ‘settled in the United Kingdom’. This means that the person concerned has to be free from restrictions on their leave to remain, and either ordinarily resident in the UK, without having entered or remained in breach of the immigration laws, or despite having entered or remained in breach of immigration laws, have since been granted leave to remain and become ordinarily resident. In addition to these residency requirements, the changes to the Immigration Rules brought in strict financial requirements which sponsors must meet.<sup>18</sup> To sponsor their spouse, the sponsor within the UK must earn £18,600 or more per year. This rises to £22,400 if there is also a TCN child under the age of 18 to be sponsored, and an additional £2,400 of income is required for each additional child. If the sponsor does not earn £18,600, they can utilise savings to make up the difference, but only if they have substantial savings not in the form of property or in another’s name. To make up for any shortfalls, the sponsor must have £16,000 of savings, in addition to 2.5 times the shortfall (this means the shortfall is covered for 2.5 years – the equivalent of 30

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<sup>14</sup> The UK point-based system is complicated, and as the focus of this Chapter is family reunification, it suffices to say that applicants applying for work visas must satisfy the conditions for one of various tiers, information at <https://www.gov.uk/browse/visas-immigration/work-visas>, last accessed 29 March 2014

<sup>15</sup> Symonds, n11 above

<sup>16</sup> Immigration Rules, para 277

<sup>17</sup> Immigration Rules, para 7

<sup>18</sup> Family life as a partner - Appendix FM to the Immigration Rules, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279661/Immigration\\_Rules\\_-\\_Appendix\\_FM.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279661/Immigration_Rules_-_Appendix_FM.pdf) last accessed 29 March 2014, E-ECP 3.1 on financial requirements

months). For a sponsor without an income, this equates to savings of £62,500 to be joined by a TCN spouse. Given the UK's preferred immigrants make a financial contribution, it seems bizarre that, for 30 months after their entry, family members' incomes are ignored in relation to the assessment of the couple's assets.

The Rules have been challenged before the UK courts, and were found to be disproportionate in *MM*,<sup>19</sup> which has since been appealed to the Court of Appeal, though the verdict has yet to be handed down.<sup>20</sup> In the Queen's Bench Division, *MM* was heard by Mr Justice Blake, and was an application for judicial review by MM, a Lebanese national who entered the UK in 2001 and had been granted refugee status in the UK until 28 January 2014. He was a PhD student and unable to find work commensurate with his qualifications, so earned about £15,600 per annum. MM was engaged in 2010 to a Lebanese woman, and they married by proxy in 2013. His wife is a pharmacist and fluent in English so likely to find skilled employment if resident in the UK. MM contended that the restrictions were an unjustified interference with his right to respect for private and family life. His complaints were that his wife's arrival would not lead to any additional costs as they would reside in the accommodation he currently had; that the Rules prevent the couple from relying on the wife's earning capacity; that a deed of covenant by MM's brother to the effect that he would provide £80 per week to the couple over a five year period could not be considered, nor a promise by MM's father to provide a further £80 per week from Lebanon.<sup>21</sup>

The joined cases both concerned unemployed British citizens of Pakistani origins, the first of whom, Abdul Majid, received state benefits of £17,361 per annum and contended he had relatives willing to support him and his wife; his complaint was that the rules dealing with the admission of parents of children settled in the UK for 7 years do not apply to parents seeking leave to enter as spouses.<sup>22</sup> The second joined case was brought by Shabana Javed, a resident of an area of Birmingham that she described as 'economically and socially deprived', where she was unaware that any of her female peers had been able to earn more than £18,000. Her complaints were similar to those of MM. She further submitted that the regime under the new rules as a whole was

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<sup>19</sup> *MM, Abdul Majid, and Shabana Javed v Secretary of State for the Home Department* [2013] EWHC 1900 (Admin)

<sup>20</sup> Case reference: C4/2013/2086, *R (on the application of MM (Lebanon)) v The Secretary of State for the Home Department & Ors*, heard 4 – 5 March 2014 before Lord Justice Maurice Kay, Lord Justice Aikens and Lord Justice Treacy

<sup>21</sup> *MM*, n19 above, paras 6-8

<sup>22</sup> *ibid* para 16

unjustifiably discriminatory as it impacts on women and in particular on British Asian women, as this segment of society suffers from significantly lower rates of pay or employment than other sectors.<sup>23</sup> Blake was not convinced that the rules were unlawfully discriminatory, as no overtly discriminatory criteria are used.<sup>24</sup>

Blake found the case to be “challenging”,<sup>25</sup> as it represented the tensions between judicial respect for sensitive issues of policy making and judicial scrutiny of rules which affect the enjoyment of a fundamental right. He relied upon CJEU jurisprudence – *Carpenter*<sup>26</sup> and *Chakroun*<sup>27</sup> to demonstrate how denying admission to a spouse undermines the right of the sponsor to reside, and found that the right of a Union citizen to reside in another Member State exercising Treaty rights ‘can rank no higher in terms of constitutional significance than the inalienable right of the British national to reside in his or her own country’, finding that the exercise of either right is equally interfered with by preventing the admission of a spouse.<sup>28</sup> “Given the importance in human affairs of matrimonial cohabitation with a chosen partner, and recognising the basic policy response in Appendix FM, that partners who cannot comply with the rules will not generally be admitted to the United Kingdom unless there are insurmountable obstacles to the couple living elsewhere in the world, the administrative measures that prevent the cohabitation interfere just as much with the British citizen's right of residence as that of the European Union national.”<sup>29</sup>

Blake was satisfied that the newly introduced measures amounted to “considerably more intrusive interference than the ‘colossal’ interference deriving from the minimum age rule in *Quila*...”<sup>30</sup> Unlike getting older, earning £18,600 is not inevitable, so the Immigration Rules present a more restrictive condition than *Quila*.<sup>31</sup> While recognising that there are reasons for the restrictions in the Immigration Rules, in combination of more than one, five of them can “be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship.”<sup>32</sup> The five features identified by Blake are: the setting of the minimum income level

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<sup>23</sup> *ibid* para 21

<sup>24</sup> *ibid* paras 112-114

<sup>25</sup> *ibid* para 94

<sup>26</sup> Case C-60/00 *Carpenter* [2002] ECR I-06279

<sup>27</sup> Case C-578-08 *Chakroun* [2010] ECR I-1839

<sup>28</sup> *MM*, n19 above, para 106

<sup>29</sup> *ibid* para 106

<sup>30</sup> *ibid* para 108

<sup>31</sup> *R. (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45, discussed below

<sup>32</sup> *MM*, n19 above, para 123



above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (a level close to the adult minimum wage for a 40 hour week); the requirement of £16,000 savings before savings can be said to contribute to rectify any income shortfall; using a 30 month period for forward income projection, as opposed to a twelve month period that could be applied in a borderline case of a couple's ability to maintain themselves without needing social assistance; disregarding credible evidence of undertakings of third party support effected by deed and supported by evidence of ability to provide financial support; and the disregard of the spouse's own earning capacity during the thirty month period of initial entry.<sup>33</sup>

Blake found that the restriction on housing benefit for either spouse for five years is 'more austere than it needs to be'<sup>34</sup> to pursue the legitimate aim of preventing unjustified recourse to public funds. He compared the less restrictive pre-July 2012 rules, which enable savings to be taken into account without requiring a high initial threshold, and described the £16,000 initial savings requirement for sponsors on low incomes as "a rather cruel piece of mockery",<sup>35</sup> and it does seem entirely fanciful that a low earner should be able to demonstrate huge savings in order to be joined by their spouse. Blake recognised the Secretary of State's aims to ensure the long-term economic viability of families, but did not find that the 'front loading' of the financial requirements made sense: he suggested that examination of financial circumstances of the couple at the end of the five year period when the earning capacities of both spouses could be assessed would be more appropriate.<sup>36</sup>

The fifth factor – the complete disregard of the future earning capacity of the spouse, was considered to "the most striking feature of the new scheme": this lasts for 30 months of residence, and appeared to Blake to be "both irrational and manifestly disproportionate in its impact on the ability for the spouses to live together."<sup>37</sup> The legitimate aim of achieving transparency and ease of assessment has to be balanced against the restrictions imposed on rights to family reunification, and Blake accepted that families should be encouraged to integrate and not live on or near the subsistence level, but that the Immigration Rules "amount together to a disproportionate

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<sup>33</sup> *ibid* para 124

<sup>34</sup> *ibid* para 127

<sup>35</sup> *ibid* para 131

<sup>36</sup> *ibid*

<sup>37</sup> *ibid* para 137

interference with the rights of British citizen sponsors and refugees to enjoy respect for family life. In terms of the Strasbourg approach they do not represent a fair balance between the competing interests and fall outside the margin of appreciation or discretionary area of judgment available in policy making in this sphere of administration.”<sup>38</sup> The Immigration Rules seem to be manifestly unbalanced: their approach to savings to make up shortfalls in savings is harsh, and not able to be mitigated in practice. As Blake identified, there are justifiable and proper aims behind the Rules, but their strictness and lack of flexibility means they are disproportionate. It is to be hoped that the Court of Appeal decision will find that the rules are overly strict, manifestly disproportionate and irrational, as Blake did, and be able to reduce the likelihood of separation for many families on lower incomes.

If the Court of Appeal adopts Blake’s approach of recognising the importance of family members’ residence to ensure a UK citizen enjoys their right of residence, with reference to the CJEU cases mentioned above, this link would bring the ‘Union citizen’ into consideration under the Immigration Rules. Blake does not refer to reverse discrimination, but that is in essence what he recognised. The Court of Appeal’s judgment is thus awaited by many in the hope that the £18,600 requirement can be reduced or at least have third party funds recognised, to make it more in line with the approach of the CJEU, and a more fitting criterion for the family members of UK citizens.

#### **b. The Family Reunification Directive: Regular and Stable Resources**

Under Article 7(1)(c) Directive 2003/86, a would-be sponsor must prove that they possess stable and regular resources. This assessment of resources is closer to the approach in the UK’s Immigration Rules than that of Directive 2004/38. The differing aims of the pieces of legislation are readily apparent: the Citizens’ Directive aims not to restrict a Union citizen’s right of free movement, while both the UK Immigration Rules and the Family Reunification Directive aim to protect a Member State from incurring further expense on the social security system due to family reunification. Article 7(1)(c) represents a more onerous test than the requirement of being a worker, or possessing sufficient resources under the Citizens’ Directive: there is no concept of ‘(un)reasonable burden’ for Directive 2003/86. Instead, there can be no recourse to the

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<sup>38</sup> *ibid* para 142

social security system of the host Member State if a sponsor is to qualify. In *Chakroun*,<sup>39</sup> the amount required to indicate ‘stable and regular resources’ was set at 120% of the minimum wage of a 23 year old worker by the host Member State, and the Court found it to be incompatible with the requirements of the Directive.<sup>40</sup>

While the CJEU ruled that the 120% requirement was too strict, an income requirement of 100% of the minimum wage would have been allowed - but this would have had to be only a reference amount, rather than a strict requirement. If applicants were unable to meet this requirement, their applications must be assessed individually taking into account other facts.<sup>41</sup> In *Chakroun*, it was not the idea of a level against which TCN workers’ incomes would be measured which the Court of Justice found disproportionate - it was the application and rigidity of that rule which led to the Court’s finding. Through not taking account of individual circumstances the Dutch rule was too harsh, and the minimum amount required was too high. This underlines the difficulty which UK law may face in the continued application of its fixed income requirement for sponsors to qualify to bring family members into the UK. While, obviously, the UK is not compelled to follow the *Chakroun* decision, in that it did not implement Directive 2003/86, the UK Court of Appeal considered the case and its reasoning in the *MM* appeal.

In *Chakroun*, ‘citizenship reasoning’ was employed in relation to when a family must be formed in order to benefit from Union law: the Court deemed that it would be unduly restrictive to require that a family pre-existed the joining up of TCN sponsor and family member within a Member State, and that the Directive drew no distinction based on the date of a marriage.<sup>42</sup> The Court “for the first time established a direct link between the rights of Union citizens and their family members on the one hand and the rights of TCNs on the other.”<sup>43</sup> That the approach of the Court of Justice in relation to *Metock*, which at the time of the decision was a controversial decision,<sup>44</sup> has been applied to TCNs, demonstrates the expansive quality of citizenship case-law, and

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<sup>39</sup> *Chakroun*, n27 above

<sup>40</sup> See Arjen Leerkes and Isik Kulu-Glasgow, 'Playing Hard(er) to Get: The State, International Couples and the Income Requirement' (2011) 13 *European Journal of Migration and Law* 95, 101

<sup>41</sup> *Chakroun*, n27 above, para 48

<sup>42</sup> *ibid* para 59

<sup>43</sup> Ania Wiesbrock, 'Granting citizenship-related rights to third-country nationals: an alternative to the full extension of European Union citizenship?' (2012) 14 *European Journal of Migration and Law* 63, 85

<sup>44</sup> Hans Ulrich Jessurun d'Oliveira, 'The EU and its monarchies: influences and frictions' (2012) 8 *European Constitutional Law Review* 63, 67

potentially increases the likelihood of reverse discrimination within the UK. This is not the only instance in which the Court has adopted the same approach to TCN and rights of Union citizens – Sharpston discussed the ‘intellectual parallelism’ in the Court’s approach to non-discrimination in the area of rights for third-country national residents,<sup>45</sup> and it does seem that this is evidence in the residence cases too, with *Chakroun* being a particularly good example.

In *Chakroun*, just as under the UK Rules, the financial requirements placed upon sponsors were unable to be mitigated by any other factors - which is very different from Directive 2004/38’s approach to assessing family life in relation to OFMs.<sup>46</sup> Symonds highlighted that there must have been serious questions whether a blanket approach would be lawful.<sup>47</sup> The Supreme Court held in *Mahad* that restrictions excluding third-party support under the previous Immigration rules were not lawful, and focussed on the requirement not to become a burden on the social security system.<sup>48</sup> The current £18,600 minimum income requirement is above the level of income support within the UK, so UK nationals and TCN residents within the UK need not simply not require social assistance, but they must earn significantly in excess of the threshold amount. This does not seem to follow *Mahad*, as far less than £18,600 can indicate that a sponsor and family will not be likely to rely upon social security – particularly if the TCN spouse to join the sponsor is highly skilled and able to work within the UK once residency was granted.

### **i. The Inevitability and Impact of *Chakroun***

Wiesbrock suggested the Court’s decision in *Chakroun* was ‘far from self-evident’,<sup>49</sup> given the earlier criticism the Directive faced. The legitimacy of Directive 2003/86 was challenged in *Parliament v Council and Commission*,<sup>50</sup> where the European Parliament sought the annulment of various articles restricting the right to family reunification. The Parliament challenged exceptions to rights of family reunification

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<sup>45</sup> Eleanor Sharpston, 'Different but (Almost) Equal - The Development of Free Movement Rights under EU Association, Co-Operation and Accession Agreements' in Mark Hoskins and William Robinson (eds), *A True European: Essays for Judge David Edward* (Hart Publishing 2003) 244

<sup>46</sup> Article 3(2) Directive 2004/38, See also, Case C-200/02 *Chen* [2004] ECR I-09925

<sup>47</sup> Symonds, n11 above, 153

<sup>48</sup> *Mahad* (previously referred to as *AM (Ethiopia) and others v Entry Clearance Officer*) [2009] UKSC 16, paras 52-56

<sup>49</sup> Anja Wiesbrock, 'Granting citizenship-related rights to third-country nationals: an alternative to the full extension of European Union citizenship?' (2012) 14 *European Journal of Migration and Law* 63, 85-86

<sup>50</sup> Case C-540/03 *Parliament v Council and Commission* [2006] ECR I-05769

allowed under the Directive “on the grounds that these exceptions violated the rights to family life protected in both the ECHR and the EU Charter of Fundamental Rights.”<sup>51</sup> *Parliament v Council and Commission* was the first time that the Court referred to the Charter of Fundamental Rights,<sup>52</sup> despite the fact that, at the time, it did not have binding legal effect. The CJEU also relied upon the ECHR,<sup>53</sup> as well as other international human rights instruments, to support the Directive’s validity. The CJEU first had to consider whether the action was admissible; it was - the discretion allowed to Member States by the Directive did not make the Directive any less an ‘act’ of the institutions of the EU.<sup>54</sup> The Parliament argued that Article 4(1) rendered family reunification unachievable, through requiring integration before the child joined the sponsor, additionally that the discrimination on age was not objectively justified, and was contrary to Article 14 ECHR.<sup>55</sup> The Council, supported by the German Government and Commission, drew careful distinctions between family reunification and the right to respect for family life- submitting they are not equivalent. The Council also submitted that children prior to the age of 12 are more able to integrate into society than those above 12 years of age.<sup>56</sup>

The CJEU recognised that right to respect for family life is protected in EU law, and that it may create positive obligations for Member States. The Court emphasised the importance of Member States having regard to the best interests of minor children when implementing law, and did not find the age of 12 to infringe the principle of non-discrimination on grounds of age. The Court did not find that Article 4(6) prohibited Member States from taking account of the applications of children over 15,<sup>57</sup> or that family reunification was threatened where a Member State applied the derogation. The Court also did not find that the Article 8 waiting period precluded family reunification.<sup>58</sup> The Court was careful to distinguish between the importance of respecting family life, and a right to family reunification. While the CJEU repeatedly emphasised the importance of respecting the best interests of a minor child, it stated

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<sup>51</sup> M. Dawson, Elise Muir and M. Claes, 'Enforcing the EU's rights revolution: the case of equality' (2012) 3 *European Human Rights Law Review* 276, 283-4

<sup>52</sup> Charter of Fundamental Rights of the European Union, *OJ C 83, 30.3.2010, 389-403*

<sup>53</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 213 U.N.T.S. 222, signed on 4 November 1950, entered into force on 3 September 1953

<sup>54</sup> *Parliament v Council and Commission*, n50 above, paras 21-24

<sup>55</sup> *ibid* paras 40-44

<sup>56</sup> *ibid* paras 46-48

<sup>57</sup> *ibid* para 85

<sup>58</sup> *ibid* paras 97-100

that treating a sponsor's child over the age of 12 differently from their spouse "cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents."<sup>59</sup>

As 12 is very young- not even close to the age of majority in any Member State, and no information was cited in the judgment about the average ages at which children leave their parental home, assuming it will be not 'long' after 12 is misleading, and likely to lead to harsh decisions if the derogation is applied.<sup>60</sup> However, what this case underlines is that there is no automatic right to family reunification in a given state under national law, or EU law relating to Union citizens, or EU law relating to TCNs, or based on the Convention of Human Rights or Charter. The circumstances, the relationship in question, and, often, economic activity of a sponsor are all relevant to individual assessments of whether there is a right to family reunification in a given state, at a given time.<sup>61</sup> This is an example of the CJEU respecting the clearly outlined restrictions in secondary legislation, as it did in *Förster*,<sup>62</sup> but here with greater impact upon what can be seen as a 'core' right of TCNs – the right to reside with family, rather than what can be seen as an ancillary right of equal access to maintenance in *Förster*. The Court's decision making was constrained, once more, by the clear phraseology of the Family Reunification Directive, but, as in *Chakroun*,<sup>63</sup> where the Directive was not clear and unambiguous, the CJEU was able to apply its citizenship logic in a manner which protected the rights of family members to live together in a Member State.

### **c. Aims: Integration v Reducing Numbers**

The Home Office Statement of Intent declared that in 2010, family migration accounted for "approximately 18 per cent of all non-EU immigration to the UK –

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<sup>59</sup> *ibid.*, para 75

<sup>60</sup> Only Germany can rely upon this exception, although Cyprus adopted national provisions introducing these conditions after the Directive's implementation deadline, Commission, 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the right to Family Reunification,' Brussels, 8.10.2008, COM(2008) 610 final at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0610:FIN:EN:PDF> last accessed 29 March 2014, 5

<sup>61</sup> See Cathryn Costello, 'Metock: Free Movement and "Normal Family Life" in the Union' (2009) 46 *CMLRev* 590-591; Nicola Rogers, 'Immigration and the European Convention on Human Rights: Are New Principles Emerging?' [2003] *European Human Rights Law Review* 53

<sup>62</sup> Case C-158/07 *Förster* [2008] ECR I-08507

<sup>63</sup> *Chakroun*, n27 above

around 54,000 people out of 300,000”<sup>64</sup> and also that its objectives in updating the Immigration Rules included respecting the right to family life while maintaining immigration control and preventing abuse of the immigration system, promoting integration,<sup>65</sup> and safeguarding the economic interests of the UK.<sup>66</sup> However, the strict application of the £18,600 minimum income requirement potentially means that integration and fostering a community spirit will be more difficult, as families not meeting the threshold are denied a visa for the TCN spouse, and therefore are not complete families within the UK.

The idea of broken homes with low incomes does not fit easily with the Home Office assessment that the income requirement will lead to “increased integration of family migrants as they will be supported at a reasonable level to allow participation in everyday life”.<sup>67</sup> It is possible that the denial of visas in cases where the sponsor fails to meet the earnings criteria would even cost the UK more than it would to allow the spouse to enter, reside and work within the UK. Families with two adults of working age are more likely to have a higher income than one working age adult. There have been suggestions that the Immigration Rules will cost the UK £850 million over ten years,<sup>68</sup> identify underlying problems with the current rules, and there has been much publicised in the press about their disproportionate impact upon women and minority groups.<sup>69</sup>

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<sup>64</sup> Home Office, ‘Statement of Intent: Family Migration’ June 2012, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257359/soi-fam-mig.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf), last accessed 29 March 2014, 3

<sup>65</sup> On integration, see Bernard Ryan, ‘The INTEC project: Integration and Naturalisation tests: the new way to European Citizenship, Country Report: United Kingdom’ October 2010 at <http://www.kent.ac.uk/law/research/documents/ryan-UK-final-1.pdf> last accessed 29 March 2014

<sup>66</sup> Home Office, ‘Impact Assessment: Changes to Family Migration Rules,’ Impact Assessment HO0065, 12th June 2012 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257357/fam-impact-state.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257357/fam-impact-state.pdf) last accessed 29 March 2014, 1

<sup>67</sup> *ibid* 3

<sup>68</sup> Ian Dunt, ‘Revealed: The financial cost of Theresa May’s immigration policy,’ 9 July 2013, <http://www.politics.co.uk/news/2013/07/09/revealed-the-financial-cost-of-theresa-may-s-immigration/> last accessed 29 March 2014

<sup>69</sup> Jane Martinsen, ‘Government accused of ‘assault’ on the rights of women and minorities,’ *The Guardian*, 14 July 2013, <http://www.guardian.co.uk/society/2013/jul/14/coalition-accused-of-assault-on-equality?CMP=twf> last accessed 29 March 2014; Maryam Tafakory for Migrants Rights Network, *Divided Families Campaign*, 7 June 2013, [http://www.youtube.com/watch?feature=player\\_embedded&v=FTK7RMZcXmk](http://www.youtube.com/watch?feature=player_embedded&v=FTK7RMZcXmk) last accessed 29 March 2014

Prior to July 2012, sponsors only had to earn around £5,500 a year, after tax and housing costs were deducted, which seemed “remarkably low”,<sup>70</sup> and inadequate to prevent dependency upon the state. The Migration Advisory Committee advised various income thresholds, with £18,600 being the lowest- the income at which a two person household no longer needs Housing Benefit.<sup>71</sup> The Statement of Intent published in 2012 about the new immigration rules states that “The UK benefits from immigration but not from uncontrolled immigration.”<sup>72</sup> To tackle the perceived problem of too much immigration and an escalating benefits bill, the introduction of a minimum earnings requirement does not seem to be a disproportionate with an individual’s right to family life. Instead, it is the strictness of application of this income requirement which seems most problematic for the UK’s respect for family life- no judicial discretion is permitted. The Secretary of State has decided that £18,600 is a proportionate earnings requirement, and judges have to apply this rule:

“The new Immigration Rules are intended to fill this public policy vacuum [of courts determining what is proportionate] by setting out the Secretary of State’s position on proportionality and to meet the democratic deficit by seeking Parliament’s agreement to her policy. The rules will state how the balance should be struck between the public interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with Article 8.”<sup>73</sup>

The strict application of the minimum income requirement is particularly troublesome for UK domestic citizens and TCN nationals when *Chakroun*<sup>74</sup> is considered, as the UK is treating individuals’ family members less favourably than under EU law, not only when compared to family members of Union citizens, but also to those of TCN residents in other Member States which have implemented Directive 2003/86 and thus have to carry out more balanced assessments of resources. Despite UK efforts, discussed in Chapter Two, it seems difficult to legally impose strict minimum earnings thresholds upon economically active Union citizens living within the UK and a family member wanting to reside with them, as it has long been established that any level of

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<sup>70</sup> Migration Advisory Committee, 'Review of the minimum income requirement for sponsorship under the family migration route' 2011, November, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257244/family-migration-route.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257244/family-migration-route.pdf), last accessed 29 March 2014, 1

<sup>71</sup> *ibid* 60

<sup>72</sup> Home Office, n64 above, 3

<sup>73</sup> *ibid* 10

<sup>74</sup> *Chakroun*, n27 above



work which is more than ‘marginal and ancillary’<sup>75</sup> qualifies a Union citizen to qualify as a worker, and that reliance upon social security to supplement an income is not fatal to the classification of worker,<sup>76</sup> so a UK national may be a victim of reverse discrimination if the Immigration Rules are not found to be disproportionate.

No casework discretion is allowed in assessing a sponsor’s resources - as “It is a matter of public policy to introduce a financial requirement based on an income threshold for this form of sponsorship, and a threshold means a threshold: it must be clear and consistent in all cases.”<sup>77</sup> So if a sponsor earned £18,000 per annum, just under the required amount, instead of the income of their spouse if they were offered a job within the UK, or any property they own being taken into account, they would have to show almost £18,000 in savings. Where a sponsor has no income, they require £62,500 in savings, which seems very restrictive- particularly in relation to the rights of domestic citizens who would be refused entry of their TCN spouse due to this.

The peculiarity that the sponsor alone must earn the required threshold creates an artificial comparator - if the sponsor was not likely to be the primary earner once the couple were united in the UK it seems unreasonable that a main earner’s income potential cannot even be considered. The requirement of significant savings if the sponsor earns less than the required amount creates an obstacle difficult for many families to overcome. This would be most likely to have a negative impact upon UK citizens’ TCN partners’ rights to family reunification- as a TCN resident/settled person would most likely have a visa to work, and hence have fulfilled the criteria to enter as a worker under the Points Based System. However, a sponsor’s pregnancy, illness, disability or caring obligations could be fatal to their earning over the threshold, and hence fatal to the application for their spouse’s residence within the UK, unless they had significant savings (though excluding evidence of resources such as a family home) which again reveals discrimination against the least wealthy applicants.

Fundamental rights considerations cannot mitigate the application of the rules: in *Gulshan*,<sup>78</sup> the Upper Tribunal judges determined that ‘free-wheeling Article 8 analysis’ was not the correct approach, as the Immigration Rules addressed family

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<sup>75</sup> Case 53/81 *Levin* [1982] ECR 1035

<sup>76</sup> Case 139/85 *Kempf* [1986] ECR 1741

<sup>77</sup> Statement of Intent, para 83.c

<sup>78</sup> *Gulshan* (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)

members' positions.<sup>79</sup> The judges also recognised that “the case law on Article 8 is vast” so did not fully engage with it: “we do not intend to add to the problem.”<sup>80</sup> This case was identified as ‘run of the mill’, but the approach of the Upper Tribunal to the problem is disappointing; the Immigration Rules’ effect upon UK citizens’ lives should never be considered run of the mill. While separating families on a daily basis in accordance with strict rules may be easier, it should not be the final analysis for the courts and tribunals of the UK.

## 2. The TCN Partners of UK Nationals or TCN Residents within the UK

To qualify for family reunification within the UK as a partner of a UK/TCN resident, a partner must be above the age of 18,<sup>81</sup> although there were suggestions to raise this minimum age to counter-sham marriages these were not implemented: as Wiesbrock highlighted, there is no reason to think that raising age combats forced marriages,<sup>82</sup> and the Supreme Court undermined the initiative in *Quila*.<sup>83</sup> In 2008, the Home Secretary raised the minimum age for grant of a marriage visa from 18 to 21 in order to deter forced marriages.<sup>84</sup> *Quila* was a case for judicial review brought by the Chilean spouse of a British citizen who was refused a marriage visa under the Immigration Rules when his wife turned 18. There was no question of the marriage being forced, and he had to prove interference with Article 8 ECHR rights. The Supreme Court declined to follow the “old” decision of *Abdulaziz v UK*,<sup>85</sup> that Article 8 ECHR was not easily engaged on entry cases, as it was decided with dissent at the time and had been superseded. The inquiry was whether interference with the right to reside was justified.<sup>86</sup> Lord Brown dissented, finding that considerations of rules tackling forced marriage should be for government.<sup>87</sup>

Combating forced marriages by an age increase for visas did not justify the interference with Article 8 ECHR: the Supreme Court failed to find that the amendment was necessary, or evidence that the balance between harm caused to

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<sup>79</sup> *ibid* para 27

<sup>80</sup> *Ibid* paras 28 and 17

<sup>81</sup> Immigration Rules, para 277

<sup>82</sup> Anya Wiesbrock, *Legal Migration to the European Union: Ten Years After Tampere*, (2<sup>nd</sup> edn, Wolf Publishers 2010)

<sup>83</sup> *Quila*, n31 above

<sup>84</sup> Statement of Changes in Immigration Rules, 4 November 2008, HC 1113

<sup>85</sup> *Abdulaziz, Cabales and Balkandali v UK* (Application No 9214/80; 9473/81; 9474/81) (1985) 7 EHRR 471

<sup>86</sup> *Quila*, n31 above, per Lord Wilson at para 43

<sup>87</sup> *ibid* para 91

genuine marriages and prevention of forced marriages was fair. The UK rules placed greater restrictions upon UK spouses than EU law does upon the spouses of Union citizens residing within the UK, though the Supreme Court's decision put pressure on the government to remove the requirement.

The case demonstrates the importance of identifying justifications for interferences with fundamental rights, and if these are not proportionate, shows the Supreme Court's ability to highlight this to the government, even if such an outcome would be politically unwelcome. As Tew noted, the deciding majority's focus on the greater numbers of genuine marriages impacted by the rule "appears to ignore the potentially much more serious infringement of the rights of individuals forced into marriage compared with the effects of a temporary restriction on entry that genuine couples suffer."<sup>88</sup> This case readily highlights the difficulties which states face in finding the right balance in order to protect the rights of individuals to marry, while protecting the rights of others not to be forced to marry. It was predictable that the Supreme Court would find that a blanket ban was disproportionate: such policies need strong justifications, and the government has since considered a different approach - criminalising the arranging of a forced marriage instead of forbidding young people to marry.<sup>89</sup>

Paragraph 271 of the Immigration Rules contains the current requirements placed upon spouses or civil partners, and states that relationships must be genuine, and subsisting, with an intention to live together- although this does not necessarily mean immediately: the Immigration Rules recognise that circumstances may prevent living together straight after a decision is made: "intend to live together permanently means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently in the United Kingdom immediately following the outcome of the application in question or as soon as circumstances permit thereafter."<sup>90</sup> If the UK approach to marriage is viewed by the public as burdensome, or an undue interference, Swennen's discussion of the evolving concept of marriage suggests that overly tight regulations may not receive widespread support. His analysis of the changing role of marriage vis-à-vis the State, and, indeed, family reproduction, leads to

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<sup>88</sup> Yvonne Tew, 'Case Comment: And they call it puppy love: young love, forced marriage and immigration rules' (2012) 71 *Cambridge Law Journal* 18, 20

<sup>89</sup> Home Office, 'Forced Marriage: A Consultation: Summary of Responses,' July 2012 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157837/forced-marriage-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157837/forced-marriage-response.pdf) last accessed 29 March 2014

<sup>90</sup> Immigration Rules, para 6

a conclusion that interference by the State in an individual's private life is less acceptable now than in previous years: "The emphasis is now on the spouses' fundamental right to marry; the legitimization of the limitation thereof must meet higher requirements."<sup>91</sup>

#### **a. Tackling Immigration**

UK immigration law has responded to changing dynamics over the twentieth and twenty-first centuries, and the government has made clear that it intends to reduce immigration.<sup>92</sup> Following this aim, the family route is relatively painless to tackle, as there are less obvious financial ramifications than, for instance, limiting the numbers of TCN students able to attend university in the UK. The approach adopted by the UK in relation to what it viewed as 'abuse' of Union citizens' rights to family reunification, evidenced particularly in *Chen* and *Metock* in relation to Union citizenship,<sup>93</sup> was found to be incorrect by the CJEU, and this is largely similar to the approach of the UK courts. In *Chen*, the UK government contended that:

"the appellants in the main proceedings are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constitutes an attempt improperly to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in its view, served where a national of a non-member country wishing to reside in a Member State, without however moving or wishing to move from one Member State to another, arranges matters in such a way as to give birth to a child in a part of the host Member State to which another Member State applies its rules governing acquisition of nationality *jure soli*. It is, in their view, settled case-law that Member States are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation..."<sup>94</sup>

As the CJEU made clear, it is not the place of the EU to determine citizenship: if Union citizenship is validly acquired through the genuine and legal acquisition of national citizenship under a Member State's laws, the EU cannot find this is an abuse of law. This is similar to the UK courts' approach to the government's restrictive laws in relation to marriages of convenience: where the UK contended that marrying in

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<sup>91</sup> Frederik Swennen, 'O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage' in Masha Antokolskaia (ed), *Convergence and Divergence of Family Law in Europe* (Intersentia 2007) 123

<sup>92</sup> See Ian Macdonald, 'Rights of settlement and the prerogative in the UK - a historical perspective' (2013) 27 *Journal of Immigration Asylum and Nationality Law* 10; Ian Macdonald and Ronan Toal, *Macdonald's Immigration Law and Practice* (8th edn, Lexisnexis 2010)

<sup>93</sup> *Chen*, n46 above; Case C-127/08 *Metock* [2008] ECR I-06241

<sup>94</sup> *Chen*, n46 above, para 34

order to gain immigration benefits is an abuse, the courts did not agree, and forced a change in the primary legislation of the UK.

### **b. Marriages of Convenience**

As the UK has stated aims to reduce the numbers of immigrants to the country, one method of achieving this has been to attack ‘abuse’ of the family immigration route. Particularly, the notion of ‘marriages of convenience’ has been much debated, and the potential for abuse of immigration law in order to live within the UK has effected changes in the law. The Immigration Rules outline how the UK defines relationships of convenience, but here focus is only upon marriages of convenience. Prior to the 2012 updates to the Immigration Rules, the UK government outlined how it intended to approach marriages of convenience, or ‘sham marriages’, making clear that the Secretary of State was concerned about this as abuse of immigration law.<sup>95</sup>

The Council of the European Union defines marriages of convenience as marriages concluded “with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside”.<sup>96</sup> The Council Resolution’s definition of a marriage of convenience is narrower than the definition of a ‘sham marriage’ in section 24(5) of the Immigration and Asylum Act,<sup>97</sup> which defines such a marriage as one entered into “for the purpose of avoiding the effect of” UK immigration law, which is potentially much broader.<sup>98</sup> Marriages of convenience remain valid marriages for the purposes of UK law;<sup>99</sup> it is just the immigration consequences (and potential for criminality) which change. A finding that a marriage is one of convenience gives the UK grounds for refusing entry and residence rights to the spouse relying upon rights derived from their partner. The European Commission has issued guidance on this,<sup>100</sup> in relation to Union citizens’ marriages, but it is possible that the UK’s approach to assessing

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<sup>95</sup> Home Office, n64 above, para 96

<sup>96</sup> Council Resolution on measures to be adopted on the combating of marriages of convenience of 4 December 1997 97/C 382/01 (*OJ C 382* of 16.12.1997). point 1

<sup>97</sup> Immigration and Asylum Act 1999 (Chapter 33)

<sup>98</sup> Discussed in Helena Wray, ‘An ideal husband? Marriages of convenience, moral gate-keeping and immigration to the UK’ (2006) 8 *European Journal of Migration and Law* 303,304

<sup>99</sup> See *Silver v Silver* [1955] 1 WLR. 728; *Vervaeke v Smith* [1983] 1 AC 145

<sup>100</sup> European Commission, ‘Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,’ 2009, July, COM(2009) 313 final, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF> last accessed 29 March 2014, 14

whether a marriage is one ‘of convenience’ goes beyond what is proportionate in relation to TCN/domestic citizens’ partners.

Finding that marriages aim solely to circumvent the rules of entry and residence is complicated: it requires consideration of many factors, including cultural influences, and the judgments of single assessors can be determinative of individuals’ rights. It is for this reason that careful guidance has to be in place, and assumptions about marriage must be avoided.<sup>101</sup> The UK Statement of Intent recognised that cases must be assessed on an individual basis, and that entry clearance officers and caseworkers must “remain alert and sensitive to the extent to which religious and cultural practices may shape the factors present or absent in a particular case...”<sup>102</sup> The difficulties faced by individual assessors to determine accurately whether a given marriage is genuine or of convenience are very real, and the Home Office updates its guidance regularly.

**i. The UK’s previous approach to countering marriages of convenience:  
Certificates of Approval**

To counter marriages of convenience and “a suspected increase in the abuse of EC law, as a ‘legal loophole’ to circumvent UK immigration rules”<sup>103</sup> whereby individuals were bringing disingenuous TCN spouses into the UK, the UK introduced a scheme of certificates of approval, under which permission had to be granted before an individual residing in the UK could marry a person subject to immigration control<sup>104</sup> within the UK. The scheme was introduced by the Asylum and Immigration Act 2004,<sup>105</sup> and aimed to control marriages within the UK where one partner was a TCN. It was justified by the Home Office to protect against “an improper advantage [that could be] obtained by persons subject to immigration control, who were marrying British citizens and EEA nationals and in so doing improving their immigration position.”<sup>106</sup> However, the scheme, which was one of various UK efforts to prevent “not only the

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<sup>101</sup> See Helena Wray, *Regulating Marriage Migration into the UK: A Stranger in the Home* (Ashgate 2011)

<sup>102</sup> Home Office, n64 above, para 100

<sup>103</sup> Lisa Pilgram, 'Tackling "sham marriages": the rationale, impact and limitations of the Home Office's "certificate of approval" scheme' (2009) 23 *Journal of Immigration Asylum and Nationality* 24

<sup>104</sup> Section 19(4) Asylum and Immigration (Treatment of Claimants etc.) Act 2004: “For the purposes of this section- (a) a person is subject to immigration control if— (i) he is not an EEA national, and (ii) under the Immigration Act 1971 (Chapter 77) he requires leave to enter or remain in the United Kingdom (whether or not leave has been given),

<sup>105</sup> Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Chapter 19)

<sup>106</sup> Adrian Berry, 'The right to marry and immigration control: the compatibility of Home Office policy with Art.12 and Art.14 ECHR in Baiai' (2009) 23 *Journal of Immigration Asylum and Nationality Law* 41, 43

entry of those who may have entered a sham marriage, but immigration through marriage generally”<sup>107</sup> like older restrictive schemes, has now been repealed.<sup>108</sup> The UK has been active in its response to ‘abuse’ of immigration law, much more so than the EU, where cases in which the issue could have been raised do not consider it.<sup>109</sup> The need for the EU to balance respect for the core freedoms of movement and integrationist aims with political sensitivity is almost the opposite of UK aims to restrict numbers of immigrants.

The *Baiai* decision of the House of Lords led to amendments of the requirements of potential TCN-spouses having to ask permission to marry within the UK,<sup>110</sup> unless the marriage was to be conducted by the Church of England, pay a fixed fee of £295 and the citizen residing within the UK have ‘sufficient leave to remain’ in order to obtain a certificate permitting marriage. The Court of Appeal in *Baiai* had made declarations of incompatibility with Article 12 ECHR,<sup>111</sup> which were not followed by the House of Lords, save as to the discrimination between civil and Anglican marriages. The House of Lords did, however, dismiss the Secretary of State’s appeal against the decision that the certification scheme was a disproportionate interference with the Article 12 ECHR right to marry. As Richard Drabble QC, Eric Fripp and Charles Banner submitted, “The scheme function[ed] in a manner which is impervious to or careless of the distinction between marriage on the one hand and sham marriage on the other”<sup>112</sup> so while the aim of preventing sham marriages could justify some legal intervention, it could not justify the disproportionate impact upon other marriages. The House of Lords recognised that the fundamental right to marry was not absolute, but that it was a strong right, and measures limiting it must constitute a legitimate aim and be justifiable.<sup>113</sup>

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<sup>107</sup> Helena Wray, ‘An ideal husband? Marriages of convenience, moral gate-keeping and immigration to the UK’ (2006) 8 *European Journal of Migration and Law* 303

<sup>108</sup> Section 2(1)(a)-(b) Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial Order 2011/1158)

<sup>109</sup> Rita de la Feria, ‘Prohibition of Abuse of (Community) Law: The Creation of a New Gen Principle of EC Law through Tax’ (2008) 45 *Common Market Law Review* 395, 415; Jonathan Faull, ‘Prohibition of Abuse of Law’: A New General Principle of EU Law,’ in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011) 293

<sup>110</sup> *R (on the application of Baiai and others) v Secretary of State for the Home Department*, [2008] UKHL 53

<sup>111</sup> *R. (on the application of Baiai and others) v Secretary of State for the Home Department* [2007] EWCA Civ 478

<sup>112</sup> *Baiai*, n110 above (House of Lords)

<sup>113</sup> *ibid* per Lord Bingham of Cornhill, paras 13-14

The House of Lords followed ECHR case-law in requiring the balancing of the rights of the individual with the interests of the community.<sup>114</sup> The court found that “It is open to a member state, consistently with article 12, to seek to prevent marriages of convenience.”<sup>115</sup> However, the conditions imposed did not determine the genuineness of a marriage, so were disproportionate. Following the *Baijai* judgment, the UK suspended the requirement to pay fees for the marriage certificate of approval, and a scheme was set up to repay fees to applicants who, at the time their application was made, met a financial hardship test.

A later incarnation of the original certificate of approval scheme came before the European Court of Human Rights, in *O’Donoghue*,<sup>116</sup> and was also disproportionate: “under all three versions applicants with “sufficient” leave to remain qualified without any investigation of the genuineness of their proposed marriages.”<sup>117</sup> The entire scheme was open to criticism for a lack of compliance with ECHR requirements.<sup>118</sup> The general principle of proportionality requires that measures are appropriate and necessary in order to achieve the objectives legitimately pursued by legislation, but additionally that where there is a choice between several appropriate measures, the legislature has chosen the least onerous option, and the disadvantages caused must not be disproportionate to the aim pursued.

## **ii. The Current UK Approach to Assessment of Potential Marriages of Convenience**

Assessing the validity of marriages can be extremely difficult- certain types of marriage may seem more likely to be marriages of convenience from a UK perspective than others, such as proxy marriages, which are not able to be conducted under UK law. As long as the requirements of the law under which the marriage was conducted are executed properly, proxy marriages are valid, as applied in *CB*,<sup>119</sup> where the tribunal emphasised that it was the validity of the marriage as governed by the *lex loci celebrationis*, rather than law of the country of domicile, which was important.<sup>120</sup>

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<sup>114</sup> See *Sporring and Lönnroth v Sweden* (Application No 7151/75) (1982) 5 EHRR 55; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 and *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1991] 1 AC 69

<sup>115</sup> *Baijai*, n110 above, per Lord Bingham of Cornhill, para 25

<sup>116</sup> *O’Donoghue v United Kingdom* (Application No 34848/07) [2011] 1 F.L.R. 1307 (ECHR)

<sup>117</sup> ‘Case Comment: Marriage: marriage by non-EEA national - certificate of approval - marriages of convenience’ [2011] *European Human Rights Law Review* 228

<sup>118</sup> *ibid* 229

<sup>119</sup> *CB* (Validity of marriage: proxy marriage) [2008] UKAIT 00080

<sup>120</sup> *ibid* para 21



More complicated, however, is the assessment of whether a marriage is genuine when it does not follow the accepted ‘marital norms’ in relation to parties living together, or sharing resources etc., which can often be expected. However, there is no requirement inherent in a concept of marriage that spouses must live in the same household: “[m]ost couples marry because they intend to live together but that is not axiomatic as demonstrated by couples who choose to maintain separate households, “living apart together”.”<sup>121</sup> Shared resources and a common household can be useful indicators of a genuine marriage, but cannot be the only indicators- families may need to live apart for work or other reasons, and, in relation to EEA spouses, the tribunal in *PM*<sup>122</sup> recognised that a restrictive test in relation to assessing the phrase ‘residing with’ for the purposes of acquisition of permanent residence under Regulation 15(1)(b) would not be compatible with the approach of the Court of Justice; residence within the same state- i.e. the UK, sufficed,<sup>123</sup> just as it ought to for spouses under the Immigration Rules.

### **iii. Proving a marriage is one ‘of convenience’**

The Secretary of State must prove that a marriage is ‘of convenience’- it is not for couples to demonstrate that they are not in a marriage of convenience. The standard of proof applied is the normal civil standard- on the balance of probabilities a marriage must be shown to be of convenience: and “[t]he important matter to note is that a marriage [of convenience] must be concluded with the *sole* aim of circumventing immigration rules in order to be a marriage of convenience. A marriage where there is additional aim, is not such a marriage.”<sup>124</sup>

An assessment of a marriage as a relationship of convenience is fatal to the TCN partner’s entitlement to family reunification on the basis of the Immigration Rules. The UK appreciates the importance of ensuring that mistakes are avoided, although suggestions for ensuring this is achieved in practice are not fool-proof, such as “Interviewing the couple separately, or with their family members. For sham, this could be used to check if the couple really know each other and if family members can verify that the relationship is genuine. For forced marriage, interviews could be used to

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<sup>121</sup> Helena Wray, ‘An ideal husband? Marriages of convenience, moral gate-keeping and immigration to the UK’ (2006) 8 *European Journal of Migration and Law* 303, 311

<sup>122</sup> *PM* (EEA - spouse - "residing with") [2011] UKUT 00089

<sup>123</sup> *ibid* paras 34-35

<sup>124</sup> Adrian Berry, 'The right to marry and immigration control: the compatibility of Home Office policy with Art.12 and Art.14 ECHR in Bai'ai' (2009) 23 *Journal of Immigration Asylum and Nationality Law* 41, 45

check that the marriage is consensual.”<sup>125</sup> If the couple do not actually know each other very well, due to the marriage being a consensual arranged marriage, then the application interviews may make it seem likely to the authorities that the marriage is a sham, despite this not being the case. The challenge the UK faces is to ensure that its assessments respect the ECHR right to family life, while allowing the government to remain to be seen to be tackling abuse of national immigration law.<sup>126</sup>

As Charsley and Benson noted- there is no “binary divide” between marriages entered into for good or bad reasons- “An immigration motive for marriage must be seen in that context. Immigration status may add to a potential spouse's attractions without it being the only reason for marriage”,<sup>127</sup> which makes accurately proving marriages are actually of convenience very difficult. The courts have shown that schemes introduced by the Secretary of State have been disproportionate in relation to assessing the genuineness of marriage, and have relied upon the ECHR to do this: European principles from both the ECtHR and the CJEU are relevant to national Immigration Rules, and have helped to protect individuals’ rights to family life.

### **3. The Potential for Europeanisation of Immigration Law**

#### **a. The Immigration Rules**

In exercising her competence over immigration and making changes to the Immigration Rules, the Secretary of State for the Home Department can sidestep Parliament by not formally submitting the changes to parliamentary scrutiny. *MM* emphasised that this means that all provisions have not been debated before Parliament.<sup>128</sup> The *Munir*<sup>129</sup> and *Alvi*<sup>130</sup> cases consider the circumstances in which the Secretary of State for the Home Department (SSHD) needs to present changes to the Immigration Rules to Parliament under Article 3(2) of the Immigration Act 1971:

“The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid

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<sup>125</sup> Home Office, 'Forced Marriage: A Consultation: Summary of Responses,' July 2012 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157837/forced-marriage-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157837/forced-marriage-response.pdf) last accessed 29 March 2014

<sup>126</sup> Katharine Charsley and Michaela Benson, 'Marriages of convenience, and inconvenient marriages: regulating spousal migration to Britain' (2012) 26 *Journal of Immigration Asylum and Nationality Law* 10, 13

<sup>127</sup> *ibid* 16

<sup>128</sup> *MM*, n19 above para 129

<sup>129</sup> *R (on the application of Munir and another) v Secretary of State for the Home Department* [2012] UKSC 32

<sup>130</sup> *R (on the application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33

down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter...’’<sup>131</sup>

The distinction to be drawn between acting on her prerogative and issuing guidance for immigration for which Parliamentary approval is not needed, and creating new Immigration Rules- for which approval is needed- is vital for the legitimate application of the Secretary of State’s current Immigration Rules. *Munir* found that “it is the 1971 Act itself which is the source of the Secretary of State's power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion... to control the grant and refusal of leave to enter or to remain... [The provisions] provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules.”<sup>132</sup> The decision in this case was that the changes made by the Secretary of State were under her prerogative, and so not subject to the Article 3(2) requirement of being laid before Parliament,<sup>133</sup> as they did not constitute new rules and so did not merit consideration by Parliament.

Assuming the introduction of the financial requirements is simply guidance, rather than a new rule, and hence not needing Parliamentary approval under the Immigration Act 1971, it is difficult to see how the Secretary of State for the Home Department has already determined the application of proportionality considerations. The statement that it is “the Department’s view that the new Rules on family life and private life are compatible with ECHR Article 8”<sup>134</sup> cannot remove the possibility of a judicial finding that this is not the case. This is despite the fact that proportionality is not a traditional common law concept.<sup>135</sup>

Where rules have explicitly taken proportionality into account, as the Immigration Rules have, the role of the courts is explicitly excluded from reviewing the proportionality of application, so potentially could shift from reviewing the application and likely results in an individual case, to reviewing the proportionality of the rules themselves. The Statement of Intent “intended [the Immigration Rules] to fill [the]

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<sup>131</sup> Section 3(2) Immigration Act 1971 (Chapter 77)

<sup>132</sup> *Munir* n129 above, para 44

<sup>133</sup> *ibid* para 46

<sup>134</sup> Home Office, n64 above, para 89

<sup>135</sup> Mary Arden, 'Proportionality: the way ahead?' [2013] *Public Law* 498

public policy vacuum” whereby courts were previously left to glean Parliament’s understanding of proportionality without explicit guidance, through the Secretary of State’s position on proportionality being inbuilt to the legislation.<sup>136</sup> This is contrary to the normal balancing acts courts apply in relation to proportionality assessments, but, of course, more conducive to legal certainty.

### **b. European Developments**

Peers identified that the Commission intended to update the Family Reunification Directive, highlighting the main changes,<sup>137</sup> and showing that, generally, the rights of TCN residents would be strengthened by the EU. Taking *Chakroun* into consideration, the rights of TCN residents seem to be slowly becoming more similar to those of Union citizens. This would represent a move towards greater equality of rights, which Pobjoy and Spencer highlight as an excellent aim in itself,<sup>138</sup> but, with the potential increasing of rights of TCN residents within the EU, the unaffected residents of EU Member States, their domestic citizens potentially suffer under more stringent rules with regard to family reunification, and the treatment of TCNs in the UK, Ireland and Denmark obviously would remain unaffected.

### **c. Sustainability of the UK’s restrictive approach**

Given progressive developments within EU law in relation to both the rights of Union citizens, as discussed in Chapter One, and TCN residents as discussed above, the UK’s restrictive approach to the family members of its own citizens seems out of step with the developing rights of other EU Member States. In relation to maintaining a strict approach to TCN residents’ families, the UK may have a stronger argument to put to domestic citizens than against restricting the rights of domestic citizens far more than of their mobile Union citizen counterparts. Reverse discrimination, when highlighted in such a way, can put pressure on the governments of Member States which are obliged to treat Union citizens more favourably than they choose to treat their own citizens to change such laws in order to ensure that the citizen who does not move is

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<sup>136</sup> Home Office, n64 above, paras 37-38

<sup>137</sup> Steve Peers, 'An EU Immigration Code: Towards a Common Immigration Policy' (2012) 14 *European Journal of Migration and Law* 33, 41

<sup>138</sup> Jason Pobjoy and Sarah Spencer, 'Equality for all? The relationship between immigration status and the allocation of rights in the United Kingdom' [2012] *European Human Rights Law Review* 160

not penalised: “there are still significant gaps in the protection of migrants in the domestic context”.<sup>139</sup>

#### 4. Conclusions

The Directive on Family Reunification has been interpreted with the CJEU taking a ‘Union citizenship’ approach in *Chakroun* - the Court followed its principles of applying proportionality assessments to the requirements imposed by Member States and identified that the strict application of a rule making it extremely difficult for under 23 year olds to be joined by a spouse was disproportionate.<sup>140</sup> The rights of TCNs under EU law in all Member States but the UK, Ireland and Denmark require similar, though slightly more restrictive criteria to be met by the sponsor than under Directive 2004/38, and are rights only within the host state- so these are rights for stationary TCNs, as opposed to moving Union citizens.

The UK’s Immigration Rules apply to both TCNs and UK citizens, and have been subject to many changes, with 2012 introducing an immovable requirement of an income of £18,600 per annum by the sponsor, or significant savings to counter any shortfalls. The proportionality of these Rules has been assured by the Home Office’s Statement of Intent, but the UK’s attempt to remove the jurisdiction of the domestic courts in proportionality assessments in all but exceptional circumstances is unlikely to succeed. Though the Secretary of State can introduce guidance and rules under her prerogative under the Immigration Act of 1971, she should not dictate to the courts how the general principle of proportionality works in individual cases.

In cases where applicants fall only slightly short of the £18,600 requirement, it seems inherently disproportionate to require they have £16,000 plus 2.5 times the value of the shortfall in savings, without being able to consider owning a home, or the fact that the spouse has a high-earning potential if family reunification rights were to succeed. While not an interference with the Article 12 ECHR right to marry, the income requirement can clearly interfere with the right to enjoy family life in the UK. The difficulty in families overcoming this obstacle, as the Right Honourable Lady Justice Arden reminds us, is that proportionality, though an ancient concept, does not come from common law.<sup>141</sup> This means that, in order to challenge the legislation, the more

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<sup>139</sup> *ibid* 161

<sup>140</sup> *Chakroun*, n27 above

<sup>141</sup> Arden, n136 above

burdensome test of *Wednesbury* unreasonableness would have to be passed,<sup>142</sup> unless the UK judiciary find that the Immigration Rules are not compatible with the UK's obligations under the Human Rights Act.

The insistence upon the artificial division of labour between a couple - and the recognition of only the resident's earnings if the TCN spouse to be sponsored is highly skilled may prove difficult for Courts to apply strictly: Blake J in *MM* found this condition the most striking of the Rules, and it does not seem to serve much purpose.<sup>143</sup> Just as the refusal to recognise third party support makes little sense if the government's aims are accepted as being simply to reduce reliance upon social security, the potential for a spouse to work should not be ignored. However, as the Secretary of State intended, legal certainty is improved if the requirements are strictly applied, and there would be little risk of a spouse becoming dependent upon social security if they had the massive savings required under the Rules where the income is insufficient.

Discussion of the UK's approach to marriages of convenience was intended to highlight the focus within the UK of 'tackling' migration through family routes, and having to advance different schemes to make this acceptable before the courts. Additionally, it highlights the difficulties in accurately assessing the genuineness of marriages. There is nothing inherently wrong with TCN partners joining their UK domestic national spouse, or a TCN spouse residing within the UK and being subject to certain conditions- but the approach of the UK put relationships under scrutiny which meant that the Certificate of Approval Scheme could not be compatible with the ECHR right to marry, even though a number of 'sham' marriages may be abusing immigration law.

The EU's approach to the rights of TCNs and Union citizens alike to family reunification underlines the great respect for family life and family reunification which the Court of Justice shows, its Union citizenship based reasoning is no longer restricted to Union citizens, and the Court is consistent in its application of proportionality assessments. However, the CJEU does not act alone, and the other institutions also play a part in developing the legislative framework in which family reunification within the EU is possible. The EU seems to recognise, much more than the UK

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<sup>142</sup> James Goodwin, 'The Last Defence of *Wednesbury*' [2012] *Public Law* 455

<sup>143</sup> *MM*, n19 above

legislature, that integration of residents is important: Union citizens or TCNs are more likely to settle within a Member State and work there happily and productively if their family members are able to join them. Family reunification seems to be key to integration, and high financial requirements seem likely to preclude this possibility for many within the UK. As such, alternate routes to family reunification under EU law as interpreted by the CJEU are the subject of Chapters Four and Five.

## Chapter Four

### Residence Rights from beyond Directive 2004/38:

#### Complex cross-border links and developing theories

As had been made clear in Chapter Three, UK law concerning TCN immigration is more onerous than EU law, even where the sponsor is a UK citizen. A UK citizen working within the UK is not necessarily entitled to be joined by TCN family members - family members have no guarantees under immigration law without substantial earnings or savings on the part of the UK citizen, and the challenges families face to demonstrate residence rights are far more burdensome than the requirements placed upon Union citizens residing within the UK under Directive 2004/38.<sup>1</sup> This chapter explores the potential for residence rights outside of the Citizens' Directive, but still under EU law, and assesses how the UK has adapted to the requirements placed upon it to comply with developing CJEU case law. It aims to show that, since the introduction of the more onerous Immigration Rules in 2012, the UK has been less willing to recognise EU rights of residence for its citizens' family members. As entitlements under EU law can be more generous than UK policy, when a link can be established so as to make EU law relevant, a UK citizen (as a Union citizen), should take advantage of such a link, and this chapter considers the efficacy of UK legislation to enable UK citizens to do so.

This chapter does not consider the citizenship article, Article 20 TFEU, as this is discussed separately in Chapter Five. Instead, it assesses the ways in which the CJEU has been able to find rights of residence for the family members of Union citizens based upon what were initially somewhat vague notions of respecting a Union citizen's ability to exercise free movement rights under the Treaty. The idea of the purely internal rule, or 'wholly internal situation' is in the background to many of the decisions considered in this chapter, making clarity of reasoning by the CJEU very important, to establish exactly when Union citizens can rely upon EU law, and to make the principles workable for domestic courts.

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<sup>1</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158, 30.4.2004, 77–123*



This chapter tracks the development of case law, identifying patterns which can be applied within domestic courts. In doing so, it primarily considers the development of ‘return’ cases in relation to residence rights, although Union citizens’ rights to social security and educational grants following their return to a given Member State have also been developed by the Court.<sup>2</sup> The essential element triggering the applicability of EU law in many of the cases discussed below is the potential to discourage the enjoyment of free movement rights, and there is an important temporal consideration in these cases: enjoyment of free movement is not simply a right of Union citizens at a given time in the present, it is something which is reflected in their past, and potentially, future, too. If a Union citizen *would have been* discouraged from exercising the right to free movement had they known what the result would have been upon their return, they can potentially rely upon EU law to change this result, and similarly, if a law means that a Union citizen is unlikely to be able to avail themselves of their rights as Union citizens in the future due to a particular law, it may not be permitted under EU law.

The second section considers rights of residence directly from Treaty provisions (other than Article 20 TFEU), as, in addition to Article 21 TFEU, Treaty Articles seemingly unlikely to contain residence rights have been shown to do so to great effect. The third section assesses some of the rights upon which family members can rely contained in secondary legislation other than Directive 2004/38, and shows why the Directive, with its various economic requirements, cannot be a comprehensive source of residence rights for all Union citizens at all times.

### **1. Return cases**

*Surinder Singh*<sup>3</sup> predated the introduction of Union citizenship and involved a UK national and her TCN husband who moved to Germany to live and work before returning to the UK, where Mr Singh was granted limited leave to remain. The couple began divorce proceedings with a decree nisi pronounced in July 1987, and the UK refused to grant Mr Singh indefinite leave to remain as the spouse of a UK citizen following this pronouncement. His limited leave expired in May 1988 and deportation proceedings commenced. The divorce was not finalised until February 1989. The UK

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<sup>2</sup> Case C-192/05 *Tas Hagen and Tas* [2006] ECR I-10451; Case C-406/04 *De Cuyper* [2006] ECR I-06947; Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger*, Judgment of the Court 18 July 2013, nyr, Case C-224/98 *D’Hoop* [2002] ECR I-6191

<sup>3</sup> Case C-370/90 *Surinder Singh* [1992] ECR I-04265

argued that the right of entry and residence was under domestic law and so was subject to UK rules, but the CJEU found that the Mrs Singh's work in Germany altered this, stating that a national of a Member State might be deterred from leaving their home state in order to exercise their right to work or to be self-employed in another Member State if "the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State."<sup>4</sup> The CJEU further found that the movement of family members was particularly important for ensuring that Member State nationals are not deterred from exercising free movement rights.<sup>5</sup> Mr Singh was thus entitled to enjoy "at least the same rights" as if his spouse had entered and resided in another Member State.<sup>6</sup>

The case did not meet with universal acclaim, and Watson criticised the Court's solution, suggesting that it would have been more logical for the Court to have addressed the rights of returning migrant workers more directly, ruling "that they should be no more and no less in quantum or quality that those which he or she had when he left home to seek his or her fortunes abroad."<sup>7</sup> However, this was not the approach taken by the CJEU, and it was not a one-off, being affirmed in *Eind*.<sup>8</sup> In this decision, the Court applied *Surinder Singh* and made clear that a national of a Member State can be deterred from leaving that Member State to exercise a right to work within another Member State "if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State."<sup>9</sup> Craig and De Búrca summarised this: "a citizen is less likely to travel if he believes that he will not be able to later return to his home country with his family. This is so even if the members of the EU citizen's family included a third country national who did not have a right to reside in his home country when he initially left, and it was not material in this respect that the EU national returning home did not intend to engage in economic activity"<sup>10</sup> The intention of the EU citizen who moved to work upon return to their home Member State was unimportant in *Eind*,<sup>11</sup> instead, as Bierbach noted, the Court's focus was upon the rights of the 'citizen of the

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<sup>4</sup> Case C-370/90 *Surinder Singh* [1992] ECR I-04265, para 19

<sup>5</sup> *ibid* para 20

<sup>6</sup> *ibid* para 27

<sup>7</sup> Philippa Watson, 'Free Movement of Workers: a one way ticket?' (1993) 22 *Industrial Law Journal* 68, 77

<sup>8</sup> Case C-291/05 *Eind* [2007] ECR I-10719

<sup>9</sup> *ibid* para 35

<sup>10</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) 753

<sup>11</sup> Case C-291/05 *Eind* [2007] ECR I-10719, paras 38 and 45

Union’, who had replaced the ‘Community national’ previously in the central role in case law on TCN family members’ residence rights.<sup>12</sup>

The potential for family members’ lack of rights of residence in one state deterring a Union citizen’s movement to another gives a potential link to EU law, and means that situations which seem to be internal to one Member State are not necessarily so. The *Surinder Singh* approach has been seized upon by some UK citizens hoping to escape the newly restrictive rules introduced in 2012 concerning family reunification for UK citizens who have no link to EU law.<sup>13</sup> The availability of the *Surinder Singh* ‘route’ means that the UK is less able to control who may live within its territory, if UK nationals decide to avail themselves of the right to exercise one of their fundamental freedoms within another Member State.

It was important, then, that the CJEU had confirmed that there is no abuse of law where the intention of an individual when exercising their right of free movement was to activate residence rights within another state. The Court did this in *Akrich*,<sup>14</sup> where it made clear that “the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity”.<sup>15</sup> *Akrich* preceded the implementation deadline of Directive 2004/38, and, while Faull stated that it “can be said not to be a reading of the Directive at all”,<sup>16</sup> as a general principle, the approach of the CJEU still stands.<sup>17</sup>

The UK authorities have recognised the potential for residence based upon *Surinder Singh*, but have not made it simple for family members to learn about it: information contained in the ‘EEA family permit’ section of the newly updated government

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<sup>12</sup> Jeremy B. Bierbach, ‘Right of residence affirmed for a family member who is a third-country national upon the return of a Union citizen to the member state of which he is a national, even when the Union citizen no longer carries on any effective and genuine economic activities. Grand Chamber decision of 11 December 2007, Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*’ (2008) 4 *European Constitutional Law Review* 344, 346

<sup>13</sup> See Catrin Nye, ‘The Britons Leaving the UK to get their Relatives In’ BBC 25 June 2013, at <http://www.bbc.co.uk/news/uk-23029195> last accessed 21 March 2014

<sup>14</sup> Case C-109/01 *Akrich* [2003] ECR I-09607

<sup>15</sup> *ibid* para 55

<sup>16</sup> Jonathan Faull, ‘Prohibition of Abuse of Law’: A New General Principle of EU Law,’ in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011) 292

<sup>17</sup> This is discussed further in relation to the determination of what constitutes ‘genuine’ exercise of Treaty rights in Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Judgment of the Court, 12 March 2014, nyr

services and information website states that British citizens are ineligible for EEA family permits for their family members,<sup>18</sup> and it is only in the separate Guidance on EEA family permits that the *Surinder Singh* route is mentioned.<sup>19</sup> The website thus has the potential to mislead British citizens and their family members seeking to understand how EEA family permits work; unless a UK citizen already had knowledge of *Surinder Singh*, it would be easy to assume that, as stated on the EEA family permits page, only EEA nationals from states other than the UK are capable of being joined by family members who are eligible for an EEA family permit. This difficulty is not the only one a UK citizen and family member face in having their rights as returning Union citizen and family member recognised.

Recent updates to the Immigration (EEA) Regulations,<sup>20</sup> which came into force on 1 January 2014, amended Regulation 9 in relation to the family members of British citizens, so as to read:

“(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen (“P”) were an EEA national.

(2) The conditions are that—

(a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;

(b) if the family member of P is P’s spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P’s life has transferred to the EEA State where P resided as a worker or self-employed person.”<sup>21</sup>

Each condition is problematic. The first requires the Union citizen to have been a worker or self-employed within the host Member State, which is no longer in line with EU law following *O and B*.<sup>22</sup> The second condition restricts the family members to the spouse or civil partner of a Union citizen, which was not the Court’s approach in *Eind* – where a dependent child was considered to be a family member and entitled to rely upon a derivative right of residence. The third condition most encapsulates the UK’s

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<sup>18</sup> <https://www.gov.uk/family-permit>

<sup>19</sup> Guidance: EEA family permit: EUN02: Published 13 November 2013 <https://www.gov.uk/government/publications/eea-family-permits-eun02/eea-family-permit-eun02> , last accessed 22 March 2014, point 14

<sup>20</sup> Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 ([SI No 3032](#))

<sup>21</sup> Regulation 9 of the Immigration (EEA) Regulations as amended by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013, 2013 No. 3032

<sup>22</sup> *O and B*, n17 above

hardening approach. The transfer of ‘the centre of [the UK citizen]’s life’ to another Member State is not something *Surinder Singh* necessarily requires. The test is expanded upon in the Explanatory Memorandum to the Amendment:

“7.11 ...The new regulation 9 of the 2006 Regulations introduces a requirement that the British citizen must have transferred the ‘centre of their life’ to another member State before their family members can benefit from the *Singh* provisions. Whether or not a British citizen has transferred the centre of their life to another member State will be assessed by reference to a number of criteria, including the length of residence, the degree of integration and whether or not the British citizen has moved their principal residence to that other [M]ember State.

7.12 These changes have been made to ensure that there has been a genuine and effective use of free movement rights in the other [M]ember State before such rights may apply by analogy upon return to the UK. The *Singh* judgment sought to prevent a possible deterrent to the exercise of free movement rights; such a deterrent can only occur if the British citizen intends to exercise rights genuinely and effectively in another member State. This paragraph will also have the effect of preventing abuse by those British citizens who move temporarily to another member State in order to circumvent the requirements of the usual immigration rules for their family members upon return to the UK.”<sup>23</sup>

The aim of ensuring that there has been a ‘genuine and effective use of free movement rights’ is compatible with the CJEU decisions in *Surinder Singh* and *Eind*, but the UK amendment goes further than this. Its linking of ‘abuse’ with the exercise of free movement rights when UK/Union citizens move to another Member State ‘in order to circumvent the requirements’ appears to be the reason for the introduction of the more onerous test. The UK seemingly equates genuine exercise of EU freedoms as excluding any such exercise where there could be a separate motivation of having an effect upon immigration rights upon return.

This appears to be contrary to EU law as the CJEU has emphatically stated that the motive for exercise of a free movement right is irrelevant: it is the genuineness of the exercise of Treaty rights which Member States are entitled to investigate.<sup>24</sup> This was established long before *Surinder Singh* was decided – for example, *Levin* demonstrated that taking up a part-time low-paid job with the aim of gaining worker status still entitled the worker to be recognised as such, as long as there was ‘effective and genuine’ work.<sup>25</sup> The Court considered the purpose for the movement, or the objectives of the (then) EEC national, Ms Levin, and did not find that the objective of movement had to be solely to accept offers of employment within another Member

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<sup>23</sup> Explanatory Memorandum to the Immigration (EEA) (Amendment) (No. 2) Regulations 2013, No. 3032 at [http://www.legislation.gov.uk/ukxi/2013/3032/pdfs/ukxiem\\_20133032\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/3032/pdfs/ukxiem_20133032_en.pdf) last accessed 23 March 2014

<sup>24</sup> No case law on the transfer of centre of life test has been found to assess the arguments of legal representatives, or the approach of the courts.

<sup>25</sup> Case 53/81 *Levin* [1982] ECR 1035; see discussion in Katja Ziegler, 'Abuse of Law' in the Context of the Free Movement of Workers' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011)

State, provided the pursuit of employment was genuine: “the motives which may have prompted the worker to seek employment in the member state concerned are of no account and must not be taken into consideration.”<sup>26</sup>

The CJEU later showed that the acquisition of Union citizenship with intent to benefit from EU law is not abuse of EU law. In *Chen*,<sup>27</sup> the motivation of giving birth in Ireland in order to gain Irish nationality and hence Union citizenship with the ability to move and reside within the EU was no abuse of law – Irish or EU. The CJEU has been reluctant to limit the recognition of exercise of Treaty freedoms to those freedoms exercised purely for their own sake: working solely for money or work, etc. Union citizens do not necessarily only have one motivation for any exercise of a Treaty right, and there is no justification for the UK to exclude genuine exercise of Treaty freedoms with the intent of avoiding the Immigration Rules. Furthermore, by limiting its recognition to when a UK citizen has transferred their entire lives to another Member State, the UK has gone beyond the Court’s approach in *Surinder Singh* or *Eind*, where neither case contained any reference to a desire on the part of the Union citizen to remain permanently or indefinitely within the host Member State before their return, which is something that such a transfer could require. Similarly, a transfer of life requirement was not the approach of the CJEU in the recently decided *O and B* case.<sup>28</sup>

Exercising a Treaty freedom with another aim cannot be prevented under EU law, and should not be treated any differently than exercise of a Treaty freedom for the sole purpose of enjoyment of that freedom by the UK rules. The Regulation 9 factors for assessing whether there has been a transfer of the centre of life include period of residence, location of the UK citizens’ “principal residence” and the degree of integration in the host Member State. *O and B* goes some way to showing that the UK approach of assessing the transfer of the centre of life must be incorrect, though the decision emphasised the importance of a ‘genuine’ exercise of rights under the Treaty, as well as a ‘genuine’ family life within the host Member State.<sup>29</sup> In relation to assessing genuine exercise of Treaty freedoms, the UK considerations of length of residence and integration into the host state appear to be in line with the approach of the CJEU.

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<sup>26</sup> *ibid* para 22

<sup>27</sup> Case C-200/02 *Chen* [2004] ECR I-09925, paras 34-37

<sup>28</sup> *O and B*, n17 above

<sup>29</sup> *ibid* paras 50-51

Both parties in *O and B* were TCN nationals with sponsors from the Netherlands and there was an element of movement to another Member State. Mr O was Nigerian and lived in Spain, where he was regularly visited by his Dutch wife on holidays, though she retained her place of residence in the Netherlands being unable to find work in Spain. Mr B was a Moroccan national and had resided within the Netherlands with his partner from 2002 – 2005, whereupon he was declared to be undesirable within the territory of the Netherlands due to use of a false passport. He then moved to Belgium and lived in an apartment rented by his partner. She resided there every weekend, and they married in July 2007.

The CJEU agreed with the referring court that Directive 2004/38 established no derived right of residence for TCN family members in the Member State of which the Union citizen is a national.<sup>30</sup> The Court emphasised that the reason for which residence rights of TCNs may be derived from Article 21(1) TFEU was the fact that a refusal to allow such a right of residence would interfere with the Union citizen's freedom of movement by discouraging him from exercising rights of entry into and residence within the host Member State. The Court reaffirmed the 'return' principle applied in *Surinder Singh* and *Eind*, and determined that this was capable of application to family members of Union citizens who had resided in another Member State exercising rights under Article 21(1) TFEU,<sup>31</sup> rather than simply to family members of workers or the self-employed. The reason for this was that the obstacle to be removed – the genuine deterrence of a Union citizen exercising their rights to free movement - was the same, whichever Treaty freedom was exercised.

The Court emphasised that the Union citizen and TCN family member's residence in the host Member State must have been 'sufficiently genuine' so as to count as family life, and the length of and reason for residence in the host state is relevant, which is not dissimilar from some of the UK's conditions for assessing derived rights of residence. The Court observed that residence under Article 6(1) of Directive 2004/38 (residence for up to three months) does not demonstrate an attempt to create or strengthen family life in the host Member State, so residence to family members following Article 6 residence in another Member State would not have to be granted in the home Member State.

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<sup>30</sup> *ibid* paras 37-43

<sup>31</sup> *ibid* para 49

Residence under Article 7(1)-(2) of Directive 2004/38 would be, in principle, capable of developing genuine family life, so Article 21(1) TFEU can enable that family life to continue within the home Member State through the recognition of a derived right of residence to the TCN family member. The Court found that where a right of permanent residence had been granted within the host Member State, a Union citizen returning to their Member State of origin is entitled to be accompanied by a TCN family member who had also been granted the right of permanent residence within the host state.<sup>32</sup> *O and B* took up AG Sharpston's call to provide clear clarification as to the circumstances in which rights of residence may be derived from Article 21(1) TFEU,<sup>33</sup> and based its approach very much upon Directive 2004/38. The CJEU established the idea that residence of a Union citizen and family member under Articles 7 or 16 of the Directive can give rise to residence rights under Article 21(1) TFEU upon return to the home Member State. The Court referred to the periods of residence in *Surinder Singh* and *Eind* (2.5 years and 1.5 years respectively), but did not suggest a minimum period of residence in a host Member State for a TCN family member to qualify for residence rights in reliance upon Article 21(1) TFEU within the Union citizen's home state.

The focus in *O and B* was to protect genuine family life which has been 'created or strengthened' within the host Member State and to prevent the refusal of residence rights for a family member restricting a Union citizen's exercise of free movement rights.<sup>34</sup> While the assessment in relation to genuine family life in the host Member State is left to the national court, the CJEU has made clear that temporary, intermittent residence does not qualify for TCN residence rights upon return under Article 21(1) TFEU, that a right of permanent residence in the host Member State does qualify, and that residence under Article 7 Directive 2004/38 can also qualify. The CJEU emphasised that residence within the host state to create or strengthen family life must have been *as family members*, and followed Directive 2004/38's definition of family member – so Mr B, who married his Dutch wife after she had resided in the host state

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<sup>32</sup> *ibid* para 59

<sup>33</sup> Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie*, and Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie*, Opinion of Advocate General Sharpston, delivered on 12 December 2013, para 66

<sup>34</sup> *O and B*, n17 above, para 54



with him, had not been residing as a family member during that time, due to not yet being the spouse of a Union citizen.<sup>35</sup>

In determining when this could apply, the Court suggested that the conditions to be fulfilled to grant TCN family members rights of residence within a returning Union citizen's state of origin should not be more strict than those applied by Directive 2004/38 under the circumstances where a Union citizen and family member live in a host Member State: the Directive should be applied by analogy.<sup>36</sup> This may require a returning UK citizen to be able to fulfil the Article 7 of Directive 2004/38 conditions, to 'qualify' by analogy. This requires clarification as it would represent a different approach from that taken in *Eind*, where the nature of the residence of the Union citizen in their home state was not of consequence. It is unclear whether *O and B* requires UK citizens to show they would have qualified for residence had they held the nationality of another Member State, such as through working or having sufficient resources, and thus would have been able to bring family members to join them had they had the nationality of another Member State, or whether simply having genuinely created or strengthened family life in another Member State and returning to the Member State of nationality means no greater burden can be put upon the family member intending to join the UK citizen within the UK than upon a family member joining a qualified Union citizen in a host Member State.

As identified above, *O and B* extended *Surinder Singh* from economically active Union citizens to any Union citizen genuinely exercising their right to free movement within another Member State, so the UK's Regulation 9 requirement of being a worker or self-employed person in another Member State is now out of date, and thus should not be applied where there is genuine movement and residence under Article 21 TFEU and a genuine family life was enjoyed in the host state. Given how recently *O and B* was decided, there has not yet been judicial consideration of how the Regulations conform to the requirements of EU law. An additional discrepancy in approach is apparent in relation to the third criterion: though the CJEU in *O and B* was at pains to emphasise that, firstly, the exercise of Treaty right must be genuine and, secondly, family life must be genuine, it did not require so complete a move as an entire transfer of the Union citizen's life to the host state. This condition within the UK Regulations remains without foundation if applied strictly. As the Court found in *Prinz*,

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<sup>35</sup> Article 2(2) Directive 2004/38

<sup>36</sup> *O and B*, n17 above, para 50

integration is important to establish genuine residence, but sole conditions, such as transfer of centre of life, may not be permitted under EU law.<sup>37</sup> What is most discernible from the developments from *Surinder Singh* to *O and B* is the Court's concern not to deter genuine exercise of movement, and a recognition that familial residence rights can be vital to such movement. The Court has also been able to ensure residence rights for family members where there has not necessarily been much exercise of free movement rights by the Union citizen. Such cases are discussed next.

## 2. Rights of residence in reliance upon Treaty provisions

In *Carpenter*,<sup>38</sup> the CJEU reduced the effect of the purely internal rule from a different angle. Guild tersely suggested that "Part of UK identity rights and duties is either not to marry a foreign national irregularly in the UK or if this is irresistible, not to seek to have the spouse live with the national in the UK."<sup>39</sup> Mr Carpenter did not comply with Guild's suggested 'duty', and sought to rely upon EU law to enable his Filipina spouse to reside with him in the UK. Mr Carpenter remained as a resident within the UK at all times, so *Surinder Singh* was inapplicable, but he was self-employed and provided some services to other Member States, exercising his rights under Article 56 TFEU, and thus a link to EU law was found.

The Court held that a refusal to grant his TCN spouse a right of residence could interfere with Mr Carpenter's exercise of his rights under EU law. In addition, the Court also considered the effect of Mrs Carpenter's deportation on Mr Carpenter's right to respect for his family life – finding that this may constitute an infringement of his right to respect for family life as guaranteed by Article 8(1) ECHR,<sup>40</sup> and that deportation did not strike a 'fair balance' between the competing interests of respect for family life and maintenance of public order.<sup>41</sup> Article 56 TFEU read in light of Article 8(1) ECHR precluded Mrs Carpenter's deportation,<sup>42</sup> and demonstrated a

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<sup>37</sup> C-585/11 *Prinz and Seeberger*, Judgment of the Court 18 July 2013, nyr, para 38

<sup>38</sup> Case C-60/00 *Carpenter* [2002] ECR I-06279

<sup>39</sup> Elspeth Guild, 'Developing European Citizenship or Discarding It? Multicultural Citizenship Theory in Light of the *Carpenter* Judgment of the European Court of Justice' (2003) 12 *The Good Society* 22

<sup>40</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, (European Convention on Human Rights) Rome, 213 U.N.T.S. 222, signed on 4 November 1950, entered into force on 3 September 1953

<sup>41</sup> *Carpenter*, n38 above, para 43

<sup>42</sup> *ibid* para 46

willingness on the part of the Court to rely upon fundamental rights arguments to strengthen the exercise of free movement rights.<sup>43</sup>

Spaventa identified three main theories used to explain the scope of the free movement provisions: the discrimination theory, the double burden theory and the market access theory.<sup>44</sup> Her assessment of the developing approach to the cross border rule was thorough, considering developments in *Gebhard*,<sup>45</sup> where a restrictions placed upon establishment as a lawyer in Italy had to be non-discriminatory, justified, suitable for attaining the objective, and not go beyond what was necessary:<sup>46</sup> essentially, limitations on the right to establishment had to be proportionate. The broadening approach to what fell within the ‘services’ definition, in addition to what Spaventa described as a more ‘interventionist’ approach in *Carpenter*,<sup>47</sup> leads to the current confusion over when situations have sufficient proximity to EU law. This is discussed in detail in Chapter Five in relation to reliance upon Article 20 TFEU, but when Union citizens may rely upon rights of residence from other Treaty rights is discussed below.

*Carpenter* was extended by the recent decision of *S and G*,<sup>48</sup> which was decided on the same day as *O and B*;<sup>49</sup> in this case, the TCN family members claimed rights of residence based upon their familial relationship with Dutch citizens currently working within another Member State, as frontier workers. The sponsor of S, a Ukrainian national, was her Dutch son-in-law, who resided in the Netherlands and made regular trips to Belgium for work. The sponsor of G, a Peruvian national, was her Dutch husband who had established a business in Belgium and who travelled there daily to work. The Court’s decision in *S and G* is of interest for two main reasons: firstly, it took the logical step to extend *Carpenter* to Article 45 TFEU workers, rather than simply service providers under Article 56 TFEU.<sup>50</sup> Secondly, it reaffirmed the Court’s preference for determining residence based upon economic activity rather than Union citizenship.<sup>51</sup>

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<sup>43</sup> This is discussed further in Chapters 5 and 6

<sup>44</sup> Eleanor Spaventa, ‘From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution’ (2004) 41 *Common Market Law Review* 743, 744

<sup>45</sup> Case C-55/94 *Gebhard* [1995] ECR I-04165

<sup>46</sup> *ibid* para 37

<sup>47</sup> Eleanor Spaventa, ‘From *Gebhard* to *Carpenter*’ (2004) 41 *Common Market Law Review* 743, 766

<sup>48</sup> Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G*, Judgment of the Court, 12 March 2014, nyr

<sup>49</sup> *O and B*, n17 above

<sup>50</sup> *S and G*, n48 above, para 44

<sup>51</sup> *ibid* para 45

The Union citizen sponsors had a current link to another Member State – they were frontier workers, against whom the Court has already established there can be no discrimination due to their exercising the fundamental freedom to work in another Member State.<sup>52</sup> The CJEU agreed that Directive 2004/38 was not applicable to *S and G*, as it establishes no derived right of residence for TCN family members in the Member State of which the Union citizen is a national.<sup>53</sup> Instead, the Court referred to *Carpenter*,<sup>54</sup> and found that the interpretation of Article 56 TFEU was transposable to Article 45 TFEU.<sup>55</sup> The Treaty right to work within another Member State was interpreted as “conferring on a third country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.”<sup>56</sup>

As the CJEU was able to transpose the *Carpenter* approach to ascertaining rights of residence, it found that there was no reason to consider Articles 20-21 TFEU: the Court said these Articles “find specific expression in Article 45 TFEU in relation to freedom of movement for workers”,<sup>57</sup> which echoed earlier case law.<sup>58</sup> It is still easier for the CJEU to find residence rights for Union citizens who have been economically active in another Member State, rather than simply Union citizens who have resided in another Member State, which is why *O and B* is noteworthy - it represents more of a development for family reunification than the work/service based decisions which preceded it. In those decisions, the enjoyment of ‘family life’ was not assessed in the same way by the Court – it was not the subject of the decision, which it was in *O and B*. Instead of simply assessing deterrent to the exercise of Treaty freedoms, the CJEU introduced a link between creating or strengthening family life while exercising the right to live in another Member State in accordance with Directive 2004/38’s provisions, and the right to return to a home state with the family member with whom a Union citizen enjoyed family life. This case relied upon Article 21 TFEU, which

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<sup>52</sup> Case C-212/05 *Hartmann* [2007] ECR I-06303

<sup>53</sup> *S and G*, n48 above, para 34

<sup>54</sup> *Carpenter*, n38 above

<sup>55</sup> *S and G*, n48 above, para 40

<sup>56</sup> *ibid* para 44

<sup>57</sup> *ibid* para 45

<sup>58</sup> Case C-233/12 *Gardella*, Judgment of the Court 4 July 2013, nyr, para 38; Case C 3/08 *Leyman* [2009] ECR I 9085, para 20, Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, para 26

was earlier used to great effect to secure the residence rights of Union citizens falling outside the scope of the Directive.

The Article 21 TFEU right to move to and reside in another Member State is capable of direct effect - and was relied upon directly in cases such as *Baumbast* and *Chen*.<sup>59</sup> Direct reliance upon Article 21 TFEU has been capable of granting rights of residence to Union citizens who do not fulfil the conditions of secondary legislation, as shown in *Baumbast*, and their family members, such as in *Chen*. In *Baumbast*, as discussed in Chapter One, Mr Baumbast was able to rely upon Article 21 TFEU to limit the ‘limitations and conditions’ contained in secondary legislation.<sup>60</sup> As Mr Baumbast was a mobile Union citizen, his residence would not fall under the UK Immigration rules, so is less relevant for family reunification in the UK than *Chen*.

Under Directive 2004/38, a Union citizen must be a ‘qualifying’ citizen to bring family members to reside within the host state, i.e. they must fulfil one of the Article 7 conditions of residence.<sup>61</sup> In situations where parents are TCNs, and the only Union citizens are children, there are immediately obvious difficulties if reliance upon the Directive is to be attempted – TCN ascending line family members must be dependent upon the Union citizen under Article 2(2)(d) to benefit from a derived right of residence, rather than, as would mostly be the case with a Union citizen child, the other way around with dependence upon the TCN adults. The latter case illustrates the difficulties which Catherine, an Irish citizen with Chinese parents, and her mother faced to demonstrate a right to reside within the UK. Catherine had been born in Northern Ireland, and moved to Wales, so never actually left the UK, though she was granted Irish nationality due to the *ius soli* principle applying at the time of her birth. As Catherine was a child, she did not personally possess sufficient resources, though the Court of Justice found that there was no restriction as to the origin of resources, so the resources of her TCN parents could suffice.<sup>62</sup>

Beyond finding that *Catherine* could rely upon a right of residence from Article 21 TFEU and Directive 90/364,<sup>63</sup> the Court found that failing to grant her mother (and carer) a right to reside would “deprive the child’s right of residence of any useful

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<sup>59</sup> Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925

<sup>60</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L 180*, 13.7.1990, 26–27

<sup>61</sup> Article 7(1)(a)-(c) Directive 2004/38

<sup>62</sup> *Chen*, n59 above, para 30

<sup>63</sup> *ibid* para 41

effect.”<sup>64</sup> In order to make the child’s right of residence meaningful, her mother had to be able to reside also, so where Article 21 TFEU and Directive 90/364 “grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same provisions allow a parent who is that minor’s primary carer to reside with the child in the host Member State.”<sup>65</sup> Hofstotter saw the *Chen* decision as part of a continuing judicial activism with regard to Union citizenship,<sup>66</sup> and the decision uses the Union citizenship of a child to great effect. Its focussing upon the useful effect of the residence rights of such a child, can be seen as an antecedent to the Court’s bolder decision in *Ruiz Zambrano*,<sup>67</sup> which is the subject of the next chapter.

The incorporation of *Chen* into UK law took a long time, it was only 8 years later that the rights of ‘primary carers’ of EEA minor children came to be reflected in the Immigration EEA Regulations. When the decision was incorporated, the right of residence was kept separate from that of family members: it was classified as a ‘derivative right of residence’ under Regulation 15A.<sup>68</sup> The conditions include the parent being the primary carer of an EEA national under the age of 18 residing ‘as a self-sufficient person’ within the UK, and unable to remain in the UK should the parent/carer be required to leave.<sup>69</sup> Such a derived right of residence is not capable of leading to a right of permanent residence within the UK,<sup>70</sup> and it is not clear whether this is in accordance with EU law. ‘Legal’ residence for the acquisition of the right of permanent residence under Article 16 of Directive 2004/38 does not have to be residence by a Union citizen under the Directive,<sup>71</sup> but cannot be under domestic law of their state of origin.<sup>72</sup>

*Chen* type residence for a Union citizen is not under domestic law, but under EU law – as self-sufficiency of the Union citizen has been established through the funds of the

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<sup>64</sup> *ibid* para 45

<sup>65</sup> *ibid* para 46

<sup>66</sup> Bernard Hofstotter, 'A cascade of rights, or who shall care for little Catherine? Some reflections on the *Chen* case' (2005) 30 *European Law Review* 548

<sup>67</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177

<sup>68</sup> Regulation 15A was introduced by the Immigration (European Economic Area) (Amendment) Regulations 2012, 2012 No.1547

<sup>69</sup> Regulation 15A(2) of the Immigration (EEA) Regulations, as amended

<sup>70</sup> Regulation 15(1A) of the Immigration (EEA) Regulations, as amended states that “Residence in the United Kingdom as a result of a derivative right of residence does not constitute residence for the purpose of this regulation”

<sup>71</sup> Case C 162/09 *Lassal* [2010] ECR I-9217, para 40

<sup>72</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375, para 37

parent/carer. The potential for the derivative right of the primary carer to lead to permanent residence has not been considered by the CJEU, but it seems likely that, as it is residence with a Union citizen in accordance with EU law, the CJEU would be able to find such a right should be granted, though the familial relationship not falling within the Directive's definition could prove problematic if Article 16(2) was interpreted as only meaning family members as defined by the Directive.<sup>73</sup> The alternative, that upon the Union citizen's 18<sup>th</sup> birthday their parent/carer be required to leave, does not seem to be in line with the approach of the CJEU in *O and B* to enjoyment of genuine family life.

As Horsley said, "The Court remains free to engage with the Treaties' empowering norms in order to legitimize its efforts to influence the development of EU law";<sup>74</sup> in relation to Union citizens' rights of residence and those of their family members, this is certainly true: the CJEU has been able to find reasons for protecting 'genuine' family life and protecting the exercise of free movement rights. While the Court should not circumvent the limits on Article 21(1) TFEU entirely, its interpretations in case law have meant that Union citizens' family members can rely upon rights of residence within the Union citizens' state of origin, rather than having to rely upon domestic law. Dougan suggested that, had the court 'been bent on a campaign of unilateral policymaking' it had the legal tools to do so - indirect judicial review and personal circumstances assessment – which could have circumvented the preferences of the Union legislature.<sup>75</sup> Thankfully, for the sake of legal certainty at least, the CJEU has refrained from any unilateral attack on clear secondary legislation in the realm of residence rights, and has focussed its attentions on developing meaningful opportunities to realise Treaty rights – taking particular care in *O and B* to expand upon the scope of the rights.

### **3. Rights of Residence from a Secondary Source Other than Directive 2004/38**

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<sup>73</sup> Article 2(2) of Directive 2004/38 does not include ascendant relatives who are not dependants

<sup>74</sup> Thomas Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal Limits to Judicial Lawmaking*' (2013) 50 *Common Market Law Review* 931, 964

<sup>75</sup> Michael Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 148

Directive 2004/38 offers an incomplete codification of residence rights, so this section seeks to explore an alternate source of rights contained in secondary legislation. This section mostly concerns the scenario whereby a Union citizen worker has a child in education and the Union citizen leaves or loses their employment and thus is not likely to have resources or be able to support their family under the conditions required by the Directive. This scenario gives a sense of the reasons for which the rights of residence discussed below are not included in Directive 2004/38: the Directive maintains a focus upon economic activity or resources in order to establish residence. Much as it represented a step towards granting Union citizens residence rights due to their holding the citizenship of an EU Member State, the Directive assesses the finances of the individual Union citizen and family members, and the impact of their likely residence upon the host Member State. As a mobile Union citizen is not always economically active or financially secure, the Directive cannot cover all situations where EU law is an important source of residence rights. This section focuses upon children and their carers or guardians, which is something of a recurring theme; the Court's ingenuity in developing non-traditional rights of residence especially with the aim of protecting children's rights has allowed for flexibility in its approach, and a link to be forged between Union citizenship and the right to family life within the EU.

Focus is upon the rights developed from the repealed Article 12 of Regulation 1612/68<sup>76</sup> now contained in Article 10 of Regulation 492/2011,<sup>77</sup> in order to show an important development of the CJEU pre-Maastricht and which perhaps could show a penchant on the part of the Court to advance the rights of Union citizen children in unexpected ways. The residence rights in this section demonstrate situations where the requirements placed upon the Union citizen by the Directive are not met,<sup>78</sup> and some, or all family members would have no right to reside within the host Member State unless residence rights were found elsewhere. Traditionally, rights of residence and

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<sup>76</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ L 257, 19.10.1968, 2-12*

<sup>77</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *OJ L 141, 27/05/2011, 1-12*

<sup>78</sup> This does not apply in relation to Article 12 Directive 2004/38, as following the death or departure of a Union citizen, family members may retain their right of residence, providing they have been residing in the host Member State 'as family members for at least one year before the Union citizen's death' (Article 12(2) Directive 2004/38).



rights to equal treatment for family members were granted in order to facilitate a worker's mobility;<sup>79</sup> now, however, there are broader aims which the CJEU values.

If a Union citizen no longer fulfils the requirements contained in Article 7 Directive 2004/38 then their family members' rights of residence within a Member State, too, may be lost. In certain circumstances, however, they can remain: Article 12(3) Directive 2004/38 states that the death or departure of the Union citizen "shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies."<sup>80</sup> Under Article 12 of Regulation 1612/68 children of an EU worker were entitled to access to a State's general educational system. Article 12 read as follows:

"The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."<sup>81</sup>

Article 12 of Regulation 1612/68 was not repealed by Directive 2004/38, but by Regulation 492/11, which transposed Article 12 word for word into its Article 10. The text does not seem to provide a right of residence for children to facilitate their access to education, or a right of residence for a primary carer: following a literal reading, the Article is purely concerned with access to education for children residing in a host Member State's territory. However, case law derived a right of residence from the Article, and this was not subject to the conditions of sufficient resources: in *Gaal*, the CJEU found that the conditions placed upon family members' residence rights by Articles 10-11 of Regulation 1612/68 could not be read into Article 12 of Regulation 1612/68,<sup>82</sup> and so do not apply to Article 10 of the new Regulation. Article

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<sup>79</sup> Case 207/78 *Even* [1979] ECR 2019, paras 20 -22

<sup>80</sup> Article 12(3) of Directive 2004/38

<sup>81</sup> Article 12 of Regulation 1612/68

<sup>82</sup> Case C-7/94 *Gaal* [1995] ECR I-1031, paras 21-23 - Article 10 of Regulation 1612/68 defined the family members who may travel with a worker, including a concept of 'other family member'; Article 11 of Regulation 1612/68 contained the right of family members to work within the territory of the host Member State, regardless of nationality. Both Articles were repealed by Article 38(1) of Directive 2004/38.

10 of Regulation 492/11 does not require a Union citizen to be employed within the territory of the Member State at the time of their children's reliance upon this right of access to education - past employment of a Union citizen also suffices.

As *Baumbast and R* illustrated, for a child and carer to benefit from rights of residence under Article 10 of Regulation 492/11, the Union citizen adult who had been working need not remain with the family – in *R*, the Union citizen husband did not live with his family, and was later divorced from his TCN wife, though this did not impact upon the rights which the family were able to derive from the Regulation. The family had had a right to live with the Union citizen husband when he had been a worker, and part of the family, but there was no requirement for them to live permanently with that worker,<sup>83</sup> and the rights of a child to continue their education within a host state would not be effective without a carer also having a right to reside.

*Ibrahim and Teixeira*<sup>84</sup> were decided after Directive 2004/38 was implemented, and both cases relied upon Article 12 of Regulation 1612/68 to find a right of residence for the primary carer of children in education. *Ibrahim* concerned the Somali wife of a Danish national who worked in the UK from October 2002 – May 2003 before claiming incapacity benefit until March 2004, whereupon he left the UK, to return in December 2006. Ms Ibrahim joined her husband in February 2003, with the couple's three Danish children, and a fourth child was born in the UK. The eldest two children attended state schools, and Ms Ibrahim separated from her husband when he left the UK in 2004; she remained in the UK though she was never self-sufficient and lacked comprehensive sickness insurance. She was dependent on social assistance to cover all expenses and upon the NHS for health needs. A housing assessment offer refused Ms Ibrahim's application for housing assistance in February 2007, finding that neither she nor her husband was resident in the UK under EU law, a decision which was confirmed by the housing review officer in March 2007. Ms Ibrahim appealed, arguing that as the mother of EU children and their primary carer, that she has a right of residence in the UK under Article 12 of Regulation 1612/68 as the children were in school and her husband is a Union citizen who worked in the UK.

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<sup>83</sup> *Baumbast and R*, n59 above, paras 61-63

<sup>84</sup> Case C-310/08 *Ibrahim* [2010] ECR I-1065, and Case C-480/08 *Teixeira* [2010] ECR I-1107

*Teixeira* also concerned the mother of a Union citizen child, but Ms Teixeira was a Portuguese national, and worked in the UK from 1989 – 1991, with her daughter, Patricia, being born in 1991. Ms Teixeira and her Portuguese husband divorced, and both remained within the UK. Ms Teixeira worked during some of the time her daughter was in education, with her last period of employment ending in early 2005. Following a court order, Patricia lived with her father from June 2006, but could contact her mother as she wished. In November 2006, she enrolled upon a childcare course at the Vauxhall Learning Centre, and in March 2007, went to live with her mother. Ms Teixeira applied for housing assistance for homeless persons, basing her right of residence on Article 12 of Regulation 1612/68, which was rejected by the London Borough of Lambeth at initial assessment and review stage, and Ms Teixeira appealed to the County Court, with the case being referred to the CJEU.

The Court rejected arguments that the Directive introduced more stringent requirements (including the possession of a separate right of residence) to allow children in education to continue to benefit from the right to access education.<sup>85</sup> For O'Brien, the cases made clear “that Directive 2004/38 was not a closing chapter” in the free movement and national solidarity ‘saga’.<sup>86</sup> The Court in *Ibrahim* said “That independence of Article 12 from Article 10 of that regulation [1612/68] formed the basis of the judgments of the Court... and cannot but subsist in relation to the provisions of Directive 2004/38.”<sup>87</sup>

The CJEU in both cases was careful not to limit or reduce the pre-existing rights of Union citizens. *Ibrahim* and *Teixeira* thus successfully relied upon a right of residence for economically inactive persons not wholly covered by the Directive; they “address a novel interaction of old and new secondary EU legislation in the light of established ECJ case law, notably *Baumbast and R*”.<sup>88</sup> The application of the (now) Article 10 of Regulation 429/11 has led to protection of children’s rights to access education and recognises that to attend educational courses it is important to allow a carer to reside with a child in order to achieve the best conditions for learning. However, Stalford and

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<sup>85</sup> *Ibrahim*, *ibid* para 42 and *Teixeira*, *ibid* para 46

<sup>86</sup> Charlotte O'Brien, 'Case C-310/08 *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department*, Judgment of the Court (Grand Chamber) of 23 February 2010, nyr. Case C-430/08 *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*, Judgement of the Court (Grand Chamber) of 23 February 2010, nyr.' (2011) 48 *Common Market Law Review* 203

<sup>87</sup> *Ibrahim*, n83 above, para 42

<sup>88</sup> Peter Starup and Matthew J. Elsmore, 'Taking a logical step forward? Comment on *Ibrahim* and *Teixeira*' (2010) 35 *European Law Review* 571

Drywood have suggested that “any proclivity towards endowing children with direct rights has been primarily driven by a desire to protect the mobility and residence rights of their parents.”<sup>89</sup>

While it is far more likely for adults rather than children to exercise their rights of free movement and residence, it is not only the migrant Union citizen who benefits from Article 10 Regulation 429/2011 protection. The Regulation does not require a Union citizen to be a worker at the time of reliance upon it, or even require a Union citizen to remain within the family, so it is broader than a free movement enhancing provision, and aims to facilitate the education and integration of family members of children Union citizens as well as protecting mobility and residence rights of parents. The Court defined ‘children’ for the purposes of Article 12 of Regulation 1612/68 broadly, which also applies to Article 10 of Regulation 429/2011, and does not apply any age criterion: children need not be under 21 years of age or remain dependent upon a Union citizen to benefit from the Article. Instead, the question is whether a ‘child’ is in full-time education,<sup>90</sup> with education including tertiary education.<sup>91</sup> This reflects the importance of access to education and also means that the Article 10 of Regulation 429/11 rights are not interpreted restrictively.

However, Regulation 15A of the UK implementing Regulations which incorporates the *Ibrahim* and *Teixeira* decisions does require a child to be under the age of 18,<sup>92</sup> and also that the child be the child of a Union citizen.<sup>93</sup> This latter condition should not be applied in practice: while often a child in the situation of those in *Ibrahim* or *Teixeira* will be the child of a Union citizen, they need not be – Article 2(2) of Directive 2004/38 includes the child of a non-EU spouse of a Union citizen as a family member, and such a child should also be protected by Article 10 of Regulation 429/11 should the Union citizen ‘parent-in-law’ leave the host state.

#### 4. Conclusions

The *Surinder Singh* case itself has become something of a *cause célèbre* within the UK. However, the newly introduced requirement of transferring the centre of life to another Member State is not required by the CJEU, though potentially the ‘genuine’

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<sup>89</sup> Helen Stalford and Eleanor Drywood, 'Coming of Age?: Children's Rights in the European Union' (2009) 46 *Common Market Law Review* 143, 149-150, emphasis in original

<sup>90</sup> Case C-7/94 *Gaal* [1995] ECR I-1031, paras 24-25, and 31

<sup>91</sup> *Echternach and Moritz*, n49 above, paras 29-30

<sup>92</sup> Regulation 15A(5)(a) of Immigration (EEA) Regulations as amended

<sup>93</sup> Regulation 15A(3)(a) of Immigration (EEA) Regulations as amended

family life discussed by the Court in *O and B* mean that the new conditions could be interpreted in a manner which was compatible with the Court's approach. If, however, the UK takes a more restrictive approach, it would be acting contrary to EU law.

The development of the Court's jurisprudence for returning citizens in the recent *O* and *S* decisions continue to strengthen the Court's protection of Treaty rights across all time-frames, as in – previous or future movement, exercise of free movement rights, is also worthy of protection and establishes rights of residence for family members. In relation to *Carpenter*, Guild said that “Citizenship, human and cultural rights and constitutional principles” could not get his wife a right of residence within the UK – “Only his capacity as an economic actor can give him the result he wants.”<sup>94</sup> While the economic link to exercising the Treaty freedoms has an enduring hold, the CJEU has softened its approach and found ways to extend from the *Carpenter* search for a link to EU economic activity.

The Court's recognition of Union citizen's rights and the importance of protecting 'genuine' family life means that there is a possibility that Union citizens at home can be joined by their TCN family members following a period of living abroad under Articles 7 or 16 Directive 2004/38. This is particularly relevant for UK citizens, where the Immigration Rules are inflexible and have become more stringent, with strict minimum income requirements placed upon the UK spouse. The EU potentially offers Union citizens from the UK who have moved abroad - for a more than transient time – the right to continue their family life within the UK without having to show earnings of £18,600. As *O and B* suggested, the requirements which should be placed upon of Union citizens returning to their home Member State in order to have a TCN family member's right of residence recognised under Article 21(1) TFEU, should be no more than would have been required had the Directive applied. This means *any genuine work* suffices - £18,600 per annum as required by the UK Immigration Rules would not be necessary.

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<sup>94</sup> Elspeth Guild, 'Developing European Citizenship or Discarding It? Multicultural Citizenship Theory in Light of the *Carpenter* Judgment of the European Court of Justice' (2003) 12 *The Good Society* 22, 24

**Chapter Five**  
**Residence Rights from Article 20 TFEU:**  
**The Court's bravest leap?**

As discussed in Chapter Four, the Treaty can be an important source of residence rights for Union citizens and their family members not falling within the scope of Directive 2004/38.<sup>1</sup> This Chapter considers the prospect of successful reliance upon Article 20 TFEU as a source of residence rights within the EU.<sup>2</sup> The Treaty Article granting Union citizenship is not a free movement provision: it makes no reference to movement or to another Member State and is not an obvious source of rights of residence. Nonetheless, such a right was found in the groundbreaking *Ruiz Zambrano* case,<sup>3</sup> which only became possible in light of *Rottmann*,<sup>4</sup> in which the CJEU based its decision on the concept of Union citizenship.

*Ruiz Zambrano* did not contain a cross-border link of any sort; it involved the Court finding a right of residence for Union citizen children within their home Member State, based upon Article 20 TFEU. As such, it represents a separate source of residence rights, and one capable of circumventing the restrictive UK Immigration Rules for TCN family reunification. This chapter assesses when Article 20 TFEU is capable of providing a source of residence for Union citizens and their family members not falling within the scope of the Directive due to not having moved, or to those who do not fulfil the conditions of national legislation to gain residence rights within the UK, and to whom other rights of residence are unavailable. The potential relevance of the fundamental right to family life is considered throughout this chapter; the *Ruiz Zambrano* judgment notably failed to mention fundamental rights, despite the seemingly obvious potential of a fundamental rights element to the case.

The first section of this chapter discusses the *Ruiz Zambrano* case itself – outlining its facts and the reasoning provided by the CJEU. It assesses the decision's impact upon the purely internal rule, and considers the extent to which Union citizenship has

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<sup>1</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, 77–123

<sup>2</sup> Article 20 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), *OJ C 83*, 30.3.2010, 47–403

<sup>3</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177

<sup>4</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449

extended the traditional boundaries of EU law. The second section assesses the scope of reliance upon the *Ruiz Zambrano* principle, in order to explore how family residence rights can be found in reliance upon Article 20 TFEU. This section also assesses the coherency of the principle, and highlights tension with fundamental rights law. The third section builds upon the second's assessment of coherency and considers how the UK has approached the practical assessment of rights of residence based upon Article 20 TFEU. This is done with focus upon the practical implications for families, as well as consideration of legal arguments put forward by legal representatives as to when *Ruiz Zambrano* does should or could apply and the corresponding domestic courts' decisions. In this way this chapter is able to assess what a fundamentally important step in Union citizenship case law means within the UK.

### **1. The *Ruiz Zambrano* Case**

*Ruiz Zambrano* was decided by the Grand Chamber of the CJEU in March 2011. The judgment is short and has left many questions unanswered.<sup>5</sup> The facts of *Ruiz Zambrano* were decidedly unusual and are as follows: a Colombian couple with a child moved to Belgium and sought asylum, which was refused, though they were not deported to Colombia due to civil war there.<sup>6</sup> Subsequent attempts to regularise the family's residence were unsuccessful. The family stayed in Belgium and two children were born who attained Belgian nationality due to being born within the country and that they would otherwise have been stateless. Mr Ruiz Zambrano secured employment but did not hold a work permit. The authorities found out that he had been working without a work permit and terminated his employment; Mr Ruiz Zambrano appealed against the decision not to grant him unemployment benefits.

The CJEU had to determine whether Articles 18, 20 and 21 TFEU separately or in conjunction could confer a right of residence on minor Union citizens within their home state, regardless of movement; whether the Charter of Fundamental Rights in conjunction with the Treaty articles granted any rights of residence to the parents of minor Union citizens within the country of the child's origin; and if the Treaty articles and Charter provisions must be interpreted as negating the need for a work permit of the parents of such children. Mr Ruiz Zambrano argued that: "he enjoys a right of

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<sup>5</sup> Emphasised in Niamh Nic Shuibhne, 'Editorial: Seven questions for seven paragraphs' (2011) 36 *European Law Review* 161

<sup>6</sup> *Ruiz Zambrano*, n3 above, paras 14-15

residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.”<sup>7</sup>

All of the Member States which submitted observations to the Court argued that there could be no rights for the family under EU law as the Union citizens - the children born in Belgium - had never moved, thus could not come within the situations envisaged by the Treaty.<sup>8</sup> The Court found that Directive 2004/38 did not apply, as its Article 3(1) specifically requires movement between states,<sup>9</sup> but in five short paragraphs<sup>10</sup> the Court determined that the Union citizenship of the two younger children was enough to find a right of residence, and work permit, for “a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect”<sup>11</sup> as to deprive the citizens of the “genuine enjoyment of the substance of the rights”<sup>12</sup> conferred due to their Union citizenship. The work permit had to be granted in order to provide ‘such a person’ (i.e. carer) to provide themselves and their family and ensure the Union citizen were able to remain within the EU:<sup>13</sup>

“the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.”<sup>14</sup>

The CJEU decision meant that the Colombian parents, and their eldest child, were entitled to a right of residence (and access to employment for the parents) without the need to show sufficient resources, health insurance, or a cross-border element,<sup>15</sup> basing the decision solely on the nationality of the two younger children. The alternative

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<sup>7</sup> *ibid* para 34

<sup>8</sup> *ibid* para 37

<sup>9</sup> *Ruiz Zambrano*, n3 above, para 39

<sup>10</sup> *ibid* paras 41-45

<sup>11</sup> *ibid* para 43

<sup>12</sup> *ibid* para 42

<sup>13</sup> *ibid* para 44

<sup>14</sup> *ibid* para 45

<sup>15</sup> Required by Directive 2004/38 for family members to demonstrate a right of residence Article 7, which says Union citizens shall have a right of residence “on the territory of another Member State” if they fulfil the other relevant criteria



finding, that the TCN parents had no right to reside under EU law, would have meant that the Union citizens could have been compelled to leave the territory of the Union, thus having an adverse impact upon their free movement rights. Arguably, they would have travelled to another Member State, so not have had to leave the Union at all, but there would have been no possibility for a *Chen* right of residence.<sup>16</sup> In that case the Chinese mother of an Irish national was able to reside within the UK with her Union citizen daughter and provide for her, as she had sufficient resources not to become a burden upon the host state and comprehensive sickness insurance so Article 21 TFEU<sup>17</sup> and Directive 90/364<sup>18</sup> provided a right of residence for the Union citizen child, who did not have to personally be self-sufficient, and her mother, who did not have to be dependent upon her child. Children are normally dependent upon their parents to provide for them, so usually the rights of Union citizen children to reside within a given Member State are dependent upon the right to reside of their parent(s),<sup>19</sup> rather than the other way around. In *Ruiz Zambrano*, however, the family were not self-sufficient- Mr Ruiz Zambrano's appeal against the refusal to grant him unemployment benefit triggered the case- and there had not been any movement to trigger Directive 2004/38.

The analysis in the remainder of this section focuses on how, or why, Union citizenship was able to bring the situation, which traditionally would have been seen as a matter purely internal to Belgium, within the scope of EU law, and hence the CJEU judgment effectively requiring Belgium to facilitate the residence and work of the Colombian parents. Bobek presented a view contrary to many,<sup>20</sup> that the *Ruiz Zambrano* decision "is not devoid of an understandable reason, giving clear and transposable guidance to [national courts]",<sup>21</sup> which has been justified as far as the UK courts are concerned – they have relied upon the decision, although its brevity was a challenge, the courts did not see the decision as an 'illegitimate' expansion of EU law through citizenship without substantive reasons.

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<sup>16</sup> Case C-200/02 *Chen* [2004] ECR I-09925

<sup>17</sup> Then Article 18 EC

<sup>18</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ L 180, 13.7.1990, 26–27*

<sup>19</sup> For instance Directive 2004/38 defines family members as including descendants under 21 and dependents in Article 2(2)(c)

<sup>20</sup> See Niamh Nic Shuibhne, 'Editorial: Seven questions for seven paragraphs' (2011) 36 *European Law Review* 161

<sup>21</sup> Michal Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 207

### a. *Ruiz Zambrano* and the Purely Internal Rule

Traditionally, there must be a link with EU law to trigger its application - some cross-border economic activity - and traditionally, there is no such link when the situation was purely internal to one Member State.<sup>22</sup> The doctrine was developed from discussion in *Knoors*,<sup>23</sup> to its application in *Saunders*,<sup>24</sup> and the Court has since broadened the connecting factors which cause a case to come within the scope of EU law. This is noticeable in *Carpenter*, where the Court relied upon the cross-border trigger of Mr Carpenter's business with other Member States to find that the decision to deport his wife was an interference with the exercise of his right to respect for family life,<sup>25</sup> which could be an obstacle to his exercise of his fundamental freedom to provide services to other Member States.<sup>26</sup> O'Leary highlighted developments in the 1980s which she identified as precursors of, "even catalysts for", the development of Union citizenship- these being the expansion of the type of situations regarded as governed by EU law, and the transformation of the Article 18 TFEU principle of equal treatment "from a tool designed to enhance mobility and complete the internal market to a semi-autonomous value forming a central part of the EU's goals."<sup>27</sup>

O'Leary recognised calls for the revision or abandonment of the purely internal rule in light of the introduction of Union citizenship,<sup>28</sup> identifying the key criticism of the Court's approach: it "centres on the fact that insistence on cross-border movement to trigger application of the provisions of the TFEU on free movement contradicts the claims made by the court relating to that status, ignores the qualitative change in the EU's objectives to which the introduction of that status is testament, and creates situations of reverse discrimination for static Union citizens which conflict with the principle of non-discrimination on grounds of nationality in art.18 of the TFEU."<sup>29</sup> However, O'Leary justified the continued application of the purely internal rule, as its

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<sup>22</sup> Case 175/78 *Saunders* [1979] ECR 1129, para 11; Case 147/87 *Zaoui v Cramif* [1987] ECR 5511, para 15; Case C-153/91 *Petit v Office National des Pensions* [1992] ECR I-4973, para 8; Case C-206/91 *Koua Poirrez* [1992] ECR I-06685, para 11; Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723 paras 15-16; Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-03171, para 23

<sup>23</sup> Case 115/78 *Knoors* [1979] ECR 399

<sup>24</sup> Case 175/78 *Saunders* [1979] ECR 1129

<sup>25</sup> Case C-60/00 *Carpenter* [2002] ECR I-06279, para 41

<sup>26</sup> *ibid* paras 37-38

<sup>27</sup> Siofra O'Leary, 'The past, present and future of the purely internal rule in EU law' (2009) 44 *Irish Jurist* 13, 25

<sup>28</sup> *ibid* 27

<sup>29</sup> *ibid* 37

“raison d’être remains valid”, though Union citizenship has transformed the landscape within which the Court must apply the purely internal rule.<sup>30</sup>

In *Ruiz Zambrano*, however, the CJEU did not even attempt to locate a cross-border trigger for its reliance upon EU law, thereby limiting the application of the purely internal rule in relation to Article 20 TFEU. Indeed- finding that Union citizenship only applies when a border is crossed would have been to go against the aims of a borderless-EU: “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured...”<sup>31</sup> Union citizens are always Union citizens, even when they have yet to exercise their right to free movement. The genuine enjoyment test, which instead provided the link to EU law in *Ruiz Zambrano*, is a potential encroachment on the purely internal rule in relation to Union citizen’s rights.<sup>32</sup> Reliance upon Article 20 TFEU and Union citizenship to bring matters within the personal scope of EU law is not unique to this case; Spaventa analysed earlier cases since the introduction of Union citizenship<sup>33</sup> and concluded that “nationality alone” was sufficient to fall within the personal scope of the Treaty.<sup>34</sup> Kochenov agreed that Union citizenship “overwhelmingly enlarged the scope *ratione personae* of EU law”,<sup>35</sup> and *Ruiz Zambrano* quite possibly extends the scope of Union citizenship’s ability to bring matters within the scope of EU law as far as is permissible.

Lenaerts identified five methods of bringing situations within the scope of EU law,<sup>36</sup> and *Ruiz Zambrano* comes under the most difficult method to reconcile with the traditional approach and respecting Member State autonomy, as it merely requires a ‘sufficient connecting factor’ to EU law. *Ruiz Zambrano* involved no movement, and there was not even the potential of reliance upon any dual-EU nationality to suggest

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<sup>30</sup> *ibid* 46

<sup>31</sup> Article 3(2) TEU - Consolidated Version of the Treaty on European Union (TEU), *OJ C* 83, 30.3.2010, 13-46

<sup>32</sup> Stephanie Reynolds, 'Exploring the "intrinsic connection" between free movement and the genuine enjoyment test: reflections on EU citizenship after Iida' (2013) 38 *European Law Review* 376, 377

<sup>33</sup> *Inter alia*: Case C-224/98 *D'Hoop* [2002] ECR I-01619; Case C-192/05 *Tas Hagen and Tas* [2006] ECR I-10451; Case C 403/03 *Schempp* [2005] ECR I 6421; Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-06483

<sup>34</sup> Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 13, 22

<sup>35</sup> Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International & Comparative Law Quarterly* 97, 119

<sup>36</sup> Koen Lenaerts, “Civis europaeus sum’: from the cross-border link to the status of citizen of the Union’ (2011) 3 *Online Journal on Free Movement of Workers within the European Union* 6

some kind of link, which has been attempted before the CJEU with varying degrees of success. In identity cases involving children, such as *Garcia Avello* and *Grunkin and Paul*,<sup>37</sup> EU law has been successfully relied upon, unlike cases involving adults with similar problems with legislation controlling names within Member States.<sup>38</sup> This is in some respects similar to the success of *Ruiz Zambrano*, which involved dependent children, and the subsequent cases before the Court, all of which have failed and involved reliance upon an adult EU citizen to bring the situation within the remit of EU law- such as *McCarthy* and *Dereci*.

For Kochenov and Plender, the Court's early reluctance to rely upon Union citizenship as a rights bearing status was more at odds with its teleological approach to interpreting EU law than in finding it did affect the application of law- as they point out, "[n]o other Part of the Treaty has ever been presented by the Court as unable to affect the division of competences between the EU and the Member States."<sup>39</sup> They thus suggest that the separation of Union citizenship and the internal market "represents a return to the Treaty text".<sup>40</sup> This 'return' was not made in one step by *Ruiz Zambrano*. The Court's reliance upon Union citizenship to find rights for individuals is discussed in the second section, but in relation to the purely internal rule, *Rottmann*<sup>41</sup> was a crucial development and paved the way for *Ruiz Zambrano*.

*Rottmann* also involved a situation which may have seemed to be wholly internal to one Member State but was found to come within the scope of EU law. The case was discussed in detail in Chapter One, and essentially involved the Court adding a requirement of proportionality analysis to the revocation of citizenship of a Member State where this would leave the Union citizen stateless: the CJEU found that "by reason of its nature and consequences",<sup>42</sup> the factual situation came within the scope of EU law and therefore that the decision to withdraw naturalisation has to observe the principle of proportionality in light of EU law.<sup>43</sup> Through bypassing the 'traditional' analysis and not requiring a cross-border link to establish the relevance of EU law, the

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<sup>37</sup> Case C-148/02 *Garcia Avello* [2003] ECR I-11613 and Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639

<sup>38</sup> Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, and Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693

<sup>39</sup> Dimitry Kochenov and Richard Plender, 'EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text' (2012) 37 *European Law Review* 369, 376

<sup>40</sup> *ibid* 395

<sup>41</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449

<sup>42</sup> *ibid* para 42

<sup>43</sup> *ibid* paras 55, and 58-59

CJEU developed a different, and potentially more sophisticated, test to determining the application of EU law.

Instead of searching for a cross-border element alone, the Court looked for links to EU law, considering the effect of national measures on the rights of the individuals. The CJEU examined the circumstances and consequences of EU law not being relevant in *Rottmann*- i.e. the removal of Member State citizenship and hence Union citizenship from an individual, and the consequent effects on them and their family members. Adam and Van Elsuwege viewed *Rottmann* as the first time the Court “explicitly moved away from the dogma that a cross-border element is required to trigger the application of EU law”.<sup>44</sup> In both *Ruiz Zambrano* and *Rottmann*, the individuals concerned would have faced harsh consequences had the Court not found that EU Law was relevant. This is something which O’Gorman saw as key to the decisions - the Court acknowledged the severity of the interference with Union citizenship rights in *Ruiz Zambrano*, which he linked to the Court’s earlier approach in *Garcia-Avello*, where potential professional and private disruption due to the national naming legislation meant that there was a connection to EU law.<sup>45</sup> Potentially, then, it was the avoidance of undesirable consequences, rather than any logical application of Article 20 TFEU, which prompted the decision in *Ruiz Zambrano*. Lansbergen and Miller suggested the judgment “prioritised individual justice over legal certainty and the consistent application of settled principle”,<sup>46</sup> and legal certainty is something which can be lacking in EU law, and which makes interpretation of its doctrines difficult-direction has to come from the CJEU,<sup>47</sup> and *Ruiz Zambrano* lacks a strong sense of direction, as it feels more responsive than thoroughly reasoned. Peers and Berneri noted that in some of the subsequent decisions where *Ruiz Zambrano* did not apply, the CJEU found alternate options were open to the applicants.<sup>48</sup>

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<sup>44</sup> Stanislas Adam and Peter Van Elsuwege, 'Case Comment: Citizenship rights and the federal balance between the European Union and its Member States: Comment on Dereci' (2012) 37 *European Law Review* 176

<sup>45</sup> Roderic O’Gorman, 'Ruiz-Zambrano, McCarthy and the purely internal rule' (2011) 46 *Irish Jurist* 221, 225

<sup>46</sup> Anja Lansbergen and Nina Miller, 'European Citizenship Rights in Internal Situations: An Ambiguous Revolution?' (2011) 7 *European Constitutional Law Review* 287, 306

<sup>47</sup> Jonathan Faull, 'Prohibition of Abuse of Law': A New General Principle of EU Law' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011)

<sup>48</sup> Discussing *Iida* and *O and S* - Steve Peers and Chiara Berneri, 'Iida and O and S: further developments in the immigration status of static EU citizens' (2013) *Journal of Immigration, Asylum and Nationality Law* 162, 173

The use of Union citizenship as almost a ‘stop-gap’ in cases where individuals before the national courts risk either having to leave the EU (as in *Ruiz Zambrano*) or losing Union citizenship (due to the potential removal of Member State nationality in *Rottmann*) means that the Court has risked losing coherency over its development of Union citizenship, and injustice may result, or at least inconsistency. Taken alone, *Ruiz Zambrano* has massive potential, but the CJEU quickly established limits for its application, which are discussed in the second section of this chapter in relation to the application and limits of the *Ruiz Zambrano* principle.

As it stands, it appears that reliance upon rights contained in the Treaty are no longer conditional upon proving a cross-border link with the Treaty but rather on a relatively vague ‘genuine enjoyment’ test, which is analysed further below, along with the cases which have limited its application.<sup>49</sup> The introduction of this extraordinary doctrine, which the CJEU has not yet adequately explained, changes the focus of national courts in cases where there are not obvious links to residence rights under EU law. *Ruiz Zambrano* now requires domestic courts to consider the ‘genuine enjoyment of the substance of a Union citizen’s rights’ in addition to their standard assessments of other connecting factors to EU law. Assessing the interference with genuine enjoyment on the basis of the *Ruiz Zambrano* decision itself would be almost impossible, as the brevity of the decision means that interpretation or application of it could not be certain. As such, the later decisions of the CJEU are of vital importance for explaining the unpredicted decision.

## **2. The Scope of Application of *Ruiz Zambrano*: The Impact within Citizenship Case law**

Lansbergen and Shaw viewed the Court’s statements of Union citizenship as a fundamental status as “decidedly aspirational rather than empirical”<sup>50</sup> in 2010, but the Court’s reliance upon Union citizenship in *Ruiz Zambrano* extended residence rights to the family members of static Union citizen children, who would otherwise have been beyond the scope of Treaty protection. This case represents a truly fundamental use of Union citizenship. *Ruiz Zambrano* has shown that, for some applicants hoping for residence rights, Union citizenship alone can potentially provide the necessary link to

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<sup>49</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375; Case C-256/11 *Dereci* [2011] ECR I-11315; Joined Cases C-356/11 and C-357/11 *O and S*, Judgment of the Court, 6 December 2012, nyr

<sup>50</sup> Anja Lansbergen and Jo Shaw, 'National membership models in a multilevel Europe' (2010) 8 *International Journal of Constitutional Law* 50, 51

EU law, and the purely internal rule may not apply. For Kochenov, Union citizenship ‘finally’ became able to shape the material scope of EU law.<sup>51</sup>

The ‘fundamental status’ of Union citizenship had been demonstrated in earlier judgments,<sup>52</sup> but this was more as a ‘back-up’ to existing rights such as Article 18 TFEU. In *Ruiz Zambrano*, the effect of Union citizenship was on a different scale: it did not remove a condition on residence or find that the strict application of a rule was disproportionate in relation to Union citizens’ rights,<sup>53</sup> but instead was the foundation upon which all of the relevant rights were based. This is the reason for which its potential is so important to ascertain – immigration does not fall within the EU’s competence and the UK fiercely guards its immigration laws. The rights discovered in *Ruiz Zambrano* threaten the Member States’ ability to determine their immigration rules with certainty.<sup>54</sup> Van Eijen and de Vries suggest it has provided a ‘new route to the promised land,’ extending the protection of Union law where no economic link could be established,<sup>55</sup> as well as relying upon Union citizenship as more than a ‘back up’ to strengthen pre-existing rights.

#### a. Extent of the Doctrine According to the CJEU

Cases which followed *Ruiz Zambrano* before the Court have been less successful in showing interference with the substance of the rights of a Union citizen. In none of the subsequent cases has the interference with the rights of a Union citizen been enough to ensure successful application of the *Ruiz Zambrano* doctrine, though this was not clear-cut at the time, and the Court has been criticised for its lack of “effort to establish a sound methodological or dogmatic basis for the new category of substantive

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<sup>51</sup> Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International & Comparative Law Quarterly* 97, 101

<sup>52</sup> Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported' (2011) 48 *Common Market Law Review* 1253

<sup>53</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-02691, Case C-413/99 *Baumbast* [2002] ECR I-07091

<sup>54</sup> See Kees Groenendijk, Elspeth Guild, Ryszard Cholewinski, Helen Oosterom-Staples and Paul Minderhoud, 'Annual European Report on the Free Movement of Workers in Europe in 2010–2011' (European Commission 2012) available at <http://ec.europa.eu/social/BlobServlet?docId=7764&langId=en> last accessed 20 March 2014 and Alina Tryfonidou, 'Reverse discrimination in purely internal situations: An incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43 on reverse discrimination

<sup>55</sup> Hanneke van Eijken and Sybe de Vries, 'Case Comment: A new route into the promised land? Being a European citizen after *Ruiz Zambrano*' (2011) 36 *European Law Review* 704, 709

citizenship rights”.<sup>56</sup> *McCarthy, Dereci, O and S, Iida and Alopka*<sup>57</sup> all failed to rely upon rights under Article 20 TFEU, and it remains to be seen whether there will be many instances of successful reliance beyond the very specific facts of *Ruiz Zambrano*.

In *McCarthy*, the Jamaican husband of a British-Irish dual citizen was refused a right of residence within the UK, but this did not mean that Mrs McCarthy was compelled to leave the territory of the EU to join him in Jamaica. The disruption to family life was inadequate to interfere with the substance of Mrs McCarthy’s rights as a Union citizen, so her claim failed. As a dual citizen, Mrs McCarthy’s residence in the UK was lawful due to her being a citizen within the host state, and the newly acquired Irish nationality did not provide a cross-border link to trigger residence rights as her residence had never been on the basis of EU law.

Similarly, in *Dereci*, the TCN family members of adult Austrian nationals who had never exercised their right to freedom of movement were unable to prove the substance of the Union citizens’ rights were interfered with by a decision not to allow the TCN family members to remain in Austria. In this case AG Mengozzi’s View aimed to provide “a better understanding of the implications”<sup>58</sup> of *Ruiz Zambrano*, and Tryfonidou noted that the judgment attempts to provide further guidance on the interpretation of the ‘Zambrano principle’, rather than focussing on applying it to the facts of the case.<sup>59</sup> In interpreting *Ruiz Zambrano*, the CJEU emphasised that the principle applied only “to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole”.<sup>60</sup> The principle, then, appears to have narrow application,<sup>61</sup> as being forced to leave the Union requires a great deal of pressure - seemingly it is limited to cases of absolute dependence by a Union citizen on a TCN

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<sup>56</sup> Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported' (2011) 48 *Common Market Law Review* 1253

<sup>57</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375; Case C-256/11 *Dereci* [2011] ECR I-11315; Joined Cases C-356/11 and C-357/11, *O and S*, Judgment of the Court, 6 December 2012, nyr; Case C-40/11 *Yoshikazu Iida v City of Ulm*, Judgment of the Court, 8 November 2012 – though the CJEU did not mention *Ruiz Zambrano*, AG Trstenjak did in her Opinion for the case, delivered on 15 May 2012; Case C-86/12 *Alopka and Others*, Judgment of the Court, 10 October 2013, nyr

<sup>58</sup> Case C-256/11 *Dereci*, View of Advocate General Mengozzi delivered on 29 September 2011, para 17

<sup>59</sup> Alina Tryfonidou 'Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy' (2012) 18 *European Public Law* 493, 505

<sup>60</sup> Case C-256/11 *Dereci* [2011] ECR I-11315, para 66

<sup>61</sup> Alicia Hinarejos, 'Citizenship of the EU: clarifying "genuine enjoyment of the substance" of citizenship rights' (2012) 71 *Cambridge Law Journal* 279, 281



who lacks a right of residence in the Union citizen's state of nationality. Hailbronner and Thym suggested that only parents will be able to enjoy a right of residence derived from Article 20 TFEU and the Union citizenship of a child,<sup>62</sup> but this was not even accurate in relation to *Ruiz Zambrano*, where the elder Colombian sibling remained unmentioned, but presumably also derived a right of residence to remain with the family in Belgium.

In *O and S*; and *L*, the CJEU examined whether a TCN step-parent of a Union citizen could derive a right of residence from the Union citizenship of the child. In *O and S*, a Ghanaian national residing in Finland with a Finnish child married a TCN man after her relationship with the child's father broke down. The joined case, *L*, concerned an Algerian national residing in Finland with a Finnish child and TCN child, and the application was for her TCN husband, the father of her second child of Algerian nationality, to join the family in Finland. In both cases the Finnish children's fathers were still in Finland. The TCN mothers of the children possessed permanent residence permits, so under law there would be no obligation for them, or their Union citizen dependants, to leave the Member State or EU as a whole. The situation was not automatically assimilated to a purely internal one, but the CJEU held that it was for the national court to establish whether a refusal to grant residence permits on the basis of family reunification with the Union citizen child concerned a denial of the genuine enjoyment of the substance of the rights conferred by the status of Union citizenship. The Court emphasised that 'genuine enjoyment' requires a Union citizen being forced "to leave not only the territory of the Member State of which he was a national but also that of the European Union as a whole."<sup>63</sup> This is one reason for which Article 20 TFEU gave rise to no right of residence in *Alopa*,<sup>64</sup> where a Togolese national with French children (born in Luxembourg) was refused a right of residence in Luxembourg, as there was no risk that the Union citizen children would have had to leave the EU: the family could have returned to France.

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<sup>62</sup> Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported' (2011) 48 *Common Market Law Review* 1253, 1267

<sup>63</sup> Joined Cases C-356/11 and C-357/11 *O and S*, Judgment of the Court, 6 December 2012, nyr, para 47

<sup>64</sup> Case C-86/12 *Alopa and Others*, Judgment of the Court, 10 October 2013, nyr, discussed in Maria Haag, 'Alopa and Moudoulou – Union citizenship rights clarified? Redefining the Ruiz Zambrano decision' on the Durham European Law Institute blog, 2014 at <http://delilawblog.wordpress.com/2014/01/29/alokpa-and-moudoulou-union-citizenship-rights-clarified-redefining-the-ruiz-zambrano-decision/> last accessed 29 March 2014

National courts thus only have a limited margin of appreciation,<sup>65</sup> and situations where there is already an adult with a right to reside in the host Member State capable of looking after the Union citizen child, like *McCarthy*, do not currently fall within the scope of EU law. There is no reason for which a TCN step-parent would be treated differently from a parent of a Union citizen, if their residence were essential to ensure the genuine enjoyment of the rights of the Union citizen- “it does not follow from the Court’s case law that their application is confined to situations in which there is a blood relationship.”<sup>66</sup> If the mothers of the Finnish children had been incapable of providing adequate care, and their Finnish fathers were unable or unwilling to provide care for them, then it would have been possible for the TCN step-fathers to claim that their residence within Finland was essential to ensure the enjoyment of the children’s rights as Union citizens.

**b. When does *Ruiz Zambrano* apply?**

Union citizenship is now a possible tool for mitigating the strict requirements of the secondary legislation limiting the primary right to free movement and residence contained in Article 21 TFEU. Just as proportionality assessments achieved this in *Baumbast*, Union citizenship has added a new layer of consideration. As Union citizenship is an entire source of rights of residence independent of all else, its application is in need of clarification, in order to ensure that the Citizens’ Directive, supposedly aiming to clarify and strengthen the rights of citizens, does not become only a small part in a much wider web of residence and free movement rights open to citizens.

The ‘genuine enjoyment’ test itself is difficult to apply - and is not a genuine test at all - it does not provide certainty, but leaves discretion to national courts. Kochenov saw this as sending “contradictory signals as to the essence of the EU citizenship status and the role it ought to play in the system of EU law.”<sup>67</sup> Indeed, if Union citizenship now holds the key to residence rights for the family members of certain static citizens, this has to be enunciated clearly, just as the rules for mobile Union citizens are outlined in

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<sup>65</sup> Adam Cygan, 'Citizenship of the European Union' (2013) 62 *International & Comparative Law Quarterly* 492, 501

<sup>66</sup> Joined Cases C-356/11 and C-357/11 *O and S*, Judgment of the Court, 6 December 2012, nyr, para 55

<sup>67</sup> Dimitry Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' (2013) 19 *European Law Journal* 502

Directive 2004/38 in detail.<sup>68</sup> Obviously, the CJEU faces the difficulty that it cannot legislate, nor can it provide answers to questions which are not asked of it, but in answering those which do appear in the future, it should take pains to recognise links with fundamental rights, or say there are none if it believes this to be the case, rather than saying nothing like in *Ruiz Zambrano*.

*McCarthy* shed some light on when the doctrine cannot apply, though there discussion focussed on Article 21 TFEU, due to the attempt to create a cross-border link, rather than Article 20 TFEU.<sup>69</sup> Van den Brink criticised the judgment as making an artificial distinction between the facts and those in *Ruiz Zambrano*,<sup>70</sup> in relation to sufficient interference with the rights of a Union citizen. However, despite the Court not discussing the family situation of Mrs McCarthy, and the reason for which she was not in employment, due to her providing care for her disabled child, the overall outcome of the case sits comfortably with *Ruiz Zambrano*: Mrs McCarthy did not have to leave the EU due to a refusal to allow her husband to enter and reside within the UK. *McCarthy* also provided more information regarding the limits to the scope of application of primary and secondary Union citizenship law,<sup>71</sup> but did not say that an adult Union citizen would never be able to benefit from the doctrine to be joined by his/her spouse, or reduce the scope of *Ruiz Zambrano* through failing to extend it to the TCN spouse of a UK/Irish dual national residing within the UK.

There may well be situations as yet unexplored where an adult could require the care or support of the TCN spouse to remain within the EU, instances of disability could potentially provide the necessary level of interference with the right to remain. However, normally, static Union citizens do not benefit from rights of family reunification under EU law, and normally the option would be open to them to travel to another Member State to trigger EU law should they so desire.<sup>72</sup> If the substance of one's rights as a Union citizen can be considered in a more expansive way than they

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<sup>68</sup> As discussed in Chapter Four, the Court attempted to provide specific guidance in Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Judgment of the Court, 12 March 2014, nyr, which should make application easier for national courts

<sup>69</sup> Stanislas Adam and Peter Van Elsuwege, 'Case Comment: Citizenship rights and the federal balance between the European Union and its Member States: Comment on Dereci' (2012) 37 *European Law Review* 176, 180

<sup>70</sup> M.J. Van Den Brink, 'EU citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273, 279

<sup>71</sup> Peter Van Elsuwege, 'Case Comment: European Union citizenship and the purely internal rule revisited: Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department' (2011) 7 *European Constitutional Law Review* 308, 311

<sup>72</sup> Case C-370/90 *Surinder Singh* [1992] ECR I-04265

are currently, then the scope of application of *Ruiz Zambrano* could extend. For instance, instead of maintaining the focus solely on residence within the EU, in Mrs McCarthy's case, a potential claim that she was unable to work within the EU due to the UK not granting residence to her husband could have had more merit. As Mrs McCarthy was a full-time carer, if her husband were able to take over these duties then she would be able to exercise her freedom to work within a Member State of the EU. The difficulty with this, however, lies in the fact that Mrs McCarthy would not genuinely be operating one of her fundamental freedoms to work if she did work- because, as a dual-British-Irish national she was in one of her 'home' states. She would have had to have given up one of her nationalities to make this possible. If the CJEU ever did extend its interpretation of the substance of rights to include the operation of fundamental freedoms within a home state then the scope of *Ruiz Zambrano* could be extended hugely, with great impact upon national immigration rules, so the likelihood of this happening is slim.

Questions of proportionality do not enter into the *Ruiz Zambrano* test- the CJEU has not developed a doctrine which allows a small amount of interference with a small amount of the Union citizens' rights, instead, it is all or nothing, with no proportionality assessments required. This means that people who just fail to meet the exceptionality requirement still have their rights as Union citizens interfered with in a significant way, but are left with no redress under EU law, as there would be no jurisdiction for intervention. Perhaps this is where a coherent and reasoned link to fundamental rights law is most required. The difficulty, however, is that the Charter of Fundamental Rights would only apply if the *Ruiz Zambrano* threshold had been passed, and EU law therefore became relevant. Nonetheless, Member States all have to adhere to the ECHR,<sup>73</sup> and Article 8 rights to family life incorporate proportionality assessments. While not expecting the Court to "slice the Gordian knot" of reverse discrimination, which Lansbergen and Miller suggested was "a source of friction that inhibits the full and smooth absorption of European Union free movement rights into domestic systems",<sup>74</sup> the application of *Ruiz Zambrano* does highlight something of a vacuum in protection for static citizens who lack the rights to family reunification of

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<sup>73</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, (European Convention on Human Rights) Rome, 213 U.N.T.S. 222, signed on 4 November 1950, entered into force on 3 September 1953

<sup>74</sup> Anja Lansbergen and Nina Miller, 'European Citizenship Rights in Internal Situations: An Ambiguous Revolution?' (2011) 7 *European Constitutional Law Review* 287, 304

their mobile Union citizen counterparts, and are also unable to rely upon EU law like citizens who have passed the exceptionality requirement of *Ruiz Zambrano*.

### **Using Union Citizenship instead of Fundamental Rights**

The Court in *Ruiz Zambrano* did not develop fundamental rights arguments, in contrast to Advocate General Sharpston's Opinion, where "the term "fundamental right" featured no less than 101 times... By contrast, the Court's judgment mentioned the same term only on 4 occasions when it repeats or summarizes the preliminary reference of the Belgium court."<sup>75</sup> The different approach is obvious, and Hailbronner and Thym suggest that the judges "opted quite deliberately not to activate human rights".<sup>76</sup> Why they would do this, given the CJEU's willingness to apply fundamental rights in other settings, and the introduction of the EU's own Charter of Fundamental Rights,<sup>77</sup> is difficult to fully explain, unless there was simply no agreement within the Court, save about the answer to be reached. This question is addressed more fully in Chapter Six, where the limitations of the Charter are assessed. Judges of the CJEU have to be politically astute, and as Smismans discussed, the relevance of fundamental rights to EU law and policy is not an inherent link,<sup>78</sup> despite impressive advancements since the Treaty of Rome. Advocate General Sharpston's approach was more fundamental rights-friendly, and more generous to the claimants. Though it was not followed, Opinions "enter the *acquis jurisprudentiel* and can be used as 'persuasive weight' in future cases."<sup>79</sup>

Fundamental rights protection applies across the scope of EU law, though Hailbronner and Thym said *Ruiz Zambrano* "does not considerably extend the scope of EU human rights".<sup>80</sup> However, in a way, the decision did extend the application- without the genuine interference principle, the situation would not have fallen under the scope of EU Law at all, so the Charter of Fundamental Rights, though not discussed in *Ruiz*

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<sup>75</sup> Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported' (2011) 48 *Common Market Law Review* 1253, 1255

<sup>76</sup> *ibid* 1260

<sup>77</sup> Charter of Fundamental Rights of the European Union, *OJ C 83/02*, 30.3.2010, 398-403

<sup>78</sup> Stijn Smismans 'The European Union's Fundamental Rights Myth' (2010) 48 *Journal of Common Market Studies* 45

<sup>79</sup> Iyiola Solanke, 'Using the Citizen to Bring the Refugee In: *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*' (2012) 75 *The Modern Law Review* 101, 104

<sup>80</sup> Kay Hailbronner and Daniel Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported' (2011) 48 *Common Market Law Review* 1253, 1258

*Zambrano* itself, potentially becomes relevant solely due to it.<sup>81</sup> Had the CJEU made Union citizenship and a genuine enjoyment test merely the trigger for fundamental rights, rather than the source of a right of residence under Article 20 TFEU, *Ruiz Zambrano* would have been far less exceptional. However, as the British case *Sanade*, said “A claim under art.8 of the Convention did not need to be exceptional”,<sup>82</sup> whereas successful reliance upon *Ruiz Zambrano* has to show exceptional circumstances, so is far less likely to succeed, and thus less likely to cause political upset due to encroachment upon the competence of Member States in relation to their immigration laws.

Extending the relevance of the Charter to the situation of the nationals of one Member State residing within that Member State, while not extending it to other citizens of that state leaves open the potential for reverse discrimination where the exceptionality required by *Ruiz Zambrano* is not met. Reverse discrimination is not unacceptable under EU law,<sup>83</sup> and the fact that static Union citizens can now potentially rely upon their status as Union citizens to trigger EU law, and hence fundamental rights protection, makes the discrimination against other citizens more notable. Fundamental rights have altered the approach of the CJEU to the fundamental freedoms across the years, including in *MRAX*,<sup>84</sup> according to Judge da Cunha Rodrigues,<sup>85</sup> who also viewed Union citizenship and fundamental rights having “common destinies” as the values upon which the EU should be based.<sup>86</sup> The interplay between Union citizenship and fundamental rights is discussed in much greater detail in Chapter Six.

### **3. *Ruiz Zambrano* within the UK: When to Apply the Principle**

The CJEU’s development in *Ruiz Zambrano* had not been anticipated by the UK judiciary. In the 2007 Court of Appeal decision in *Liu and Others*,<sup>87</sup> where a number of adult TCN applicants sought to claim a right of residence in the UK by virtue of a connection with a child who was a Union citizen, Lord Justice Buxton said “It is to be hoped that the professions, and the Legal Services Commission, will take good note...

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<sup>81</sup> Article 51(1) CFREU is discussed in detail in Chapter 6

<sup>82</sup> *Sanade (British Children: Zambrano: Dereci)*, [2012] UKUT 48 (IAC)

<sup>83</sup> Sandra Mantu, 'European Union citizenship anno 2011: Zambrano, McCarthy and Dereci' (2012) 26 *Journal of Immigration Asylum and Nationality Law* 40, 49

<sup>84</sup> Case C-459/99 *MRAX* [2002] ECR I-06591

<sup>85</sup> José Narciso da Cunha Rodrigues, 'Apropos European Citizenship: The Right to Move and Reside Freely' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 202

<sup>86</sup> *ibid* 206

<sup>87</sup> *Liu and others v the Secretary of State for the Home Department* [2007] EWCA Civ 1275

and that these appeals will be the last occasion on which the AIT, and this court, is troubled with these issues.”<sup>88</sup> *Liu* was not referred to the CJEU, as the Court of Appeal was sure this was unnecessary. Since the CJEU determined there was a potential for rights of residence of TCNs based upon the residence of a Union citizen, there have been a number of references to *Ruiz Zambrano* situations within UK courts and tribunals, and the Home Office is keen to show that it has implemented the *Ruiz Zambrano* requirements.<sup>89</sup>

There has been successful reliance on *Ruiz Zambrano* in the UK,<sup>90</sup> which demonstrates that the unexpected decision in relation to Article 20 TFEU is not simply limited to Colombian asylum seekers with children in Belgium. The UK cases have demonstrated that, at times, family members are able to persuade UK courts of the interference with the substance of the rights of Union citizens. However, like those before the CJEU, most cases attempting to rely upon *Ruiz Zambrano* have failed.<sup>91</sup> There is a sense of unpredictability as to when the fundamental right to family life or *Ruiz Zambrano* principle may help claimants, and in *Otomunde* the tribunal said as a result of *Ruiz Zambrano*, “national courts must engage with the question whether removal of a particular parent will 'deprive [the child] (sic) of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen’”, but failed to engage with that question- focussing analysis on the fundamental rights and proportionality aspects of the case instead.<sup>92</sup>

Yeo reported *Otomunde* as an example of the difficulties facing judges in assessing the impact and proportionality of a removal decision on affected children,<sup>93</sup> and that *Ruiz Zambrano* was discussed as *obiter*. However, the Upper Tribunal said “We conclude that either requiring Tolu [a Union citizen child] to live in Nigeria or depriving him

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<sup>88</sup> *ibid* para 32

<sup>89</sup> The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (SI 2012/2560), discussed in Alison Harvey, 'Legislative Comment: Passing laws' (2013) 27 *Journal of Immigration Asylum and Nationality Law* 4, 5

<sup>90</sup> *Omotunde (best interests - Zambrano applied - Razgar) Nigeria*[2011] UKUT 00247(IAC); *Pryce v Southwark LBC* [2012] EWCA Civ 1572; *MA and SM (Zambrano: EU children outside EU) Iran*[2013] UKUT 00380 (IAC)- though only the first appellant successfully relied upon *Zambrano*.

<sup>91</sup> E.g. *R. (on the application of Sanneh) v Secretary of State for Work and Pensions*[2013] EWHC 793 (Admin); *Fatima v Secretary of State for the Home Department*, Court of Appeal (Civil Division), 17 January 2013, unreported; *Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736

<sup>92</sup> *Omotunde (best interests - Zambrano applied - Razgar) Nigeria*[2011] UKUT 00247(IAC), paras 31-32

<sup>93</sup> Colin Yeo, 'Case Comment: *Omotunde (best interests - Zambrano applied - Razgar) Nigeria*' (2011) 25 *Journal of Immigration Asylum and Nationality Law* 391

o[f] his primary carer would undermine his rights of residence”,<sup>94</sup> which does not seem to be *obiter*. Instead, *Otomunde* seems to be a case which could have been decided much more easily than it was: the Upper Tribunal undertook detailed proportionality assessments, following ‘EU principles of proportionality’ and Article 8 ECHR balancing, following the decision that the substance of Tolu’s rights as a Union citizen would be interfered with if his TCN parent was not allowed to remain within the UK.

The factors which concerned the tribunal in *Otomunde* were the acts of fraud by and subsequent imprisonment of the claimant, Tolu’s father and primary carer. While *Ruiz Zambrano* does not give an absolute right to reside, in that it does not apply to all Union citizens at all times, and cannot guarantee derivative rights of carers or TCN parents, the CJEU has not subjected the test to proportionality assessments. Once the substance of a Union citizen’s rights are sufficiently threatened, it is essential that they are protected, and Article 20 TFEU provides the means by which protection is available. As Fortin suggested, *Ruiz Zambrano* arguably “achieves far greater certainty for these immigrant families than does the decision in *ZH*”<sup>95</sup> - that being a decision of the Supreme Court regarding the importance of a child’s best interests, and proportionality balancing acts.<sup>96</sup> As such, residence upon Article 20 TFEU provides more certainty than fundamental rights protection, once the difficult hurdle of showing genuine interference with the enjoyment of rights as a Union citizen has been passed.

#### **a. Level of Interference with the Rights of Union Citizens**

In *Sanneh*,<sup>97</sup> the Gambian mother of a British child was not entitled to benefits while her residence status was being investigated; she was granted a right to work during the course of her appeals against the refusals to pay benefits, and was provided with accommodation by the Council after she was given notice to quit on rented accommodation. She was given a small allowance while her entitlement to child tax credit, child benefit and income support was determined.<sup>98</sup> The QBD was quick to point out that the decisions to refuse interim payments were lawful under domestic

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<sup>94</sup> *Otomunde (best interests - Zambrano applied - Razgar) Nigeria* [2011] UKUT 00247(IAC), para 32

<sup>95</sup> Jane Fortin, 'Are Children's Best Interests Really Best? *ZH (Tanzania) (FC) v Secretary of State for the Home Department*' (2011) 74 *The Modern Law Review* 932, 959

<sup>96</sup> *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4

<sup>97</sup> *R. (on the application of Sanneh) v Secretary of State for Work and Pensions* [2013] EWHC 793 (Admin)

<sup>98</sup> *ibid* the decisions against which she appealed are outlined in para 75



law,<sup>99</sup> so the case had to be challenged on the basis of giving effect to the British daughter's rights as an EU citizen. Counsel for the appellant relied upon the House of Lords decision in *Factortame*<sup>100</sup> to support the validity of providing interim relief to protect EU rights,<sup>101</sup> but the Secretary of State denied that *Ruiz Zambrano* confers rights to means tested benefits.<sup>102</sup>

Though her situation may have been difficult in the interim period, she and the child were not compelled to leave the UK, so the level of compulsion required to breach Article 20 TFEU rights was not present. The Queen's Bench Division underlined that *Ruiz Zambrano* was primarily concerned with the rights of the Union citizen children, and the derivative rights of Mr *Ruiz Zambrano* to reside and work were necessary to ensure his children could stay within Belgium, and hence the EU.<sup>103</sup> Just as in *McCarthy*, the likelihood of a lesser income due to not having a working spouse with whom to reside in the UK did not mean that Mrs McCarthy was forced to reside outside of the state, a reduced income did not compel the parties to leave the UK in *Sanneh*.<sup>104</sup> Nothing less than being forced to leave the territory of the EU has been deemed to breach the Article 20 and 21 TFEU rights of Union citizens by the CJEU in *Dereci, O and S*, and *McCarthy*, and the British courts have followed.<sup>105</sup> The threshold for reliance upon *Ruiz Zambrano* is high, and in *Sanneh*, a concession that the Claimant would never in practice leave the UK due to economic pressure<sup>106</sup> acknowledged the futility of the claim. EU law was not engaged as the British child's rights as a Union citizen were never in jeopardy.

Cases in which a TCN spouse of a British national with British children is appealing against deportation<sup>107</sup> have been approached in a manner consistent with *Dereci* and *O and S*. In *Harrison*, Mr Drabble (counsel for the appellants) contended that interference with the enjoyment of a right to reside could trigger *Ruiz Zambrano* rights,

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<sup>99</sup> *ibid* para 76

<sup>100</sup> *R v Transport Secretary ex parte Factortame Ltd (No 2)* [1991] AC 603

<sup>101</sup> *R. (on the application of Sanneh) v Secretary of State for Work and Pensions*[2013] EWHC 793 (Admin), para 82

<sup>102</sup> *ibid* para 88

<sup>103</sup> *ibid* para 10

<sup>104</sup> *ibid* para 95

<sup>105</sup> *Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736; *R. (on the application of Sanneh) v Secretary of State for Work and Pensions*[2013] EWHC 793 (Admin), para 76

<sup>106</sup> *Sanneh* [2013] EWHC 793 (Admin), para 97

<sup>107</sup> *Harrison* [2012] EWCA Civ 1736; *Sanade (British Children: Zambrano: Dereci)* [2012] UKUT 48 (IAC)

but the Court of Appeal disagreed. Deprivation of rights and interference with the enjoyment of a right are different entirely, and if *Ruiz Zambrano* and Article 20 TFEU automatically provided a source of rights for the parents or carers of all Union citizens where there was a risk of interference with their enjoyment of residence within their home state, then Member States' control over third-country immigration would be greatly affected. Economic considerations which may make it desirable for a British national to reside with their TCN spouse as a family unit do not mean that they are compelled to leave the territory of the entire EU if the spouse is not allowed to remain, and the children's rights to reside being rendered less enjoyable if one parent were to be deported would not make *Ruiz Zambrano* apply either.

### **b. The Effect of Successful Reliance**

In *Pryce*, the Jamaican mother of two British citizens (and one older non-British child) appealed against a finding that she was subject to immigration control, due to a right of residence as the sole carer for British citizen children derived from Article 20 TFEU and *Ruiz Zambrano*.<sup>108</sup> The local authority conceded her appeal but the Secretary of State intervened and the case was brought before the Court of Appeal as a test case on the emerging concept of the *Ruiz Zambrano*-carer. Ms Pryce was estranged from the British father of her British twins. The Court of Appeal stated that the Council and Ms Pryce were in agreement that applicants with valid *Ruiz Zambrano* claims are not subject to immigration control,<sup>109</sup> which the earlier judge had not recognised. Counsel for the Secretary of State sought assurances that application of the *Ruiz Zambrano* principle could not become automatic, and that it should remain exceptional.<sup>110</sup> As the parties had agreed that Ms Pryce's situation fell under the *Ruiz Zambrano* principle, the Court of Appeal did not discuss the facts in detail, but emphasised that whether an applicant has a *Ruiz Zambrano* claim is "clearly fact-sensitive."<sup>111</sup>

Essentially, the Court of Appeal had little to determine in relation to Ms Pryce's reliance upon *Ruiz Zambrano* and the Article 20 TFEU of her two younger children; instead, the Court of Appeal's decision was important for UK Immigration Law because it recognised a right not to be subject to immigration control from *Ruiz Zambrano*, with a broader relevance than the case at hand. The Immigration and

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<sup>108</sup> *Pryce v Southwark LBC* [2012] EWCA Civ 1572, para 9

<sup>109</sup> *ibid* para 26

<sup>110</sup> *ibid* para 29

<sup>111</sup> *ibid* para 32

Asylum Act 1999 s115 says anyone “subject to immigration control” is excluded from access to most non-contributory benefits,<sup>112</sup> so, having demonstrated adequately that she could rely upon *Ruiz Zambrano*, Ms Pryce demonstrated that she was not subject to immigration control, and thus her eligibility for homelessness assistance, and other benefits. The nature of the *Ruiz Zambrano* right of residence is wholly different from that of the rights of residence under Directive 2004/38, where self-sufficiency or working are key,<sup>113</sup> and there is no immediate right to equal treatment in relation to access to the social security system of the Member State.<sup>114</sup>

### **c. Applying *Ruiz Zambrano* beyond EU borders**

The UK Upper Tribunal recently took *Ruiz Zambrano* beyond the territory of the Member States- recognising in *MA and SM*<sup>115</sup> that there is no reason to restrict judicial recognition of the rights of Union citizens to when they are residing within the EU. The Upper Tribunal considered the two cases together, but despite both involving British children residing in a third country with a TCN parent at the time of the application of entry clearance for the TCN parent, there were important distinctions between them, and the bases of the rights of residence of the respective spouses of the British citizens ended up wholly different. MA, the first appellant, was a Turkish national, married to a man from Iran who naturalised as a British citizen after being granted indefinite leave to remain within the UK following a successful asylum claim. The couple had a British citizen son who lived with his mother in Turkey, despite a brief period living with his father, which proved too difficult due to the father’s post-traumatic stress disorder, so the son returned to Turkey where his mother could provide better care.

SM, the second appellant, is the Thai wife of an unemployed British national. The couple have two British children, the oldest attends Primary School and resides in the UK with his father, and the younger resides with his mother in Thailand. The Entry Clearance Officer (ECO) was not satisfied the family could maintain itself without recourse to public funds (the husband was in receipt of child tax credit, jobseeker’s allowance and child benefit), so refused entry clearance.<sup>116</sup> The ECO considered

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<sup>112</sup> Immigration and Asylum Act 1999 (Chapter 33) s115

<sup>113</sup> Article 7 of Directive 2004/38

<sup>114</sup> Article 24(2) of Directive 2004/38

<sup>115</sup> *MA and SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 00380 (IAC)

<sup>116</sup> *ibid* paras 22-23

Article 8 ECHR, and concluded that the sponsor could maintain a relationship with his family abroad through visits to Thailand, and wrote “you have failed to provide a satisfactory explanation as to why your sponsor cannot reside with you and your child in Thailand.”<sup>117</sup> The husband claimed he would be able to obtain work if his wife were in the UK, due to her being able to take over household duties and take the children to school, giving him increased hours in which to work. This was essentially an argument similar to *Carpenter*, as discussed in Chapter Four, where a husband’s exercise of his right to provide services under Article 56 TFEU would have been interfered with had his wife not been granted a right of residence. The CJEU has yet to extend *Carpenter* in relation to Article 20 TFEU, and the Entry Clearance Manager reviewing the case found that the sponsor had made no efforts to obtain work, and many lone parents manage to work and care for their children.<sup>118</sup>

The Upper Tribunal considered the law relating to Union citizenship in relation to both appeals, adopting Hickinbottom J’s six point summary of the law in *Sanneh*: 1) all Member State nationals are Union citizens, and these have the right to enjoy the substance of the rights that attach to the status of Union citizens; 2) Union citizens must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For minors, that freedom may be dependent upon leave of an ascendant relative to stay within the EU. However, the rights of a Union citizen child will not be infringed if he is not compelled to leave – so when there is another ascendant relative who can care for the child; 3) national courts must determine as a question of fact whether a Union citizen is compelled to leave the EU following a TCN relative upon whom they are dependent; 4) nothing less than compulsion engages Articles 20-21 TFEU. A diminishment in standard or quality of life does not necessarily engage EU law, unless there is compulsion to leave the EU; 5) the CFREU only applies when Member States are implementing EU law, otherwise Article 8 ECHR considerations apply in relation to national law; 6) ‘exceptional’ means the *Ruiz Zambrano* principle will not be regularly engaged.<sup>119</sup>

Following its earlier decision in *Campbell*,<sup>120</sup> the Upper Tribunal considered that *Ruiz Zambrano* principles can have relevance to entry clearance cases, as refusals to

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<sup>117</sup> *ibid* para 25

<sup>118</sup> *ibid* para 27

<sup>119</sup> *R. (on the application of Sanneh) v Secretary of State for Work and Pensions* [2013] EWHC 793 (Admin), para 19

<sup>120</sup> *Campbell (exclusion; Zambrano)* [2013] UKUT 00147 (IAC), para 30

recognise entry rights can lead to the denial of the genuine enjoyment of the substance of the rights conferred by the status of a Union citizen. Building on this, the Upper Tribunal found no reason in “EU law terms” why *Ruiz Zambrano* could not be relied upon by a parent or primary carer “of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality”.<sup>121</sup> The appellants had agreed that the Immigration (EEA) Regulations implementing Directive 2004/38 were not applicable to their cases.<sup>122</sup>

Determining the first appeal, the Upper Tribunal found that the father of the British national did not have the capability to look after the Union citizen child, there was no evidence of other relatives within the UK, and that “it is no answer to the appellant’s claim under the *Ruiz Zambrano* principles that AP could exercise his right of residence in the EU by being adopted or otherwise placed in the care of Social Services”.<sup>123</sup> The tribunal found that a refusal to admit the appellant mother to the UK would deprive her British son of the genuine enjoyment of the substance of his rights associated with his status as an EU citizen, so, on the exceptional facts of the case “denying the appellant in the first appeal a right of entry and residence to the United Kingdom would lead to a breach of Article 20 of the Treaty on the Functioning of the European Union.”<sup>124</sup> The Upper Tribunal followed this finding with a brief outline of the reasons for which Article 8 ECHR would have been engaged leading to a finding of non proportionate interference, had the *Ruiz Zambrano* principle not applied.<sup>125</sup>

In determining the second appeal, the Upper Tribunal did not find that the *Ruiz Zambrano* principle applied: the appellant’s husband was residing in the UK and caring for the elder child, so the younger child could join him without difficulty, there being no suggestion the sponsor was incapable of looking after two children. This means that, while living without their mother in the UK could make life difficult for the sponsor and the children, refusing to admit her would not deprive the children of

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<sup>121</sup> *MA and SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 00380 (IAC), para 44

<sup>122</sup> *ibid* para 42

<sup>123</sup> *ibid* para 50

<sup>124</sup> *ibid* para 51

<sup>125</sup> *ibid* para 52

the genuine enjoyment of the substance of their rights as Union citizens.<sup>126</sup> The facts of the second appeal were not exceptional enough to make *Ruiz Zambrano* applicable.

However, the Upper Tribunal continued with Article 8 ECHR analysis, finding the ECO's decision was an action concerning children undertaken by an administrative authority, so that Article 3 of the UN Convention on the Rights of the Child came into play.<sup>127</sup> The tribunal began with the assumption that the best interests of a child are usually best served by being with both parents, and that family life existed in the case, and the decision entailed consequences "of such gravity so as to engage Article 8."<sup>128</sup> Proportionality assessments including economic considerations and the likelihood of a permanent breakdown in physical relationship between the appellant and her children if entry clearance were refused were considered. The Upper Tribunal summarised this with "The position is a plain one. If the scales tip in favour of the ECO, it will have the effect of separating a mother from her two children one of whom for which she has been the principal carer and the other who has suffered as the result of their separation."<sup>129</sup> The Upper Tribunal found that there was a compelling need for the family to be reunited in the best interests of the children, and the "harm that would flow from their continued split is sufficient to tip the scales in favour of the appellant coming to the UK due weight having been given to the competing economic factor of limiting the demands made on the public purse."<sup>130</sup> In this way, the second appellants also escaped the application of the UK's Immigration Rules.

*MA and SM* highlights the difficulty of reliance upon *Ruiz Zambrano* principles: just as there was no application of the *Ruiz Zambrano* principle in *McCarthy*, a TCN spouse cannot expect to rely upon the principle to join an able sponsor within the UK, even if there are children involved, as in the case of the second appellant. In the case of the first appellant, the situation was more exceptional, as the naturalised British citizen was unable to provide care for his son. Had the father been born a British citizen and hence been more likely to have had family to support him and to help provide for the children, the principle may not have applied, as the wider family could have helped adequately to ensure that the child's rights as a Union citizen were respected. This is

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<sup>126</sup> *ibid* paras 55-56

<sup>127</sup> *ibid* para 59; United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990

<sup>128</sup> *MA and SM*. n121 above, para 64

<sup>129</sup> *ibid* para 74

<sup>130</sup> *ibid* para 76

not to say that the principle only applies to naturalised Union citizen parents, or TCN parents (as in *Ruiz Zambrano* itself), but meeting the exceptionality criteria is arguably more difficult for parents with no disability born with the nationality of the Member State and brought up there, as the case of the second appellant shows.

The Upper Tribunal's willingness to explore the potential of Article 8 in this case is something which the CJEU refrained from doing in *Ruiz Zambrano*, despite the Opinion of Advocate General Sharpston considering fundamental rights in detail.<sup>131</sup> It is a shame that *Ruiz Zambrano* failed to fully engage with the fundamental rights aspects of the case- the CJEU missed the opportunity to develop a coherent link between Union citizenship rights and fundamental rights to family life. Reliance upon Union citizenship almost seems like the reasoning was to avoid reliance upon fundamental rights, and thus the enraging of Member States and their national courts due to bypassing their immigration rules, but the effect is still to bypass national immigration rules, despite the limited scope for application. As Costelloe wrote, Union citizenship transcends economic purposes- "Some citizenship rights seem to be more akin to fundamental (i.e. human) rights, rather than economic freedoms",<sup>132</sup> which is why the CJEU has been unwilling to go boldly into uncharted territory: it has neither the competence nor the taste for national immigration control, save in the most exceptional circumstances. That is despite the interpretation and development of EU doctrines taking on expansive approaches and unpredictable growth.

#### **d. Union citizens in Member States other than their own**

While the Upper Tribunal has extended the application of the *Ruiz Zambrano* principle to allow TCN residents to enter the UK so as to ensure the fundamental rights of Union citizen children (UK nationals) are respected, it is still a doctrine restricted to one Member State. No Union citizen from a Member State other than the UK can successfully claim that a TCN carer, spouse or parent not being able to reside with them within the UK would force them to leave the territory of the EU as a whole, as the option would remain for them to return to the Union citizen's home Member State, which is in line with the *Alopa* decision of the CJEU.<sup>133</sup> If a Union citizen had to

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<sup>131</sup> Case C 34/09 *Ruiz Zambrano*, Opinion of Advocate General Sharpston delivered on 30 September 2010

<sup>132</sup> Cathryn Costello, 'Citizenship of the Union: Above Abuse?' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011) 325

<sup>133</sup> Case C-86/12 *Alopa and Others*, Judgment of the Court, 10 October 2013, nyr

leave the UK to return to their home state, but needed a TCN carer to reside with them so as to enable the residence, it is against the home state which a *Ruiz Zambrano* claim must be made, not against the initial state of residence. The exceptionality of *Ruiz Zambrano* in relation to other sources of residence under EU law is notable, and befits a doctrine whose application is only to be in the most exceptional circumstances.

#### 4. Conclusions

*Ruiz Zambrano* establishes a Union citizen's right of residence within the territory of the EU, and thus in their own Member State. The degree of interference with the substance of a Union citizen's rights, and whether these rights extend beyond the right to be within the EU, are some of the many questions left unanswered. While the Court has not only not extended the principle in the cases which followed *Ruiz Zambrano*, but instead restricted it, so that thus far it has only successfully been relied upon in relation to the Union citizenship rights of children, there may well be cases where adult Union citizens' rights are sufficiently endangered so as to justify a relative of theirs should remain with them within the EU.

*Ruiz Zambrano* has the potential to bypass national immigration rules, and has done so successfully for TCN family members of UK children. The impact of Union citizenship in relation to family residence is thus immense: the unique rights based upon Article 20 TFEU have, however, mostly been linked in consideration before the UK courts with fundamental rights questions. While the application of *Ruiz Zambrano* remains exceptional and has not been extended - other than territorially - the consideration of the two potential sources of rights to help families remain together seems to make sense in practice. The CJEU seems likely to face cases trying to extend its scope beyond the fairly restrictive application we have seen so far,<sup>134</sup> though these are unlikely to be easy to predict. The exceptionality criterion within *Ruiz Zambrano* is far removed from Article 8 ECHR considerations, and the source of residence derived from Article 20 TFEU and Union citizenship will no doubt be further developed by the CJEU as Union citizenship increasingly grows in relevance and as the fundamental status of Member State nationals.

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<sup>134</sup> Davies suggests there will be greater application of the doctrine: Gareth Davies, 'The family rights of European children: expulsion of non-European parents,' *EUI Working Paper*, Robert Schuman Centre for Advanced Studies, RSCAS 2012/04



Guild *et al.* paraphrase the Rolling Stones in their consideration of *Ruiz Zambrano*: “EU citizens cannot always get what they want – but if they try real hard, national authorities must give them what they need.”<sup>135</sup> Distinguishing between desirability and dependency in case law is definitely a useful approach, and one potentially linked quite closely to Strasbourg’s approach to successful Article 8 ECHR cases – where there is essentially no option for a family to live elsewhere. This is discussed in the next chapter.

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<sup>135</sup> Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014) 66

## Chapter Six

### The Lisbon Treaty and Fundamental Rights:

#### The Charter of Fundamental Rights and pledge of ECHR Accession

When assessing the sources of rights to reside under EU law, in addition to rights of residence derived from free movement law, it is important to consider the right to family life derived from fundamental rights law. In the UK courts, family reunification cases often require consideration of immigration law as well as human rights, as was apparent in Chapter Three and Five. However, the CJEU has not shown that it can adopt such an approach to family rights easily. This chapter explores the reasons for this, as the Court has otherwise been very active in developing fundamental rights protection within the EU. The EU did not initially have its own fundamental rights legislation, and the Treaty of Lisbon brought important constitutional changes in this respect.<sup>1</sup> The Treaty follows its predecessors' aims:<sup>2</sup> to provide an area of freedom, security and justice, and ensure the free movement of persons.<sup>3</sup> It strengthened fundamental rights protection within the EU, through both the formal recognition that the Charter of Fundamental Rights is of equal status to a Treaty,<sup>4</sup> and the promise of EU accession to the European Convention on Human Rights.<sup>5</sup> It is currently difficult to estimate what the full impact the Treaty will have on fundamental rights protection and Union citizens will be, as the promised accession has yet to happen and the extent of the Charter's protection is yet to be fully explored.

This chapter will assess the scope for reliance upon fundamental rights provisions by exploring the constitutional status of those provisions. Chapter Five introduced the CJEU's reluctant approach to potential links between Union citizenship and

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<sup>1</sup> Consolidated Version of the Treaty on European Union (TEU), *OJ C 83, 30.3.2010, 13-46*, and Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), *OJ C 83, 30.3.2010, 47-403*

<sup>2</sup>Koen Lenaerts, 'The contribution of the European Court of Justice to the area of freedom, security and justice' (2010) 59 *International and Comparative Law Quarterly* 255, 256 – the objective is somewhat recent, introduced with Maastricht, the Treaty on European Union [1992] *OJ C191/1*, and Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts [1997] *OJ C340/1*, and enshrined with the Lisbon Treaty

<sup>3</sup> Article 3(2) TEU

<sup>4</sup> Charter of Fundamental Rights of the European Union, *OJ C 83/02, 30.3.2010, 398-403*; Article 6(1) TEU

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, (European Convention on Human Rights) Rome, 213 U.N.T.S. 222, signed on 4 November 1950, entered into force on 3 September 1953, henceforth "ECHR". Article 6(2) TEU declares the EU will accede to the ECHR

fundamental rights to family life in case law, with focus upon *Ruiz Zambrano*.<sup>6</sup> This chapter considers the extent to which the Lisbon Treaty is likely to be able to provide increased protection of fundamental rights for Union citizens in relation to family life. This chapter considers the Charter as representing a shift away from the originally economic focus of the EU; in recognising the emphasis on families and social rights in the Charter, the EU refined its impact on families. While the EU lacks formal competence for family law, its regulation of families has increased since its inception, and the impact of fundamental rights upon family life is important to assess the rights accorded to Union citizens in relation to family reunification, which is why the status and scope of such rights need to be considered. This Chapter takes a critical view of the approach of the CJEU to interpreting the scope of application of the Charter, and aims to show that the Court has not applied the activism for which it was so criticised in relation to developing a meaningful status for Union citizenship to determining when the Charter applies.

While acknowledging there are sound reasons for the Court not to go beyond the scope of EU law, it is argued that in failing to link the Charter with the protection of the rights of Union citizens, and in failing to acknowledge that certain situations fall within the scope of the Charter's application, the Court has deviated from its approach to finding a link to EU law as evidenced in *Ruiz Zambrano*, and has failed to include situations which could fall within the scope *ratione materiae* as coming within the Article 51 CFREU delimitation. As such, the Court has failed to strengthen Union citizens' rights to family life under EU law, or even to respect fundamental rights in situations which could be interpreted as falling within the scope of EU law if the approach taken to interpreting the Treaty based provisions extended to the Charter.<sup>7</sup>

The first section of this chapter discusses the historical development of fundamental rights protection within the EU: from general principles to the introduction and changing legal status of the Charter, to the Lisbon commitment to EU accession to the

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<sup>6</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177

<sup>7</sup> As discussed in Chapters Four and Five: most recently the Court's expansive interpretation of Article 21(1) TFEU was capable of giving rise to rights of residence for TCN family members in Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Judgment of the Court, 12 March 2014, nyr is of note as this brought an internal situation – the residence of a Union citizen within their home state, within the scope of EU law

ECHR, and creation of a ‘culture’ of human rights.<sup>8</sup> This is done with a focus on the ability of citizens to rely upon fundamental rights in relation to EU law, and where fundamental rights standards actually come from, rather than the content of those rights in great detail. In this respect, the strictly ‘legal story’ is not enough – the judicial dialogue between the ECtHR and CJEU extends far beyond their reading of the other’s decisions to regular meetings between members of the courts,<sup>9</sup> and, as the EU does not contain homogenous states, individual Member States’ concerns and interests are important.

Acknowledging the political environment in which the Court acts, this chapter’s second section assesses the approach of the CJEU in relation to the application of fundamental rights based upon the ECHR and the CFREU. Particular attention is paid to the burgeoning case law on applicability of the Charter, as when the Charter applies is not wholly clear. This chapter intends to show that the Charter is not being applied to cases where Union citizenship could be determinative of rights, particularly in relation to family residence rights, and that the Court has failed to link the Charter firmly to the rights of Union citizens. The third section of this chapter considers the UK’s approach to the CJEU doctrine in relation to the Charter, so as to enable understanding of the role fundamental rights can play in relation to family reunification in practice and to consider whether the Charter has the potential to bring Union citizens any additional rights of residence. The fourth section considers the impact of EU accession to the ECHR, and whether this will, as Polakiewicz considered, ‘square the circle’ of fundamental rights protection within the EU.<sup>10</sup>

## **1. The EU and Fundamental Rights Protection**

In the original Community treaties, there were no provisions for human rights protection, which was neither a failure on the part of the Community nor an omission. The Community’s aims at its genesis were economic, and to ensure peace, rather than

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<sup>8</sup> Discussed in Nina-Louisa Arold Lorenz, Xavier Groussot and Gunnar Thor Petursson, *The European Human Rights Culture - A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff Publishers 2013)

<sup>9</sup> Leonard F.M. Besselink, ‘Should the European Union ratify the European Convention on Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 301, 306

<sup>10</sup> Jörg Polakiewicz, ‘EU law and the ECHR: will the European Union’s accession square the circle? The draft accession agreement of April 5, 2013’ [2013] *European Human Rights Law Review* 592

to build a rights-based community.<sup>11</sup> As Von Bogdandy stated, “The European legal order started as a functional legal order”<sup>12</sup> – and functionality required a focus on the economies of Member States, rather than their protection of fundamental rights. Case law focused on border controls and obvious obstacles to inter-state trade.<sup>13</sup>

In the mid twentieth century states took steps towards cooperation in relation to human rights protection outside of the fledgling EU. The preamble to the Council of Europe Statute of 1949<sup>14</sup> affirmed the need for unity between European countries in order for them to make progress. Alston and Weiler found that the UN Declaration of Human Rights and the ECHR which followed shortly after “enabled the work of building a European community to proceed without a separate human rights foundation.”<sup>15</sup> Though separate, Nicol noted that “from the outset, the issue of human rights was interweaved with the desire for broader European union.”<sup>16</sup> For the purposes of this thesis, the complex interweaving between the rights which families invoke to remain together within a given Member State and fundamental rights law have to be borne in mind – Union citizenship is also a non-original feature of the EU, and it is not always simply rights to free movement or national immigration law upon which families may need to rely to live together: as Chapter 5 discussed – sometimes Union citizenship itself can suffice. Awareness of complementary sources of rights, such as the fundamental right to family life, contained in Article 8 ECHR is thus essential.

Article 8 ECHR states that:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

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<sup>11</sup> See Martin Kuijer, 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?' (2011) 3 *Amsterdam Law Forum* 17

<sup>12</sup> Armin Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307, 1308

<sup>13</sup> Stephen Weatherill, 'From Economic Rights to Fundamental Freedoms' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 11

<sup>14</sup> Statute of the Council of Europe (London, 5.V.1949) ETS 1

<sup>15</sup> Philip Alston and J.H.H. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658, 659

<sup>16</sup> Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] *Public Law* 152, 155

country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.”<sup>17</sup>

This Article does not give an absolute right, as is clear from the second paragraph, and what constitutes respect for family life has been interpreted by the European Court of Human Rights with different emphases over the years.<sup>18</sup> For the purposes of this chapter, however, the importance is in the commitment by states to building human rights protection, rather than how this was interpreted by the Strasbourg court. Politicians and states committed to European unity sought greater uniformity in relation to the protection of fundamental rights- “[f]or them, the ECHR was but the ‘first step on the road leading to a united Europe.’”<sup>19</sup> Human rights agreements between states pre-dated the creation of the Community and remained external to it. This was criticised as paradoxical due to the Community’s defence of human rights<sup>20</sup> - though human rights agreements were beyond the competence of the early European Community. The linkage of fundamental rights and EU law was not a single decisive move taken by the Member States of the Union, but many steps taken by the CJEU and Member States and their representatives over a number of years.

#### **a. Case law developments within the EU**

According to Beitz, “The practice of human rights as it has developed so far can only be understood as a revisionist appurtenance of a world order of independent, territorial states”<sup>21</sup> revisionist in that human rights practice has, across the world, impacted upon the independence of states. Though Beitz did not discuss the EU in particular, the influence of the Court of Justice in relation to human rights protection within its Member States can be seen as furthering the influence of human rights within Member States. Long before the protection of fundamental rights became an integral part of Community law, the CJEU made inroads into providing human rights protection at a Community level with its decisions in *Stauder*<sup>22</sup> and *Internationale*

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<sup>17</sup> Article 8 ECHR

<sup>18</sup> See Robin C.A. White and Clare Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) Chapter 15; David Feldman, 'The developing scope of Article 8 of the European Convention on Human Rights' [1997] *European Human Rights Law Review* 265; Jane Liddy, 'The concept of family life under the ECHR' [1998] *European Human Rights Law Review* 15; Colin Warbrick, 'The structure of Article 8' [1998] *European Human Rights Law Review* 32

<sup>19</sup> Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] *Public Law* 152, 156

<sup>20</sup> Philip Alston and J.H.H. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658, 661

<sup>21</sup> Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 128

<sup>22</sup> Case 26/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419

*Handelsgesellschaft*.<sup>23</sup> These cases were to underline the view of individuals as rights holders within the EU, which is no mean feat for an originally economic union.

Maas noted the potential for excessive court activism to “energize opponents” such that “the result of litigation intended to produce social reform may be to strengthen the opponents of such change.”<sup>24</sup> Perhaps predictably, the Court’s increased protection for rights at Community level faced opposition from the German and Italian constitutional courts,<sup>25</sup> and the CJEU declared its “famous formula”<sup>26</sup> in *Nold II*:

“...fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures.

In safeguarding these rights, the [C]ourt is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states.

Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law.”<sup>27</sup>

This formula was intended to be a compromise and to appease the constitutional courts of the Member States through persuading them the principles by applied the Court originated from the Member States.<sup>28</sup> It provided the Court with the legal tools to apply fundamental rights considerations to cases before it, and relied upon Member States’ constitutions to establish what the contents of these rights were. The ECtHR has had no “official *legal* relationship” with the EU,<sup>29</sup> though the EU has had to

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<sup>23</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

<sup>24</sup> Willem Maas, *Creating European Citizens* (Rowman and Littlefield Publishers, 2007) 92

<sup>25</sup> See Case 2 BverfG 52/71 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreibe und Futtermittel* [1974] 2 CMLR 540. The case is known as ‘*Solange I*’ in which the German Bundesverfassungsgericht (Federal Constitutional Court) reserved for itself the right to determine an EU law rule which would conflict with a guarantee of basic rights in the German Constitution inapplicable in Germany, as long as the integration process has not progressed so far that the EU law would also embody a catalogue of fundamental rights decided on by a parliament and of settled validity which would be adequate in comparison with the catalogue of fundamental rights contained in German Constitution.

<sup>26</sup> Matej Avbelj, ‘European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods’ (2004) 06/04 *Jean Monnet Working Paper* 27

<sup>27</sup> Case 4/73 *Nold* [1974] ECR 491, para 13

<sup>28</sup> See discussion in Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006)

<sup>29</sup> Leonard F.M. Besselink, ‘Should the European Union ratify the European Convention on Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 302

consider its importance at various times, despite not being a signatory to the Convention. Indeed, the CJEU did not only find general principles from the Member States' constitutions: in *Rutili*,<sup>30</sup> the Court explicitly recognised the ECHR as a source of general principles.<sup>31</sup>

The CJEU re-emphasised in *Wachauf* that fundamental rights form “an integral part” of the law of the Community, and that international treaties (including the ECHR) can “supply guidelines to which regard should be had in the context of Community law.”<sup>32</sup> *Booker Aquaculture* followed the *Wachauf* approach that Member States had to apply fundamental rights protections flowing from EU law ‘as far as possible’ when implementing Union law.<sup>33</sup> The *ERT* and *Familiapress* cases<sup>34</sup> emphasised that the obligation was not simply when Member States implemented Union law, but when they acted within its scope – whether implementing EU law directly or not, and including national law derogation from EU law.<sup>35</sup> The *Familiapress* case was between private parties, rather than against a Member State, so the horizontal potential of EU fundamental protection has long been relevant. Spaventa discussed various horizontal situations and noted that the ever expanding scope of Treaty rights-provisions and the general principles doctrine “created a complex web of intersecting jurisdictions where domestic, Union and European Convention rights concur, as well as sometimes compete, with one another”.<sup>36</sup>

The concept of ‘general principles of law’ was open to criticism for lack of certainty: the protection was never fully incorporated into a Treaty provision,<sup>37</sup> and balancing

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<sup>30</sup> Case 36/75 *Rutili* [1975] ECR 1219

<sup>31</sup> *ibid* para 32

<sup>32</sup> Case 5/88 *Wachauf* [1989] ECR 02609, para 17

<sup>33</sup> Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] ECR I-7411, para 88

<sup>34</sup> Case C-260/89 *ERT* [1991] ECR I-2925; Case C-368/95 *Familiapress* [1996] ECR I-3689

<sup>35</sup> Discussed in Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, ‘The Reach of EU Fundamental Rights on Member State Action after Lisbon,’ in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013)

<sup>36</sup> Eleanor Spaventa, ‘The Horizontal Application of Fundamental Rights as General Principles of Union Law’ in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 199

<sup>37</sup> Tim Eicke, ‘The European Charter of Fundamental Rights- Unique Opportunity or Unwelcome Distraction’ [2000] *European Human Rights Law Review* 280, 285: only part of the general principle has been “incorporated” into Article 6(1)-(2) TEU: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”



constitutional traditions, rights and outcomes gave the CJEU a broad discretion.<sup>38</sup> Furthermore, the CJEU could hardly argue that it was best placed to understand the constitutional traditions of each Member State. While it may not have been judicial law-making as such, the fundamental rights general principles application was quite obviously judge-led law.<sup>39</sup> As there was no Treaty basis for fundamental rights protection within the EU, Avbelj thought the void left the Court no option but “to literally invent human rights protection on the Community level by invoking the mentioned general principles of law formula...”<sup>40</sup> As the Court developed its stance, the pressing need for human rights protection at EU level became more obvious. According to Alston and Weiler, judicial recourse was an “important, even foundational, dimension of an effective human rights regime. But while it is necessary, it is not sufficient”.<sup>41</sup> The theory was developed while lacking a legislative base, and thus also lacking legal certainty. The application of general principles remains relevant in EU law, despite increased bases for guarantees.<sup>42</sup> The development of this theory showed a level of CJEU activism and efforts to enhance fundamental rights protection which, it is suggested below, has not been continued since the Lisbon Treaty.<sup>43</sup>

### **b. Searching for Legislative Guarantees: The Possibility for EU Accession to the ECHR**

The potential for EU accession to the ECHR was first proposed by the Commission in 1979,<sup>44</sup> but the commitment was made much more recently.<sup>45</sup> The Court determined in Opinion 2/94 on EU accession to the ECHR<sup>46</sup> that unilateral accession was not open

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<sup>38</sup> Leonard F.M. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629, 636

<sup>39</sup> Elise Muir, 'The Court of Justice: a fundamental rights institution among others' in Mark Dawson, Bruno De Witte and Elise Muir (eds) *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 76-77

<sup>40</sup> Matej Avbelj, 'European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods' (2004) 06/04 *Jean Monnet Working Paper* 53

<sup>41</sup> Philip Alston and J.H.H. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658, 668

<sup>42</sup> See Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 para 75 – “The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law”

<sup>43</sup> See discussion of the Court's role in Bruno De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 860

<sup>44</sup> Philip Alston and J.H.H. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658, 659

<sup>45</sup> Article 6(2) TEU

<sup>46</sup> Opinion 2/94 [1996] ECR I-1759, para 35

to the EU. In finding that there was not competence under the Treaty to accede to the ECHR, and that accession would be “of constitutional significance and would therefore be such as to go beyond the scope of Article [352 TEU],”<sup>47</sup> the Court highlighted that only Treaty amendment could bring about such a change. A lack of unanimity between the Member States at the time meant that could be no such Treaty amendments. The reason protecting fundamental rights within the EU was so important was to ensure that its institutions were subject to the same principles and constraints as Member States and that they did not breach individuals’ rights.<sup>48</sup>

### c. The Charter of Fundamental Rights

Opinion 2/94<sup>49</sup> paved the way to the creation of the Charter of Fundamental Rights. Following the Court’s negative answer, states considered alternative options for fundamental rights protection. The German Presidency<sup>50</sup> of the EU Council proposed a Charter for the Union in the Presidency Conclusions of 1999: “at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.”<sup>51</sup> The incoming Presidency was set the task of drafting this,<sup>52</sup> and the resulting Charter of Fundamental rights was solemnly proclaimed on 7 December 2000.

The Charter of Fundamental rights is the newest EU mechanism for fundamental rights protection, and its impact was difficult to predict.<sup>53</sup> As a published Charter, it was far easier to locate and understand than the ‘general principles’ doctrine the CJEU developed over many years, and making rights more accessible was one purpose for creating the Charter.<sup>54</sup> Different motivations were suggested as prompting the EU to adopt the Charter rather than to accede to the ECHR, such as to protect its autonomy or

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<sup>47</sup> *ibid* para 35

<sup>48</sup> Daniel Denman, 'The Charter of Fundamental Rights' [2010] *European Human Rights Law Review* 349, 351

<sup>49</sup> Opinion 2/94 [1996] ECR I-1759

<sup>50</sup> Besselink considered the Charter a child or ‘at least a godchild’ of Germany - Leonard F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 *Maastricht Journal of European and Comparative Law* 68

<sup>51</sup> European Council, Presidency Conclusions, Cologne 3-4 June 1999 at [http://consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/kolnen.htm](http://consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm) last accessed 29 March 2014 point 44

<sup>52</sup> *ibid* point 45

<sup>53</sup> Effect discussed in Kim Feus (ed), *An EU Charter of Fundamental Rights: Text and Commentaries* (Kogan Page 2001)

<sup>54</sup> European Council, Presidency Conclusions, Cologne 3-4 June 1999 at [http://consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/kolnen.htm](http://consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm) last accessed 29 March 2014

to create a Bill of Rights for the EU.<sup>55</sup> Whatever the motivations, the Charter provided a clearly demarcated outline of fundamental rights for the EU and gave a legislative basis for judicial determinations,<sup>56</sup> though at the time it was proclaimed it lacked binding effect. Despite giving a “written legal basis for the Community standard of protection of human rights”,<sup>57</sup> the would-be status of its provisions was not known at the time of drafting: the Convention set the task of drawing up the Charter “was not given any instruction pertaining to its normative status. Its response was to try to formulate a Charter that could become legally binding by drafting the text as if it were to be incorporated in the treaties.”<sup>58</sup>

Eicke regretted that the European Council did not go further at the time, and undertake to make the Charter stronger; the declaration “expressly [left] open the question of “whether and, if so, how the Charter should be integrated into the treaties”.”<sup>59</sup> He considered that there were “already sufficient such *solemn declarations* (whether joint or unilateral) as to the importance of fundamental rights.”<sup>60</sup> One of the difficulties at the time was that human rights law guarantees as developed by the CJEU were “equal if not more extensive than that provided for by most national constitutions”,<sup>61</sup> and as the EU lacked competence to harmonise fundamental rights protection for the Member States, accusations of overstepping the boundaries or competence creep could emerge. Even without a binding status, the Charter represented a shift away from the economic focus of the EU; in recognising the emphasis on families and social rights in the Charter, the EU refined its impact on families. As McGlynn emphasised, while the EU lacks formal competence for family law as such, its regulation of families has been growing since the 1960s.<sup>62</sup> Fundamental rights in general are not the focus of this thesis, but their impact of the right to family life is important to assess the rights

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<sup>55</sup> Discussed in Graíne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 172

<sup>56</sup> The potential of the Charter to further fundamental rights protection is discussed in Diamond Ashiagbor, 'Economic and Social Rights in the European Charter of Fundamental Rights' [2004] *European Human Rights Law Review* 62

<sup>57</sup> Matej Avbelj, 'European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods,' *Jean Monnet Working Paper*, 2004, 06/04, 54

<sup>58</sup> John Erik Fossum, 'The European Union: In Search of an Identity' (2003) 2 *European Journal of Political Theory* 319, 329

<sup>59</sup> Tim Eicke, 'The European Charter of Fundamental Rights- Unique Opportunity or Unwelcome Distraction' [2000] *European Human Rights Law Review* 280, 282

<sup>60</sup> *ibid* 282

<sup>61</sup> *ibid* 280

<sup>62</sup> Clare McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?' (2001) 26 *European Law Review* 582, 585

accorded to Union citizens in relation to family reunification, which is why the status and scope of such rights need to be considered.

Douglas-Scott noted that “EU institutional presidents were not even given the time to complete their speeches”<sup>63</sup> when the Charter was proclaimed, underlining its lack of importance. She also highlighted that “for its first six years, the CJEU refused to cite it as an authority in its judgements[sic], preferring instead to refer to the ECHR.”<sup>64</sup> While this could have meant that the Court felt that its pre-existing approach to respecting fundamental rights was adequate, it made clear that the EU still lacked a bill of rights, and that the Charter’s legal status was not sufficiently strong to ensure the protection of individuals’ rights. In the UK, the Charter’s influence was downplayed, with Keith Vaz MP stating that he believed the Charter to be “no more binding than the Beano”.<sup>65</sup> The Charter seemed unlikely to be a useful source of Union citizens’ rights. This somewhat echoed the approach of the CJEU and the UK to the introduction of Union citizenship too – neither was quick to recognise the full potential of Union citizenship as a source of rights but this only gradually became apparent through developments in case law.

The European Court of Human Rights actually referred to the Charter before the Court of Justice did,<sup>66</sup> with the (now) General Court<sup>67</sup> and Advocates General also quicker to the mark than the CJEU.<sup>68</sup> While, as Timmermans argued, the Strasbourg Court and Court of Justice can strengthen each other’s case law and further legitimise the other’s efforts,<sup>69</sup> this would not be the case where the legislation of one court’s jurisdiction is

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<sup>63</sup> Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 645, 650

<sup>64</sup> *ibid* 651

<sup>65</sup> Reported in George Jones and Ambrose Evans Pritchard, 'European Summit Charter on Rights 'no more binding than the Beano' at <http://www.telegraph.co.uk/news/worldnews/europe/1370340/European-summit-Charter-on-rights-no-more-binding-than-the-Beano.html> last accessed 23 February 2014 and discussed in Kieron Beal and Tom Hickman, 'Beano No More: The EU Charter of Rights After Lisbon' (2011) 16 *Judicial Review* 113

<sup>66</sup> *Christine Goodwin v. The United Kingdom* (Application No 28957/95) (1996) 22 EHRR 123 paras 58 and 100

<sup>67</sup> Previously Court of First Instance – redefined in Article 256 TFEU

<sup>68</sup> The Charter was referred to in Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2001] ECR II-729 but was not found to be of consequence due to the legislation in question was adopted prior to its introduction – para 76. While the CJEU did not refer to the Charter in Case C-173/99 *R v Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-4881, Advocate General Tizzano did make reference to it in his Opinion, delivered on 8 February 2001.

<sup>69</sup> Christiaan Timmermans, 'The Relationship between the European Court of Justice and the European Court of Human Rights' in Anthony Arnull, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 151

only referred to the other court. A level of mutual respect between the courts as shown in *Bosphorus*,<sup>70</sup> where the ECtHR accepted the CJEU protection was equivalent to the protection ensured under the ECHR, means that the courts do not attempt to control each other, though they undoubtedly can influence each other's interpretations of fundamental rights. The CJEU first referred to the Charter in *Parliament v Council and Commission*,<sup>71</sup> where it emphasised that the Charter had no legally binding effect.

#### **d. Effect of Lisbon: Changing Status of the Charter of Fundamental Rights**

Just as the developing idea of economically inactive individuals being rights-holders became more of a legal reality in the Maastricht Treaty with the introduction of Union citizenship, the Charter of Fundamental Rights' legal status was changed by Treaty amendment. The legal status of the Charter changed with the Lisbon Treaty: it gained equal Treaty status in Article 6(1) TEU. The drafters were careful to limit the Charter's scope in Article 51 CFREU to instances in which Member States were implementing EU law. Groussot *et al.* suggested the reason for the restrictions in Article 51 being, in simplistic terms, a result of the influence of "national representatives from influential countries such as the United Kingdom [being] concerned that the European Court of Justice might be tempted to emulate the US Supreme Court."<sup>72</sup> Additionally, Article 51(2) CFREU stated that the Charter did not extend the scope of EU law in any way, or establish new powers. The change in legal status thus did not seem likely to herald much change in the implementation of rights protection. Nonetheless, Lenaerts and Gutierrez-Fons identified three main functions for the Charter as primary law. These were: to serve as an aid to interpretation; to be relied upon as providing rounds for judicial review, and to continue to operate as a source for 'the discovery' of general principles of EU law.<sup>73</sup>

As mentioned above, the CJEU was not the first court to refer to the Charter, but it has made reference to it since the Lisbon change in status. De Búrca assessed the CJEU's engagement with the Charter since 2009, examining the number of references to it in

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<sup>70</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland* (Application No 45036/98) (2006) 42 EHRR 1

<sup>71</sup> Case C-540/03 *Parliament v Council and Commission* [2006] ECR I-05769, para 38

<sup>72</sup> Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon,' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 100

<sup>73</sup> Koen Lenaerts and José A. Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629, 1656

decisions, and engagement with arguments based on its provisions.<sup>74</sup> She found that the Court's role in human rights adjudication, however, is not limited to the increased protection for the Charter, but also as "a consequence of the continued scope of EU law and policy."<sup>75</sup> The evolution of the Court of Justice from the court presiding over mostly economic matters, the 'ever closer union' aimed for in Treaties has expanded its jurisdiction to matters far beyond its original scope. What the Charter adds to EU general principles protection is discussed below.

## 2. Scope of Application

The scope of application of the Charter is limited to when Member States or their institutions are *implementing* EU law<sup>76</sup> – it does not have universal scope.<sup>77</sup> This is where the Court's interpretation of what falls within the field of EU law has particular resonance, and where, it is argued, it has failed to approach cases before it in a manner consistent with finding a link to EU law as in *Rottmann* and *Ruiz Zambrano*, or even *Carpenter*<sup>78</sup>, and where it has so far missed the important opportunity to take the symbolically important step of tying Union citizenship and fundamental rights protection together within EU law. The phraseology of Article 51 CFREU suggests that there has been an intentional divergence from the approach taken in *ERT* and *Familiapress*,<sup>79</sup> where fundamental rights obligations under EU law had to be applied simply within its scope, whether Member States were implementing EU law or not.

Despite its limited scope, the Charter does have universal application within its scope - it is not simply for Union citizens, or Union citizens and their family members - it is applicable to every person regardless of their nationality, when Member States act to implement EU law. The CJEU has not attempted to extend the scope of implementation of EU law in order to make the Charter applicable, as the *Fransson*<sup>80</sup> and *Melloni*<sup>81</sup> cases demonstrate. Sarmiento said that these decisions indicated "that

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<sup>74</sup> de Búrca, n55 above, 168

<sup>75</sup> *ibid* 169

<sup>76</sup> Article 51(1) CFREU

<sup>77</sup> Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 645, 652

<sup>78</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449; *Ruiz Zambrano*, n7 above; Case C-60/00 *Carpenter* [2002] ECR I-06279

<sup>79</sup> *ERT* and *Familiapress*, n34 above

<sup>80</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Judgment of the Court, 26 February 2013, nyr

<sup>81</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court, 26 February 2013, nyr

the Charter has been the source of very significant changes in EU law”,<sup>82</sup> and this can be seen in the effect of the Charter upon the CJEU and constitutional courts’ decisions. However, its being determinative or even applicable to the outcomes of cases is rare, which is significant. *Fransson* and *Melloni* are in the minority of references asking about the Charter’s applicability in that the Charter was applicable on their facts. *Fransson* concerned tax evasion, and the question whether the criminal case against Mr Åkerberg Fransson had to be dismissed as he had already been prosecuted for providing false information in his tax returns and should not be punished twice as this would infringe Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter.

The CJEU determined that tax penalties came within the scope of EU law. The required link was that the proceedings related to Mr Åkerberg Fransson’s obligations to declare VAT, and Member States are obliged under Article 325 TFEU to counter illegal activities affecting the financial interests of the European Union.<sup>83</sup> The Court recognised that the national legislation on tax penalties and criminal proceedings had not been adopted to implement EU law, but found that its application was “designed to penalise an infringement... and is therefore intended to implement the obligation imposed on the Member States...”<sup>84</sup> Conversely, Advocate General Cruz Villalón had found that the matter was not within the scope of EU law, and outlined in detail the reasons for which matters do and should fall within its scope.<sup>85</sup> Van Bockel and Wattel suggest that the Court’s finding that *Fransson* falls within the scope of the Charter “does not follow unambiguously from its earlier case law on the scope of application of general principles of EU law, and appears to give the Charter a wider scope of application.”<sup>86</sup> The link between Union law and domestic activity has been viewed as ‘tenuous’,<sup>87</sup> but in adopting a broad approach the CJEU ensures that the rights of Union citizens are respected under the Charter as far as possible.

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<sup>82</sup> Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267, 1270

<sup>83</sup> *Fransson*, n80 above, paras 24-30

<sup>84</sup> *ibid* para 28

<sup>85</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Opinion of Advocate General Cruz Villalón, 12 June 2012

<sup>86</sup> Bas van Bockel and Peter Wattel, 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson (Case Comment)' (2013) 38 *European Law Review* 866, 871

<sup>87</sup> Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 *Common Market Law Review* 219, 237

In most references concerning the Charter, the CJEU has not found that the matter fell within the scope of EU law. In *Romeo*,<sup>88</sup> the Court found it did not have jurisdiction to assess the purely internal situation identified: the case concerned a decision to reduce Ms Romeo's pension entitlement and to recover earlier amounts paid. Ms Romeo brought an action to annul the decision before the Sicilian Corte dei conti, alleging failure to state reasons for the measure "since it was not possible, inter alia, to ascertain the matters of fact and law justifying the reduction in her pension and the recovery of the sums overpaid."<sup>89</sup> The potential link to EU law was the interpretative obligation placed upon the Italian authorities to apply the principles of EU law laid down in Article 296 TFEU and Article 41(2)(c) CFREU when applying domestic law.

The CJEU recognised that it was 'clearly in the European Union's interests' that concepts taken from EU law should be interpreted in a uniform manner,<sup>90</sup> but did not find that the EU law would have been 'directly and unconditionally applicable' so as to create uniformity in relation to purely internal situations, so that there was no "clear European Union interest in a uniform interpretation of provisions or concepts taken from European Union law, irrespective of the circumstances in which those provisions or concepts are to apply."<sup>91</sup> The Charter thus was irrelevant to the Italian authorities' approach to Ms Romeo's pension rights and the CJEU found it did not have jurisdiction. Equally, in *Vinkov*<sup>92</sup> there was no application of the Charter in relation to financial penalties or points in relation to traffic offences as Bulgaria was not implementing EU law in relation to the penalties.<sup>93</sup>

In the *Siragusa*<sup>94</sup> decision, the Court was similarly reluctant to find the Charter applicable to an environmental matter: Mr Siragusa had made alterations to his property within a conservation area without the appropriate permission, for which he applied after completing the work. Article 167 of Legislative Decree No 42/04 lists the consequences of non-compliance with the obligations under Legislative Decree No 42/04, the Italian Code of Cultural Heritage and the Landscape. Article 167(4) thereof states that the competent administrative authority is to assess the compatibility of the

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<sup>88</sup> Case C-313/12 *Giuseppa Romeo v Regione Siciliana*, Judgment of the Court, 7 November 2013, nyr

<sup>89</sup> *ibid* para 9

<sup>90</sup> *ibid* para 22

<sup>91</sup> *ibid* para 27

<sup>92</sup> Case C-27/11 *Vinkov*, Judgment of the Court, 7 June 2012, nyr

<sup>93</sup> *ibid* paras 57-79

<sup>94</sup> Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, Judgment of the Court, 6 March 2014, nyr



work in question with the landscape conservation rules where work carried out without landscape compatibility clearance has resulted in an increase to the floor space, as was the case with Mr Siragusa's work. The Legislative Decree presumed that work which increased the floor space was unacceptable.<sup>95</sup>

The Soprintendenza adopted an order requiring the site to be returned to its former state as the work Mr Siragusa had undertaken was ineligible for permission as it was not compatible with the applicable conservation rules.<sup>96</sup> Mr Siragusa contested the decision, and the Court referred to the CJEU on the applicability of EU law to the landscape protection provisions:<sup>97</sup>

'Do Article 17 of the Charter ... and the principle of proportionality, as a general principle of [EU] law, preclude the application of a provision of national law such as Article 167(4)(a) of Legislative Decree No [42/04], under which a landscape compatibility clearance (*autorizzazione paesaggistica*) may not be issued by way of retrospective regularisation in any cases where human activity has resulted in an increase in floor area and volume, regardless of whether a specific appraisal has been undertaken as to whether the activity in question is compatible with the features of the landscape of the particular site which merit protection?'<sup>98</sup>

The Court found that there was not sufficient link to EU law to allow the Charter to be invoked: despite Mr Siragusa's reference to various EU texts, the court did not find the matter fell within the scope of EU law: "there is nothing to suggest that the provisions of Legislative Decree No 42/04 which are relevant to the case before the referring court fall within the scope of EU law. Those provisions do not implement rules of EU law..."<sup>99</sup> The Court's decision was that the EU aims to protect fundamental rights within the scope of EU law; that the reason this is pursued is to avoid varying levels of protection at domestic and EU level so as to undermine the unity or effectiveness of EU law, and that the situation involving Mr Siragusa's land did not establish jurisdiction for the CJEU.<sup>100</sup> The Court thus referred to the scope of EU law as well as the implementing requirement, potentially leaving future cases to determine which is to be the requirement for application.

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<sup>95</sup> *ibid* para 13

<sup>96</sup> *ibid* para 8

<sup>97</sup> *ibid* paras 10-12

<sup>98</sup> *ibid* para 15

<sup>99</sup> *ibid* para 30

<sup>100</sup> *ibid* paras 31-33

Determining when a matter falls within the scope of EU law/implementation in borderline situations is complex, and the CJEU has perhaps not given sufficient reasoning for its decisions to be applied by national courts with ease.<sup>101</sup> It remains to be seen, for instance, whether the VAT-link with EU law is especially generous: *Fransson* recognised that the legislation in question was not implementing EU law, but the Charter applied, while the Court found that provisions in *Siragusa* were not implementing EU law but sharing its aims fell outside the jurisdiction. The *Siragusa* decision was in line with the text of Article 51 CFREU and Article 6 TEU, but emphasises the disconnect between Union citizens' actions within their home Member States and protection under the Charter. As yet, the CJEU has not applied Charter rights in cases turning on points of 'Union citizenship' law: simply being a Union citizen residing in your home state is not enough – the court has not found this is a link to Union law.

In *Dereci*,<sup>102</sup> it firmly emphasised that the Charter was only applicable when Member States were implementing EU law,<sup>103</sup> and left the examining refusals in light of fundamental rights law to the referring court, under the Charter if the referring Court found the situation was covered by EU law, or under the ECHR if it did not find the matter was covered by EU law.<sup>104</sup> The CJEU thus did not oblige the Member States to undertake any analysis of the situation other than that which they were obliged to undertake in national law, as all Member States are parties to the ECHR. This is hardly the active approach to ensuring individuals freedoms which Snell identified in the Court's approach to free movement case law,<sup>105</sup> and shows an unwillingness to link the fundamental Charter rights to Union citizenship independently of any obvious

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<sup>101</sup> Considered in Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon,' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013), and criticism of the *Fransson* decision in Emily Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson' (2013) 50 *Common Market Law Review* 1411

<sup>102</sup> See Case C-256/11 *Murat Dereci and others v Bundesministerium für Inneres* [2011] ECR I-11315, discussed in greater detail in Chapter 5

<sup>103</sup> *ibid* para 71

<sup>104</sup> *ibid* para 72

<sup>105</sup> Jukka Snell, 'And Then There Were Two: Products and Citizens in Community Law' in Takis Tridimas and Paolisa Nebbia (eds), *European Law for the Twenty-First Century* (Volume 2, Hart Publishing 2004) 49

‘movement’ factor, which would in turn mean a Member State was implementing EU law in relation to the individual.<sup>106</sup>

While Union citizenship ‘links’ to EU Treaties have been found and have been relied upon by individuals in cases without other connecting factors<sup>107</sup> – with one major step being taken in *Carpenter*,<sup>108</sup> and recognition of ‘fundamental’ Union citizenship rights in *Rottmann* and *Ruiz Zambrano*<sup>109</sup> – the scope of these fundamental rights of Union citizens do not include fundamental rights as defined in the Charter, though Article 45 CFREU does echo the Treaty rights of freedom of movement and of residence of Union citizens which are key to the decisions. Currently, “It is only under the very exceptional circumstances that an EU citizen is deprived of the substance of his citizenship rights by being, in fact, forced to leave the EU territory altogether (*Ruiz Zambrano*) that no prior connection to EU law is required.”<sup>110</sup> The CJEU has not laid down simple tests for national courts to follow to determine when Member States are acting to implement EU law, and Besselink’s description of a “concoction of formulations”<sup>111</sup> still applies.

The requirement within Article 51 CFREU of Member States ‘implementing’ EU law potentially removes the Union citizen from the CFREU equation somewhat: in *Ruiz Zambrano*, the Court did not find that Belgium was implementing EU law in the finding that the matter fell within the scope of EU law. There was no suggestion that Belgium was implementing Article 20 TFEU rights in relation to the Union citizen children when assessing their parents’ rights of residence. ‘Implementing’ may prove to be a different test, and one which is at a greater distance from Union citizens at the periphery of EU law. The Court’s reluctance to find a ‘Union citizenship’ link to EU law in residence cases is notable: without such a link the Charter does not apply, and

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<sup>106</sup> The CJEU declined the referring court’s invitation to consider the effect of the CFREU in relation to Article 20 TFEU and TCN family members in Case C-86/12 *Alopa and Others*, Judgment of the Court, 10 October 2013, nyr

<sup>107</sup> See Jukka Snell, ‘And Then There Were Two: Products and Citizens in Community Law’ in Takis Tridimas and Paolisa Nebbia (eds), *European Law for the Twenty-First Century* (Volume 2, Hart Publishing 2004) 49 – Snell argues that fundamental freedoms involving Union citizens ought to be interpreted more expansively than rules relating to products.

<sup>108</sup> *Carpenter*, n78 above, discussed in Elspeth Guild, ‘Developing European Citizenship or Discarding It? Multicultural Citizenship Theory in Light of the *Carpenter* Judgment of the European Court of Justice’ (2003) 12 *The Good Society* 22

<sup>109</sup> *Rottmann*, n78 above; *Ruiz Zambrano*, n7 above

<sup>110</sup> Bas van Bockel and Peter Wattel, ‘New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson (Case Comment)’ (2013) 38 *European Law Review* 866, 875-876

<sup>111</sup> Leonard F.M. Besselink, ‘The Member States, the National Constitutions and the Scope of the Charter’ (2001) 8 *Maastricht Journal of European and Comparative Law* 68, 76

the issue of compatibility with fundamental rights would lie under the ECHR and/or national law. However, in *Ruiz Zambrano*, the sole case where Union citizens' residence has been successfully based upon a 'Union citizenship' link to EU law, there was no mention of the Charter.<sup>112</sup> The Court's reluctance to tie fundamental rights and Union citizenship together was discussed in Chapter Five, but for the purposes of this chapter, while Article 20 TFEU provided an adequate link or 'trigger' for Union law for the Ruiz Zambrano family to base residence rights upon, it seems that the Court is more willing to find an economic link to Union law as a trigger for Charter protection, than a social or family link. However, as Thym said, "Citizenship and fundamental rights cannot be held apart permanently",<sup>113</sup> and it seems possible (if not inevitable) that the CJEU's approach to VAT triggers of EU law could extend to free movement of persons in the future. This would certainly add to the concept of Union citizenship, if not in substance, as rights would typically be protected at national level, certainly symbolically.

Nonetheless, the CJEU emphasised that where "a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction".<sup>114</sup> Van Bockel and Wattel distinguished between different categories of situations to which the Charter may be applicable: those in which Member States act as agents of EU law and those in which Member States derogate from EU law in free movement cases, with the former category dividing further into "case law on directives that require implementing legislation, and case law on regulations that are directly applicable".<sup>115</sup> None of this is necessarily helpful for Union citizens hoping to rely upon rights to be joined by family members in reliance upon EU law without an obvious cross-border link. Unless a Union citizen can bring themselves within one of these categories, their rights of family reunification will not include any claims to rights of family life under the Charter.

#### **a. Interpretation of Charter Rights**

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<sup>112</sup> Discussed in Chapter 5

<sup>113</sup> Daniel Thym, 'Towards 'Real' Citizenship? The Judicial Construction of Union Citizenship and its Limits' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 169

<sup>114</sup> *Fransson*, n80 above, para 22

<sup>115</sup> Bas van Bockel and Peter Wattel, 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson (Case Comment)' (2013) 38 *European Law Review* 866, 873

Article 52(3) of the Charter specifies that “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” In relation to family rights, Article 7 CFREU is virtually identical to Article 8(1) ECHR,<sup>116</sup> and in *McB*, the Court emphasised that the meaning and scope of Article 7 CFREU must match Article 8(1) ECHR and its interpretation by the ECtHR.<sup>117</sup> As Timmermans highlighted, the Charter is a much newer codification of fundamental rights,<sup>118</sup> and the CJEU could interpret the rights it intends to protect in a more expansive manner: Charter rights may well exceed the base level of protection afforded by the Strasbourg Court under and in terms of the ECHR.<sup>119</sup> *DEB* confirmed that provisions of the Charter with parallel rights already set out in the ECHR may be relied upon to give at least as good as, and in principle greater, protection than that currently afforded to the ECHR rights under Strasbourg jurisprudence

Similarly, once the Court in *Fransson* decided that the issue fell within the scope of EU law, the CJEU reiterated that the standards to be applied in the Charter corresponded to those of the ECHR, but emphasised that the ECHR was still separate from the EU:

“[the ECHR] does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.”<sup>120</sup>

The case thus emphasised the different, and competing, sources of fundamental rights protections which ensure individuals’ fundamental rights are protected within the EU. The phraseology of some Articles of the Charter is different from the corresponding rights in the ECHR, and this may well allow for different interpretations, despite the aim that rights should be interpreted in conformity. The ECHR must now be seen as a

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<sup>116</sup> Article 7 CFREU refers to ‘communications’ rather than ‘correspondence’ as in Article 8 ECHR.

<sup>117</sup> Case C-400/10 PPU *McB* [2010] ECR I-8965, para 53

<sup>118</sup> Timmermans, n69 above, 154

<sup>119</sup> Case C 279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, para 35

<sup>120</sup> *Fransson*, n80 above, para 44

minimum standard, and further guarantees for individuals' rights must be advantageous for them. As McGlynn suggested, the Charter drafters must have had reason to deviate from the ECHR rights, so the interpretations ought to be of the new text,<sup>121</sup> with the old as a minimum standard to be maintained and built upon.

However, Article 53 CFREU does not necessarily ensure the most generous standard of fundamental rights protection available applies within the scope of EU law; a 'lower standards' interpretation as was considered by Peers, who favoured a 'higher standards' approach and suggested the former could lead to a potential 'breach of Member States' ECHR obligations'.<sup>122</sup> However, Article 53 CFREU states that nothing in the Charter shall restrict or adversely affect human rights and fundamental freedoms as recognised *in their respective fields of application* by EU law/international law/Member State constitutions.<sup>123</sup> Liisberg assumed that this provision was merely to reassure Member States that the Charter would not replace their national system of fundamental rights protection with an EU version.<sup>124</sup>

*Melloni* required the CJEU to consider this point.<sup>125</sup> The case was decided on the same day as *Fransson*, and concerned a European Arrest Warrant for Mr Melloni, who lived in Spain and had been sentenced to 10 years in prison *in absentia* in Italy for bankruptcy fraud. Italian sentences given in absence cannot be appealed against, but the Spanish Constitutional Court had established that the availability of review of the judgment rendered *in absentia* was a condition of surrender in the case of serious offences. Under the European Arrest Warrant Framework Decision Article 4a(1),<sup>126</sup> a different standard applied: as Mr Melloni had been represented in the hearings, his rights to a fair trial were not infringed under the European standard.

In *Melloni*, the CJEU had to determine whether Spanish law was able to add a condition of appeal to the EAW criteria, or whether the lower standard of protection should apply. The CJEU stated that "It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national

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<sup>121</sup> Clare McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?' (2001) 26 *European Law Review* 582, 584

<sup>122</sup> Steve Peers, 'Taking Rights Away? Limitations and Derogations' in Steve Peers and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2004) 164-5

<sup>123</sup> Article 53 CFREU

<sup>124</sup> Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 *Common Market Law Review* 1171, 1181

<sup>125</sup> *Melloni*, n81 above

<sup>126</sup> Inserted by Council Framework Decision 2009/299 JHA *OJ L 81*, 26.2.2009, 24-36

authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.”<sup>127</sup> While the uniformity of EU law is indeed important, it is striking that it cannot allow Member States to follow their own constitutional traditions in relation to when and what fundamental rights protections they require. The Opinion of AG Bot<sup>128</sup> reached the same conclusions as the Court, but de Boer criticised the Opinion for essentially conflating the application of Articles 51 and 53 CFREU-<sup>129</sup> which should not be correct. The CJEU focussed on primacy rather than the clause ‘their respective fields of application’ which in turn is problematic: enforcing the lowest standard of rights protection over higher standards goes against the Court’s general principles approach, though in relation to the EAW it makes practical sense.

In relation to free movement law, the EU has permitted Member States to be more generous towards Union citizens – for example in relation to the possible derogation in respect of access to benefits in Article 24(2) of Directive 2004/38 – these are restrictions which Member States may adopt, and the phraseology reflects this: “the host Member State shall not be obliged to confer entitlement...” rather than ‘the Member State must not confer entitlement’. Obviously, this has the potential to lead to a lack of uniformity across the Member States if some choose not to derogate from the right to equal treatment, but the aims of the Directive – to facilitate the exercise of the right of free movement and residence<sup>130</sup> are adhered to. The difference in Article 53 CFREU is the focus upon primacy: unity is a valued characteristic, and, particularly in relation to the EAW, one standard should logically be applied.

The application of *Melloni* alongside the Treaty obligation under Article 4(2) TEU to respect the equality of Member States before the Treaties “as well as their national identities, inherent in their fundamental structures, political and constitutional”<sup>131</sup> will potentially be of interest in the developing application of the Charter’s standards of fundamental rights protection. As the Court has not yet applied the Article 7 CFREU to family life to cases involving Union citizens, it is not appropriate for speculation on

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<sup>127</sup> *Melloni*, n81 above, para 60

<sup>128</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, Opinion of Advocate General Bot, delivered on 2 October 2012

<sup>129</sup> Nik de Boer, 'Case Comment: Addressing rights divergences under the Charter: Melloni' (2013) 50 *Common Market Law Review* 1083, 1093

<sup>130</sup> Preamble of Directive 2004/38, para 4

<sup>131</sup> Article 4(2) TEU

their scope here. However, the limitations in Article 53 CFREU potentially reduce the importance of a lack of reliance on the Charter by the CJEU in *Ruiz Zambrano*: had the Court determined a certain fundamental rights principle was applicable – such as the availability of another country in which the family could reside, i.e. any other Member State or a state outside of the EU, the potential rights of the family under the Charter may have been less than those recognised in reliance upon Article 20 TFEU, so the Charter may not have strengthened the family’s stance. Obviously, this is speculation as the Court did not engage with the Charter and instead relied solely upon Article 20 TFEU, but future cases involving residence rights and the Charter will hopefully illuminate any potential for residence rights protection under the EU’s new fundamental rights legislation.

### **b. Application of the Charter in the UK**

As this thesis is exploring the scope of the implementation of rights to family life in practice within the UK as well as being concerned with theoretical developments, it is appropriate to consider how the Charter is approached in the UK. In *Zagorski*,<sup>132</sup> the High Court recently considered the effect of the Charter within the UK. The case involved an application for judicial review against the Secretary of State for Business, Innovation and Skills brought by Texan death row inmates awaiting execution for the Secretary of State refusing to impose a control on the export of Sodium Thiopental from the UK to the USA. The drug was the anaesthetic used prior to the lethal injections in the Texan executions. Despite the High Court finding that the situation was one in which the UK was implementing EU law,<sup>133</sup> the court did not find that the Charter conferred any rights upon the Claimants – it did not provide protection beyond those found in the ECHR, which were also not applicable.<sup>134</sup> The High Court did not go beyond its interpretative obligations in relation to the Charter, and its approach in *Zagorski* was later echoed by the UK Supreme Court.<sup>135</sup>

However, the Charter’s current legal status and effect within Member States is not widely appreciated within the UK - even amongst members of the UK judiciary - as

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<sup>132</sup> *R (on the application of Zagorski and Baze) v Secretary of State for Business, Innovation and Skills and Archimedes Pharma UK Ltd* [2010] EWHC 3110 (Admin)

<sup>133</sup> *ibid* paras 70-71

<sup>134</sup> *ibid* para 74

<sup>135</sup> *The Rugby Football Union (Respondent) v Consolidated Information Services Limited (Formerly Viagogo Limited)* [2012] UKSC 55, para 28



demonstrated in the recently decided High Court case of *AB*,<sup>136</sup> where Mr Justice Mostyn expressed surprise that the Charter had been referred to by counsel:

“When I read this in the skeleton argument on his behalf I was surprised, to say the least, as I was sure that the British government (along with the Polish government) had secured at the negotiations of the Lisbon Treaty an opt-out from the incorporation of the Charter into EU law and thereby via operation of the European Communities Act 1972 directly into our domestic law.”<sup>137</sup>

It is clear that the UK courts do not have a uniform understanding of the status of the Charter of Fundamental Rights, and its status and scope must be clarified in order to ensure the uniform application of the Charter’s protections.

The legal effect of Protocol 30<sup>138</sup> required clarification to promote consistency and develop understanding within the UK. Though some hailed it as an ‘opt out’ clause, and, according to Mostyn, it being “absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our domestic courts”,<sup>139</sup> the Protocol is properly read as a clarification/repetition of Article 51(2) CFREU that the Charter is not to extend EU competences. In *Saeedi v Secretary of State for the Home Department*, Mr Justice Cranston held that, given the wording of the Polish and United Kingdom Protocol the Charter “cannot be directly relied on as against the United Kingdom, although it is an indirect influence as an aid to interpretation”.<sup>140</sup> The approach taken by Cranston was not correct: and the Secretary of State did not seek to support the finding before the Court of Appeal. When the case was referred to the CJEU to become *NS*,<sup>141</sup> the CJEU demonstrated the correct application of the protocol. As Denman contended, though the Protocol was addressed to the UK and Poland, its contents are of general application – it does no more than set out some implications of the way the Charter will take effect.<sup>142</sup>

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<sup>136</sup> *R (on the application of AB) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin)

<sup>137</sup> *ibid* para 10

<sup>138</sup> Protocol 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom *OJ C* 83, 30/3/2010, 313-314

<sup>139</sup> *R (on the application of AB) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin), para 12

<sup>140</sup> *R (on the application of Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin) para 155

<sup>141</sup> Joined Cases C 411/10 and C 493/10 *NS v Secretary of State for the Home Department and ME*, Judgment of the Court, 21 December 2011, nyr

<sup>142</sup> Daniel Denman, 'The Charter of Fundamental Rights' [2010] *European Human Rights Law Review* 349, 355

In *NS*,<sup>143</sup> the CJEU made clear that Protocol 30 “explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.”<sup>144</sup> The case also illustrated ‘challenges’ in the CJEU applying fundamental rights law to cases before it: Carrera, de Somer and Petkova highlight these as ensuring alignment with Strasbourg decisions to avoid overriding the *Bosphorus* doctrine, the issue of non-state third parties before the CJEU, and divergences in national rules across Member States.<sup>145</sup> De Búrca considered that the combination of the binding force of the Charter of Fundamental Rights, in combination with the expanding scope of EU competences “heralds a growing role for the Court as a human rights tribunal”<sup>146</sup> and this role is being recognised by the UK courts, though greater clarity in CJEU decisions and reasoning behind finding links to EU law would be of benefit. CJEU case law requires adherence by national courts, and, other than misunderstanding the legal status of the Charter and Protocol 30, the approach of the UK courts has not been contrary to that of the CJEU. The approach of the courts, however, is not the entire story in relation to the UK’s implementation of the EU’s increased fundamental rights protection: the UK executive is also an important actor and must be mentioned in relation to implementation.

### **c. Approach of the UK government**

In October, the UK issued a ‘Review of the Balance of Competences in relation to Fundamental Rights Law’, calling for evidence with a January 2014 deadline.<sup>147</sup> When the results are published, it is to be hoped that the Review will lead to more widespread recognition that the UK has obligations under this Charter and that the Charter has effect only when the UK is implementing EU law, rather than as an all encompassing source of rights. However, the government is mounting a challenge to the implementation of Charter rights within the UK. This challenge is in the form of

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<sup>143</sup> *NS*, n142 above

<sup>144</sup> *ibid* para 120

<sup>145</sup> Discussed in Sergio Carrera, Marie De Somer and Bilyana Petkova, ‘The Court of Justice of the European Union as a Fundamental Rights Tribunal Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice’ in CEPS (2012) 49 *Justice and Home Affairs Liberty and Security in Europe Papers*

<sup>146</sup> de Búrca, n55 above, 170

<sup>147</sup> Ministry of Justice, ‘Review of the Balance of Competences: Call for Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights’ 21 October 2013 at [https://consult.justice.gov.uk/digital-communications/boc-fundamental-rights-review/supporting\\_documents/fundamentalrightscallforevidence.pdf](https://consult.justice.gov.uk/digital-communications/boc-fundamental-rights-review/supporting_documents/fundamentalrightscallforevidence.pdf) last accessed 26 February 2014

an appeal against the Employment Appeal Tribunal (EAT) decision in *Benkharbouche*,<sup>148</sup> which was decided by Mr Justice Langstaff, President of the EAT.

The appeals to the EAT considered whether a cook and member of domestic staff employed in the UK by foreign diplomatic missions could bring an employment claim for unfair dismissal against the foreign countries whose mission it was, despite being met by an assertion of State Immunity under the State Immunity Act 1978.<sup>149</sup> Neither foreign state was an EU Member State, nor were the employees EU citizens. The EAT regarded itself bound by the supremacy of EU law and the directly effective Charter rights to disapply the State Immunity Act, despite having no jurisdiction to do so under the Human Rights Act 1998.<sup>150</sup> The Tribunal were not bound to apply human rights law against the effect of the State Immunity Act under domestic law, simply because Section 3(2)(b) of the HRA makes it clear that the Tribunal's interpretation under that Act does not affect "the validity, continuing operation or enforcement of any incompatible primary legislation".

The European Court of Human Rights had explored the inter-relationship of State Immunity and Article 6 ECHR in *Fogarty v United Kingdom*.<sup>151</sup> In that case state immunity was considered by the Strasbourg Court to be a proportionate and therefore justifiable limitation on the Article 6 rights of the applicants concerned, so the EAT in *Benkharbouche* were not following ECtHR case law in the decision. The Charter, rather than the ECHR, was the most useful source of rights for the appellants – its Article 47 recognising the same principle as Article 6 ECHR, which had no direct effect within the UK. The Charter, however, creates directly effective rights when the UK acts within the scope of EU law.<sup>152</sup> The situation was held to fall within that scope, and so the Charter was applicable. The effect of the Charter was that the provisions of the State Immunity Act which would otherwise have rendered the employment law claims by the staff inadmissible were disapplied, as provisions of domestic law which conflict with general principles of EU law must be disapplied where the substantive rights in issue fall within the material scope of EU law: UK courts must disapply a provision of domestic law which stands in its way, regardless of

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<sup>148</sup> *Benkharbouche v Embassy of the Republic of Sudan (Jurisdictional Points: State Immunity)* [2013] UKEAT 0401

<sup>149</sup> State Immunity Act 1978 (Chapter 33)

<sup>150</sup> Human Rights Act 1998 (Chapter 42)

<sup>151</sup> *Fogarty v The United Kingdom* (Application No 37112/97) (2002) 34 EHRR 12, paras 35-37

<sup>152</sup> *The Rugby Football Union (Respondent) v Consolidated Information Services Limited (Formerly Viagogo Limited)* [2012] UKSC 55, paras 26-28

whether the dispute takes place between private persons. Langstaff ruled that the obligation is limited to the material scope of EU law, i.e. rights under statutory provisions which implement Directives or Regulations, rather than employment rights in general.<sup>153</sup>

Given the ramifications of the *Benkharbouche* decision, both parties were given permission to appeal. This case clearly demonstrates the potential of the Charter: it gave individuals rights which they did not have otherwise and meant that primary UK law can be disapplied in order to ensure compliance with the Charter. The Charter's strength in relation to domestic UK law is particularly apparent: as the ECHR is not directly effective within the UK,<sup>154</sup> the Charter has filled a gap in human rights protection when situations fall within the scope of EU law. Another notable omission in fundamental rights law development is the inconsistency of all Member States being signatories to the ECHR but this not being binding upon the EU. This is the subject of the next section.

#### **4. Commitment to Accession to the European Convention on Human Rights**

The Article 6(2) TEU pledge of accession to the ECHR is groundbreaking: the EU will be the first non-Member State to sign up to the ECHR. However, the impact of accession is likely to be minimal, at least in the short term; given that the institutions of the EU are already subject to the jurisprudence of the Court of Justice, which, as Lasser highlighted,<sup>155</sup> has been greatly influenced in its development by the European Court of Human Rights in Strasbourg, accession is unlikely to make many immediate substantive changes to the law. Former Advocate General Jacobs noted:

“The ECJ has treated what is perhaps the most fundamental treaty in Europe, the European Convention on Human Rights, as if it were binding upon the Community, and has followed scrupulously the case law of the European Court of Human Rights, even though the European Union itself is not a party to the Convention.”<sup>156</sup>

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<sup>153</sup> *Benkharbouche v Embassy of the Republic of Sudan (Jurisdictional Points: State Immunity)* [2013] UKEAT 0401, para 56

<sup>154</sup> It is instead given effect by the Human Rights Act 1998

<sup>155</sup> Mitchel de S.-O.-L'E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press, 2009) 205

<sup>156</sup> Francis G. Jacobs, *The Sovereignty of Law* (Cambridge University Press 2007) 54-55

This approach of the CJEU means that its interpretation of Convention rights should be largely unchanged by accession, save as to where a more generous approach is deemed appropriate under the Charter.

Gragl discussed at length the influence of the ECtHR upon the development of EU fundamental rights protection, highlighting the key problem the EU faced: “neither court had the legal competence to protect human rights at EU level.”<sup>157</sup> The CJEU and ECtHR have an overlapping scope *ratione personae* yet neither was able to dictate how fundamental rights law should be interpreted within the EU until the Charter of Fundamental Rights gained binding status with the Lisbon Treaty. Accession further provides a solution to the key problem of lack of comp. So far, the EU has not acceded to the ECHR, but has finalised an Agreement on EU Accession.<sup>158</sup>

This Agreement’s compatibility with the Treaties is not certain: the European Commission requested that the CJEU give an opinion on compatibility.<sup>159</sup> The Opinion is still in progress; when it is given, the CJEU will determine the Agreement’s compatibility under Article 218(11) TFEU, which states that if the CJEU does not find the agreement is compatible it may not enter into force without amendment or Treaty revision. The Accession Agreement<sup>160</sup> paves the way for the ECHR to have a new legal status in the EU:<sup>161</sup> Gragl discussed how, following settled case law,<sup>162</sup> international agreements rank between primary and secondary EU law,<sup>163</sup> thus, the Convention will be binding on the EU and its institutions both internally and externally, and will enjoy supremacy over the Member States’ legal orders.<sup>164</sup>

Gragl suggested that, “as emphasized by the ECJ itself in its Opinion 2/94... a “constitutional” rank for the Convention would have been more appropriate than

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<sup>157</sup> Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 52

<sup>158</sup> European Commission and Council of Europe ‘Fifth Negotiation Meeting Between The CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Strasbourg, 3-5 April 2013 Final report to the CDDH’, 47+1(2013)008rev2, 10 June 2013 [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) last accessed 26 February 2014

<sup>159</sup> Opinion 2/13 – in progress

<sup>160</sup> Discussed in Paul Gragl, ‘A Giant Leap for European Human Rights? The Final Agreement on the European Union’s Accession to the European Convention on Human Rights’ (2014) 51 *Common Market Law Review* 13

<sup>161</sup> The negotiation process was discussed by Tobias Lock, ‘End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR’ (2012) 31 *Yearbook of European Law* 162

<sup>162</sup> Case C-61/94 *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989, para 52

<sup>163</sup> Gragl, n160 above, 21-22

<sup>164</sup> *ibid* 21

simply labelling the Convention as a mere international agreement.”<sup>165</sup> As Convention rights form EU general principles of law, and are already a substantial and integral part of EU law, accession to the Convention will not be like the EU signing up to a new international agreement which would require significant change and disruption. As such, the level of legal recognition accorded to the Convention should not be of huge importance: the general principles theory relies upon the Charter for inspiration, the Charter of Fundamental Rights refers to it, CJEU case law makes reference to it, and Member States are already signatories. While it may not be on par with Primary EU legislation in a legal sense, in the constitutional reality of the EU and how all parties will approach it, the Convention is very much a Primary source of rights for the citizens of the EU.

Nonetheless, the way the Charter and Convention will interact is open to interpretation. The Charter will be on a higher plane than the Convention,<sup>166</sup> though the latter arguably forms the basis of the Charter and much of the general principles doctrine developed by the Court. However, through accession, the EU will be able to be held to account by the Strasbourg court. As such, the importance of the prior involvement mechanism<sup>167</sup> is particularly great for the CJEU, as a method of ensuring that the Court remains the ultimate interpreter of EU law, and the Strasbourg court is not asked to adjudicate on EU law without Luxembourg having been referred to. The CJEU would not wish to be excluded from adjudicating over questions of EU law, or to be forced to apply the Strasbourg approach without having been asked where questions turn on EU law.

While Williams criticised the EU’s focus in relation to improving human rights being on structural and practical reform, rather than “re-evaluating its principled foundations”,<sup>168</sup> in a sense the EU has created its own principles over many years and recognised those of Member States, so there is no need to start afresh: the rights it

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<sup>165</sup> *ibid*

<sup>166</sup> Discussed in Georgios Anagnostaras, 'Case Comment: Balancing Conflicting Fundamental Rights: The Sky Osterreich Paradigm' (2014) 39 *European Law Review* 111, 124 "It seems to confirm that the Court reserves for itself the final word as concerns the level of rights protection under the Charter, at the expense of national constitutional courts and their understanding of the relevant national standards of fundamental rights protection. It thus provides further evidence that the Charter is the main legal arena in which the battle over judicial supremacy is currently taking place, as the interpretation of its provisions tests the reflexes and the tolerance of national constitutional courts still further"

<sup>167</sup> Discussed by Roberto Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50 *Common Market Law Review* 1305

<sup>168</sup> Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy' (2013) 24 *European Journal of International Law* 1157, 1159

advances are mature and fit for purpose. The Charter does not match Convention rights word for word, and has updated them where appropriate. Accession marks a structural change, but also a fundamental one: no more will the possibility for the anomalous case to occur where EU institutions can act incompatibly with fundamental rights principles while Member States are bound. As the EU institutions are powerful and influence the lives of EU citizens and third-country nationals within the EU, this is certainly a positive step towards fundamental rights protection.

The effect of Article 53 ECHR is very different from Article 53 CFREU; the former acts as a ‘safeguard for existing human rights’, ensuring that nothing in the Convention shall limit or derogate from human rights and fundamental freedoms otherwise protected. This means that, outside the scope of the Charter, the ECHR ensures that it is always the minimum standard to be applied: it never sets a maximum or rigid level of protection which is deemed to be appropriate. This reflects the differences in the scope of the Charter and Convention, and also that the EU is not a human rights organisation: it requires uniformity of its laws, thus ever increasing fundamental rights protection for individuals which may interfere with uniformity cannot be permitted.

## **5. Conclusions**

The CJEU made inroads into providing human rights protection in case law long before legislative action was taken by the Community which provided the foundations for later developments. The general principles theory developed by the Court still serves to inform decisions it takes and those of national courts: this is where the CJEU showed its activism in relation to fundamental rights. The general principles theory strengthened the rights of Union citizens and their families, and, through the development of fundamental rights principles, the EU signified a move away from emphasising economic factors above all else – families became more than consumers and were able to be “recognised as persons in their own right and granted rights on their own terms.”<sup>169</sup>

The promise of EU accession had a long gestation period, and the Charter of Fundamental Rights pre-dates the accession pledge, adding an additional layer of protection for individuals when Member States are acting within the scope of EU law.

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<sup>169</sup> Clare McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?' (2001) 26 *European Law Review* 582, 586

While the Charter aimed to make citizens' rights more visible, its status was somewhat unclear initially: it was a 'solemn political declaration', and not incorporated in a Treaty, which Picard saw as vital to making rights more visible.<sup>170</sup> With the Lisbon amendments, the Charter gained equal Treaty status, and thus the improved visibility of rights came with an additional enforceability: indeed, it fundamentally changed the "situation regarding protection" of human rights within the EU.<sup>171</sup>

Determining when the Charter applies has been complex: in borderline situations, the Court has found links to EU law which the Advocate General giving the Opinion did not recognise,<sup>172</sup> but failed to acknowledge where fundamental rights potential has been raised in other cases.<sup>173</sup> The consistency which must be hoped for in the future is currently lacking. The potential for developing sound links in 'citizenship' cases has not yet been realised: in relation to rights to family reunification, the Charter has added little as yet. The CJEU has seemed unwilling to take the next (not-inevitable) step<sup>174</sup> to link the Charter of the EU with its people in their 'fundamental status' as citizens of the Union. While the Charter has not been recognised as representing one of the 'fundamental rights' of Union citizens with which there can be no interference,<sup>175</sup> it does not seem impossible for the Court to rely upon Union citizenship as a link to EU law in certain circumstances, as in *Martínez Sala*,<sup>176</sup> or *Carpenter*,<sup>177</sup> and then consider the application of the Charter as an additional element relevant to Union citizens' lives with their families. This is the approach in UK courts, and *Ruiz Zambrano* would have been far simpler with fundamental rights considerations.

Where the Charter has been applicable, it has not applied the highest standards of rights protection, so *Ruiz Zambrano* could have been significantly more generous than the CJEU would have been under the Charter. The difficulty highlighted in the *Melloni* decision in relation to the level of protection to be applied means that,

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<sup>170</sup> Severine Picard, 'The Constitutional Treaty: Towards a European Citizenship for Third Country Nationals?' (2005) 1 *Journal of Contemporary European Research* 73, 77

<sup>171</sup> Wolfgang Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon' (2011) 7 *European Constitutional Law Review* 64

<sup>172</sup> *Fransson*, n80 above

<sup>173</sup> *Ruiz Zambrano*, n7 above

<sup>174</sup> This could be a small step in that the CJEU has developed more complex doctrine in relation to Union citizenship and has already established 'links' to Union law where none were apparent following a traditional analysis, yet conversely it appears a huge step in that it could effectively abolish the purely internal rule, though the doctrine allowing links in certain circumstances could be carefully limited, like *Ruiz Zambrano* itself.

<sup>175</sup> *Ruiz Zambrano*, n7 above

<sup>176</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-02691

<sup>177</sup> *Carpenter*, n78 above



potentially, concerns that the Charter may extend the scope of fundamental rights protection and constrain Member States is misplaced.<sup>178</sup> Instead, it is seemingly the higher standards of protection which may be at risk, if a specified and certain EU level of rights protection is required to ensure uniformity of the EU law in question. There have not been sufficient examples of reliance upon the Charter to establish whether this is likely to occur often: arguably, the right to fair trial arguments in relation to the European Arrest Warrant Framework were unique in that Member States could become safe havens for wanted criminals should they offer a higher standard of protection, as Spain would have done under its constitutional law. In relation to rights to family reunification, such issues are unlikely to be relevant, families are unlikely to rush to Member States with slightly better protection of the fundamental right to family life: this would not make sense as the right depends on the background of the family and their ties to a given state.

The Charter had something of an acrimonious beginning in the UK, being derided as without any effect<sup>179</sup> or of any great importance. Following Lisbon, however, the UK courts have taken varying approaches: some failed to note the Charter's binding force or that Protocol 30 was not an 'opt out' protocol at all,<sup>180</sup> while others recognised the potential of the Charter<sup>181</sup> and some actually used it to great effect – to actually disapply national law in order to respect Charter rights.<sup>182</sup> The High Court reference to the CJEU leading to the *NS*<sup>183</sup> decision meant that the status of Protocol 30 has been considered by the Court, and now must be followed by domestic courts. The impact of the Charter in the employment matter in *Benkharbouche* where domestic legislation was disapplied was opposed by the Secretary of State so has been appealed but the appeal has not yet been decided.

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<sup>178</sup> *Melloni*, n81 above

<sup>179</sup> Reported in George Jones and Ambrose Evans Pritchard, 'European Summit Charter on Rights 'no more binding than the Beano' at <http://www.telegraph.co.uk/news/worldnews/europe/1370340/European-summit-Charter-on-rights-no-more-binding-than-the-Beano.html> last accessed 23 February 2014 and discussed in Kieron Beal and Tom Hickman, 'Beano No More: The EU Charter of Rights After Lisbon' (2011) 16 *Judicial Review* 113

<sup>180</sup> *R (on the application of AB) v Secretary of State for the Home Department*, [2013] EWHC 3453 (Admin); *R (on the application of Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin)

<sup>181</sup> *R (on the application of Zagorski and Baze) v Secretary of State for Business, Innovation and Skills and Archimedes Pharma UK Ltd* [2010] EWHC 3110 (Admin)

<sup>182</sup> *Benkharbouche v Embassy of the Republic of Sudan (Jurisdictional Points: State Immunity)* [2013] UKEAT 0401

<sup>183</sup> *NS*, n142 above

EU accession to the ECHR will further cement the principles which have been enshrined as general principles of law and also through the Charter. As Former AG Jacobs said: “Informed opinion regards the Convention system as an unprecedentedly effective system for the collective enforcement of human rights in Europe, and indeed as a model for the world.”<sup>184</sup> Jacobs’ argument is far stronger than Williams’ criticism of the lack of principled reform,<sup>185</sup> and the CJEU has done a great deal to develop the idea of Union citizens as rights holding citizens, and to link fundamental rights protections with free movement rights. The extent to which this has been achieved, or is achievable, in relation to Union citizens’ family members’ rights to reside still holds potential for the future.

Currently, the Charter has not strengthened Union citizens’ rights to reside within the UK, or any other Member State. Union citizens falling outside of the scope of Directive 2004/38 are more likely to be able to rely upon residence rights from the Treaty than the Charter. This is for two reasons: showing that a Member State is implementing EU law when the Union citizen has not fallen within the scope of the Directive is difficult to show, in addition to the low minimum standard for Article 8 ECHR protection as developed by the ECtHR. Thus, while the CFREU is of symbolic importance for the EU, it has not been linked to protecting the family life or movement of its citizens, which is a missed opportunity.

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<sup>184</sup> Francis G. Jacobs, *The Sovereignty of Law* (Cambridge University Press 2007) 34

<sup>185</sup> Andrew Williams, ‘The European Convention on Human Rights, the EU and the UK: Confronting a Heresy’ (2013) 24 *European Journal of International Law* 1157

## Chapter Seven

### Union Citizenship and Residence Rights as Interpreted by the CJEU and applied within the UK

The influence of the CJEU on the development of Union citizenship is huge: with *Martínez Sala*,<sup>1</sup> the Court made the status meaningful, and it later engaged with Union citizenship's potential much more fully so as to make it a truly 'fundamental status' of Union citizens.<sup>2</sup> Nowhere has this been more apparent than in *Ruiz Zambrano*,<sup>3</sup> where there had been no cross-border movement or trigger of EU law, and the 'genuine enjoyment' of the fundamental rights of two young Union citizens sufficed to bring the residency of their parents within the scope of EU law.

The status of Union citizenship is undeniably constitutionally important: it effected changes in the judicial approach to ascertaining the rights of individuals within the EU, and has reduced the need for a 'market' link, or economic activity within another Member State. Spaventa observed that "free movement and Union citizenship rights are a vehicle to assert individual rights which do not necessarily have a clear connection with market integration",<sup>4</sup> and this is how Union citizens' rights of residence have grown, in substance and in relevance. Through the Court's expansive approach to determining their rights, Union citizens have been able to rely upon EU rights of residence in their state of origin, and to enable family members to move with them. This holds great potential for UK citizens, who face restrictive national laws for TCN family reunification where there is no link to EU law. This short chapter emphasises the importance of two developments in relation to family reunification under EU law: the Court's impact on the purely internal rule, and the introduction of EU fundamental rights legislation.

#### 1. The purely internal rule – time to move on?<sup>5</sup>

The CJEU's decisions have not been 'neatly linear',<sup>6</sup> and this chapter outlines that the activism that was once applied in relation to forging the concept of Union citizenship

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<sup>1</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-02691

<sup>2</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82; Case C-135/08 *Rottmann* [2010] ECR I-1449, para 43

<sup>3</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177

<sup>4</sup> Eleanor Spaventa, *Free movement of persons in the European Union: Barriers to Movement in their Constitutional Context* (Kluwer Law International 2007)

<sup>5</sup> Sub-title borrowed from Niamh Nic Shuibhne, 'Free movement of persons and the wholly internal rule: Time to move on?' (2002) 39 *Common Market Law Review* 731

lives on, albeit in more nuanced ways than previously. While *Förster* signified the end of the Court's most expansive decisions, and perhaps its willingness and ability to help Union citizens as it pleased,<sup>7</sup> the decision related to what may be termed an 'ancillary' right – that of access to maintenance grants - rather than a fundamental freedom under the Treaty. Its continuing expansive approach in relation to 'primary' rights is evidenced in the return cases, which have growing significance and application within the UK.<sup>8</sup>

Discussing *Carpenter*,<sup>9</sup> Guild contended that only Mr Carpenter's capacity as an "economic actor" could give him the result he wanted: the residency of his wife in the UK.<sup>10</sup> At the time *Carpenter* was decided, she was correct. Requiring an economic link to Treaty freedoms had an enduring hold,<sup>11</sup> but the Court broke from its shackles and moved on from this economic link in *O and B*,<sup>12</sup> a very recent decision which brought family life to the heart of Union citizenship law. In this decision, the Court emphasised that the reason for which residence rights of TCNs may be derived from Article 21(1) TFEU was the fact that a refusal to allow such a right of residence would interfere with the Union citizen's freedom of movement by discouraging him/her from exercising rights of entry into and residence within the host Member State. The Court determined that this was capable of extension to family members of Union citizens who had resided in another Member State exercising rights under Article 21(1) TFEU,<sup>13</sup> rather than simply to family members of workers or the self-employed. The reason for this was that the obstacle to be removed – the genuine deterrence of a Union citizen exercising their rights to free movement - was the same, whichever Treaty freedom was exercised.

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<sup>6</sup> Michael Dougan, 'Judicial activism or constitutional interaction? Policymaking by the ECJ in the field of Union citizenship' in Hans W. Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) 112

<sup>7</sup> Case C-158/07 *Förster* [2008] ECR I-08507

<sup>8</sup> Case C-370/90 *Surinder Singh* [1992] ECR I-04265; Case C-291/05 *Eind* [2007] ECR I-10719; Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Judgment of the Court, 12 March 2014, nyr; Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G*, Judgment of the Court, 12 March 2014, nyr, para 34

<sup>9</sup> Case C-60/00 *Carpenter* [2002] ECR I-06279

<sup>10</sup> Elspeth Guild, 'Developing European Citizenship or Discarding It? Multicultural Citizenship Theory in Light of the *Carpenter* Judgment of the European Court of Justice' (2003) 12 *The Good Society* 22, 24

<sup>11</sup> Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597

<sup>12</sup> *O and B*, n8 above, discussed in Maria Haag, 'O and B – S and G: Third-Country National Family Members and Derived Residency Rights at Home' on the Durham European Law Institute blog, 2014 at <http://delilawblog.wordpress.com/2014/03/26/o-and-b-s-and-g-third-country-national-family-members-and-derived-residency-rights-at-home/> last accessed 29 March 2014

<sup>13</sup> *O and B*, n8 above, para 49

This is hugely important in escaping the ‘Maastricht’ approach of market-focus: the CJEU respected the residence and movement of a family to another Member State, the (lack of) economic activity was irrelevant to the rights of the Union citizen. This does not mean that Union citizens can go on holiday to another Member State then return with TCN family members able to reside in their state of origin; the Court emphasised that the Union citizen and TCN family member’s residence in the host Member State must have been ‘sufficiently genuine’ so as to count as family life, and gave the decision certainty by considering the provisions of residence under Directive 2004/38.<sup>14</sup> In doing so, it took up AG Sharpston’s call to provide clarification as to the circumstances in which rights of residence may be derived from Article 21(1) TFEU,<sup>15</sup> and made the decision relatively straightforward for Member States to understand. The Court observed that residence under Article 6(1) Directive 2004/38 (residence for up to three months) does not demonstrate an attempt to create or strengthen family life in the host Member State, so residence of family members following Article 6 residence in another Member State would not have to be granted in the home Member State; Article 16 Directive 2004/38 permanent residence would demonstrate genuine residence and genuine family life if this had been with the family member, and residence under Article 7 may demonstrate genuine enjoyment of Article 21(1) TFEU rights too.

The focus in *O and B* was to protect genuine family life which has been ‘created or strengthened’ within the host Member State and to prevent the refusal of residence rights for a family member restricting a Union citizen’s exercise of free movement rights.<sup>16</sup> While the assessment in relation to genuine family life in the host Member State is left to the national court, the CJEU outlined clearly how this should be approached, and emphasised that residence within the host state to create or strengthen family life must have been *as family members*, following Directive 2004/38’s definition of family member. This was to the detriment of Mr B, who married his

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<sup>14</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, 77–123

<sup>15</sup> Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie*, and Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie*, Opinion of Advocate General Sharpston, delivered on 12 December 2013, para 66

<sup>16</sup> *O and B*, n8 above, para 54

Dutch wife after she had resided in the host state with him, so they had not been residing together as family members during the relevant time.

This decision is a far cry from the judgment in *Ruiz Zambrano*,<sup>17</sup> which was incredibly short and left clarification of most of its meaning to later decisions,<sup>18</sup> so the Court is now, not only demonstrating that Union citizenship is capable of being the basis for rights of residence, but making clear when they apply.<sup>19</sup> While *Ruiz Zambrano* represents, and is likely to continue to represent, the most fundamental reliance on Union citizenship possible under EU law, *O and B*, in addition to *Surinder Singh* and the other return cases,<sup>20</sup> offers something more tangible to many Union citizens: a possibility to benefit from EU law in relation to the residence of their TCN family members at home. This is why the CJEU can still be seen as showing ‘activism’ in relation to Treaty rights – it extends them beyond what would have been expected, beyond the Treaty text. Thym suggests that the legal status of TCN family members “has become the new battleground,” or frontier, for the CJEU in its development of the concept of Union citizenship,<sup>21</sup> and this can certainly be sensed in the UK.

Even before *O and B* had been decided, the UK had restricted its rules in relation to return cases, introducing a ‘transfer of the centre of life’ test,<sup>22</sup> demonstrating the reluctance with which the UK can accept that movement with a consequence of improving immigration status can be genuine under EU law. Its approach in this respect is similar to its restrictive views in *Chen and Metock*,<sup>23</sup> which received short shrift from the CJEU, which confirmed that there was no abuse of law in the acquisition of Union citizenship through legal paths, and if reverse discrimination resulted from the recognition of rights of TCN family members in *Metock*, that was no

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<sup>17</sup> *Ruiz Zambrano*, n3 above

<sup>18</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375; Case C-256/11 *Dereci* [2011] ECR I-11315; Joined Cases C-356/11 and C-357/11, *O and S*, Judgment of the Court, 6 December 2012, nyr; Case C-86/12 *Alopa and Others*, Judgment of the Court, 10 October 2013, nyr

<sup>19</sup> Bobek thought the judgment was not devoid of ‘understandable reason’: Michal Bobek, ‘Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 207

<sup>20</sup> n8 above

<sup>21</sup> Daniel Thym, ‘Towards ‘Real’ Citizenship? The Judicial Construction of Union Citizenship and its Limits’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 165

<sup>22</sup> Regulation 9 of the Immigration (EEA) Regulations as amended by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013, 2013 No. 3032

<sup>23</sup> Case C-200/02 *Chen* [2004] ECR I-09925; Case C-127/08 *Metock* [2008] ECR I-06241

fault of the EU.<sup>24</sup> The UK is not alone in tightening its laws in order to reduce reliance of its nationals on EU rights: Germany, France and the Netherlands all have done so in some respects,<sup>25</sup> as has Ireland: there can be no more *Chen* cases,<sup>26</sup> since the *ius soli* principle no longer applies to acquisition of nationality. Though *Ruiz Zambrano* has an obviously limited scope, there were suggestions that it may have led to a tightening of acquisition of nationality laws, too, to prevent circumstances where residence has to be granted to families based on the Union citizenship of children who would have been otherwise stateless.<sup>27</sup> Sharpston referred to the development of ‘Fortress Europe’ as a “retrograde and reprehensible step— and one, moreover, that would be in clear contradiction to stated policy objectives.”<sup>28</sup>

All of the Member States’ reactionary and restrictive rules ensure that reverse discrimination lives on,<sup>29</sup> despite the Court’s engagement with the protection of Treaty rights meaning that, occasionally, UK nationals will be able to benefit from EU provisions within the UK.

## 2. The EU and Protection of Human Rights

The legislative incorporation<sup>30</sup> of human rights into EU law, alongside the development of ‘citizenship’ rights, led Craig to suggest that Union citizenship developed, becoming, in addition to a status of Member State nationals, “a label to describe the rights accorded by the Charter, which are then regarded as belonging to the EU citizen. The focus is no longer solely on fees, grants and so on, but on rights to family life and the like that are protected by the Charter and felt to be constitutive of

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<sup>24</sup> *Metock*, n23 above, paras 75-77

<sup>25</sup> Laura Block and Saskia Bonjour, ‘Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands’ (2013) 15 *European Journal of Migration and Law* 203

<sup>26</sup> *Chen*, n24 above

<sup>27</sup> Alicia Hinarejos, ‘Case Comment: Extending citizenship and the scope of EU law’ (2011) 70 *Cambridge Law Journal* 309, 312; Anja Lansbergen and Nina Miller, ‘European Citizenship Rights in Internal Situations: An Ambiguous Revolution?’ (2011) 7 *European Constitutional Law Review* 287, 303

<sup>28</sup> Advocate General Sharpston in her Opinion for Case C-34/09 *Ruiz Zambrano*, delivered on 30 September 2010, para 115

<sup>29</sup> Helen Oosterom-Staples, ‘To What Extent Has Reverse Discrimination Been Reversed?’ (2012) 14 *European Journal of Migration and Law* 151

<sup>30</sup> As opposed to judicial incorporation, or development, of rights, which we saw in cases such as Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, Case 4-73, *Nold*, [1974] ECR 491, etc, see discussion in J.H.H. Weiler, ‘Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order of the European Communities’ (1986) 61 *Washington Law Review* 1103.

the EU citizen.”<sup>31</sup> The use of Union citizenship as a vehicle to make human rights law more relevant to free movement considerations is fitting: ‘traditional’ notions of citizenship link citizens with rights, and protection against abuses of these rights by the state,<sup>32</sup> and Union citizenship, though not linked to a single state, has the potential to echo this.

As yet, the fundamental rights changes brought in by the Lisbon Treaty,<sup>33</sup> have not had their ‘citizenship’ moment: the Court has not linked protection of the rights of Union citizens categorically with the application of the Charter of Fundamental Rights,<sup>34</sup> nor has the Charter constituted some of the ‘substance of the rights’ of Union citizens, the breach of which enables a link to EU law where there was otherwise none.<sup>35</sup> While, obviously, any individual capable of relying upon the Charter may be a Union citizen, the potential to link the two concepts together in case law has not been reached. Using this as a criticism of the Court, however, neglects the fact that the CJEU almost singlehandedly brought to the EU such a high level of fundamental rights protection through its case law that the ‘increase’ of rights which the Charter represents should barely be noticeable. The protection of fundamental rights prior to Lisbon was “almost entirely the product of case law”,<sup>36</sup> and the lack of decisions relying upon the Charter since its introduction mean that its substantive addition to the body of human rights law in the EU is limited,<sup>37</sup> and can even reduce the rights available under national law.<sup>38</sup>

It is mostly for consistency and symbolism, then, that the linkage between the Charter and Union citizenship remains important: without such a link, the Court does not seem to want to unify two of its most central values: Union citizenship and fundamental rights remaining separate does not, from outside of the EU, seem to endow the ‘citizenship’ of the Union with the rights which would be expected. Union citizenship is entirely different from ‘normal’ national citizenship, and the Court’s development of the concept and of case law is not easily predicted. The extension of ‘citizenship’

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<sup>31</sup> Paul Craig, 'The ECJ and *Ultra Vires* Action: A Conceptual Analysis' (2011) 48 *Common Market Law Review* 395, 416

<sup>32</sup> See T.H. Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto Press 1992)

<sup>33</sup> Consolidated Version of the Treaty on European Union (TEU), *OJ C 83*, 30.3.2010, 13-46

<sup>34</sup> Charter of Fundamental Rights of the European Union, *OJ C 83/02*, 30.3.2010, 398-403

<sup>35</sup> *Ruiz Zambrano*, n3 above, para 42

<sup>36</sup> Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 298

<sup>37</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Judgment of the Court, 26 February 2013, nyr

<sup>38</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court, 26 February 2013, nyr



rights to TCNs in *Chakroun*<sup>39</sup> was not easy to anticipate, and is actually far more important than a symbolic linkage between Union citizenship and the Charter.

In *Chakroun*, the Court's reasoning followed that of *Metock*,<sup>40</sup> and emphasised the importance of individual assessments of cases, rather than the application of strict criteria brought in by Member States.<sup>41</sup> This type of assessment underscores the lack of appreciation for UK citizens' families which the UK Immigration Rules currently enforces. Where the CJEU applies proportionality in all it does, the UK Immigration Rules have already had this assessed by the Secretary of State, so the courts can do no more.<sup>42</sup> Reverse discrimination is easily apparent in the UK Immigration Rules, and Mr Justice Blake recognised this, relying upon EU case law to demonstrate how wholly disproportionate the rules were,<sup>43</sup> emphasising that the right of a Union citizen to reside in another Member State exercising Treaty rights 'can rank no higher in terms of constitutional significance than the infeasible right of the British national to reside in his or her own country' and that either right is equally interfered with by preventing the admission of a spouse.<sup>44</sup>

### 3. Conclusions

Rights to family reunification within EU Member States are complex: in the UK the parallel systems for Union citizens and UK nationals or TCNs cannot be entirely separate, as Article 20 TFEU states that UK citizens are Union citizens. Various links to EU law are discernible within the UK's Immigration Rules: as a spillover effect, EU law impacts upon the judicial reasoning and approach to the UK Immigration Rules, and, while the UK did not implement the Family Reunification Directive,<sup>45</sup> even *Chakroun*, a judgment based on its provisions in relation to TCN family reunification, has been relied upon in UK courts to demonstrate the disproportionate nature of the Immigration Rules.

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<sup>39</sup> Case C-578-08 *Chakroun* [2010] ECR I-1839

<sup>40</sup> *Metock*, n23 above

<sup>41</sup> *Chakroun*, n40 above, para 48

<sup>42</sup> Home Office, 'Statement of Intent: Family Migration' June 2012, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257359/soi-fam-mig.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf), last accessed 29 March 2014, paras 37-38

<sup>43</sup> *Carpenter*, n9 above and *Chakroun*, n40 above

<sup>44</sup> *MM, Abdul Majid, and Shabana Javed v Secretary of State for the Home Department* [2013] EWHC 1900 (Admin), para 106

<sup>45</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification *OJ L 251, 3.10.2003*, 12–18

It is not simply in the judicial approach to the Immigration Rules that an EU influence is discernible: as highlighted above, the UK has attempted to limit the *Surinder Singh* 'route' to immigration, so this way by which EU rights are able to apply within a Union citizen's state of origin is not only recognised by the UK, but feared, as something that can circumvent the restrictive provisions of the Immigration Rules, and also highlight to UK citizens that they are being (reverse) discriminated against within their home country. Weatherill suggested that the "Court's technique of legal reasoning is not quite as remarkable as one might think",<sup>46</sup> but in relation to families with no other option to achieve family life together than to move to another Member State then later return to the UK, the Court's approach is entirely remarkable, and links the genuine enjoyment of family life with that of exercising Treaty freedoms as a Union citizen.

While few Union citizens will be able to rely upon *Ruiz Zambrano*,<sup>47</sup> other EU rights of residence, such as those found in *Surinder Singh*,<sup>48</sup> offer hope to many families within the UK:<sup>49</sup> which is something the UK Immigration Rules cannot. This shows the fundamental status and fundamental importance of Union citizenship, and that the Court which moulded it can still help the needy.

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<sup>46</sup> Stephen Weatherill, 'Activism and restraint in the European Court of Justice' in Patrick Capps, Malcolm Evans, and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Approaches* (Hart 2003) 258

<sup>47</sup> *Ruiz Zambrano*, n3 above

<sup>48</sup> *Surinder Singh*, n8 above

<sup>49</sup> Catrin Nye, 'The Britons Leaving the UK to get their Relatives In' BBC 25 June 2013, at <http://www.bbc.co.uk/news/uk-23029195> last accessed 21 March 2014

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## **Legislation**

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