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FAMILY AS A BASIS OF RESIDENCE IN THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Master Thesis

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INTRODUCTION

This Thesis is related to the notion of family as a basis to reside within the territory of the European Union (EU). This research work gives a practice-based understanding on how the law of migration works in the broader European environment and provides the analysis of the case-law of the Court of Justice of the European Union (CJEU). In each part of the Thesis we will introduce actual cases in order to explain how the CJEU has used its powers to create and interpret EU law: an explanation of the actual impact of these decisions will be supported by relevant extracts from the Court's own judgments.

"The EU law grants Union citizens the right to reside in Member States other than their own and to bring various categories of family members with them".[1] Although, Directive 2004/38/EC (the Directive) on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, sets out in detail the categories of the family members who have the right of residency, not all family members are treated in the same way. Substantive requirements are being placed on them, for example, the family member can be asked to prove his relationship with the EU citizen. Moreover, the exercise of this right is subject to a number of important conditions. The recent CJEU's cases have recognised a right of residence for a family member, despite the fact that one or more of the conditions were not satisfied. In our Thesis we will try to reveal these conditions and explain why the Court did not take them into account when deciding on family unity cases. We will also provide the Courts interpretation on which family members are being recognised under EU law and have a right to remain within the Union.

Relevance of the topic: "Of all areas of the law, family law is perhaps the one where the need to respect human rights is the most important".[2] It seems relevant that in today's society the right to marry and to create family must be guaranteed. However, since the enlargement of EU in 2004 and 2007, a great number of people found difficulty in joining their family within EU territory. The enlargement of the EU provides reason for this Thesis as free movement of persons in the EU has proven to be a dynamic issue. The migrants' integration and quality of life, as well as their desire to move, would be much lessened if they had to leave their family behind. It is for this reason that Directive 2004/38/EC provided for rights for the workers' family, regardless of the nationality of the family member.[3] Despite the aim of the Directive to help

[1] The rationale of this right, as explained in the preamble of the Directive 2004/38 Recitals 5 and 6, is to enable *moving* EU citizen to be joined by his family and to facilitate the integration of that family into the host country

[2] Carsten Smith "Human Rights as a Foundation of Society" *in: Lodrup/MODVAR (Eds.), Family Life and human Rights*, 2004, p.15.

[3] 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, Articles 2 and 3.

family members to enjoy their right to family life[4], which is also implemented on the international level, on 10 December 2008, the Commission adopted its report[5] on the application of the Directive 2004/38/EC which presented a "[...] comprehensive overview of how the Directive is transposed into national law and how it is applied in everyday life [...]".[6] "The report concluded that the overall transposition of the Directive was rather disappointing".[7]

The case law of the CJEU determining the availability of family unity rights under the EU law, has changed significantly since the introduction of the notion of the European citizenship, which provided the right to free movement not only to workers, but to *all* European citizens.[8] Despite, the fact that the right to reside is enjoyed by greater number of the EU citizens and their families, it also brings new challenges for the CJEU while deciding on family unity cases. For example, can third country national (TCN) parent of the EU child enjoy a derivative right of residence analogous to that enjoyed by family members of adult migrants? The CJEU has been left with an opportunity to fill this gap. The great number of the CJEU jurisprudence in the field of migration is exactly about the right of free movement and the conditions attached to them which the citizens of the Union and their family members are entitled to use. We will try to indentify the frequent problems relating to the right of entry and residence of TCN family members of the EU citizens.

Originality of the topic. The majority of scholars write about EU citizens' right to free movement and his right to be joined by his family. Lyra Jakulevičienė analyzed main rules and principles of the free movement of persons in the European Union,[9] Laima Vaigė examined the problematic of recognition of same-sex marriages,[10] Alina Tryfonidou analyzed family reunification rights of (migrant) Union citizens[11], Iseult Honohan provided arguments for and against family reunification[12]. However, not much attention is being paid to the rights of

[4] Charter of Fundamental Rights of the European Union (*Official Journal of the European Union 30.3.2010, C 83-389*), Article 7; The European Convention on Human Rights, Council of Europe, Rome, 4 November 1950, Article 8.

[5] Report from the Commission to the European Parliament and the Council on the application of the 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. 10.12.2008, COM (2008) 840 final.

[6] *Ibid.*

[7] 2001/0111(COD) - 02/07/2009 Follow-up document, Union citizenship: free movement and residence for citizens and their families within the Member States' territory, European Parliament, Legislative Observatory.

[8] TFEU Article 20, 21 TEU Article

[9] Lyra Jakulevičienė „Case law of the CJEU and ECtHR in the field of migration and free movement in the European Union" *National Network Conference of the European Migration; European Case law in the Field of Legal Migration 24 October 2013, Riga*

[10] Laima Vaigė „The problematics of recognition of same-sex marriages originating from Member States according to the EU legal regulation (*Socialinių mokslų studijos, 2012, 4(2) p.755-775*)."

[11] Alina Tryfonidou "Family reunification rights of (migrant) union citizens: towards a more liberal approach" (*European Law Journal, 15 (5). pp. 634-653).*

[12] Iseult Honohan "Reconsidering the claim to family reunification in migration" (*Political Studies, Vol.57, No.4 2009 p. 768-787*).

particular TCN family members residing together with an EU citizen. Although, the categories of family members are described in the Directive 2004/38, their rights are treated not in the same way. Moreover, the situation of persons who do not fall under the definition of family member under the Directive should be examined under the Member States national legislation. This Thesis is novel because scholars often focus only on the European Union citizen and his right to free movement. However we decided to focus on *family members* who can accompany and join him.

Utility of the topic. When the CJEU analyzes cases concerning family unity, the argumentation provided by the Court, of whether TCN family member may reside within the Unions' territory, varies from the interpretation of the notion of the *specific* family member. In a situation when neither Treaty, nor secondary legislation do not confer a right of residence to TCN family members, the CJEU infers this right through the use of the *right to family life*. However, the right to respect for family life appeared to be not sufficient by itself to bring the case within the scope of EU law.[13] The CJEU jurisprudence is very unclear on this matter. For example, the TCN parents have a right to remain together with their *static* EU minor child,[14]on the other hand this right cannot be enjoyed by the TCN spouse of the *static* EU citizen.[15] The EU minor child and EU adult spouse are EU citizens; their family members are TCNs, the reason why the Court protects the right to family life of only one but not both families remains unclear. The Court frequently states, that the obstacles which would prevent the free movement of persons, should be abolished. However, its own case-law became difficult to reconcile with explicit conditions figuring in recent secondary EU legislation.[16] We may presume that the Court itself creates the obstacles for the family members. Still, we will try to provide the criteria which are being used by the Court in the context of family unity cases, paying more attention to criteria applied to the rights of family members.

Sources. We will base our arguments on the jurisprudence of the CJEU. The relevant case-law will be analyzed in order to reveal definitions and provisions of the Directive 2004/38/EC. We will rely on Regulation 1612/68 in order to find the right of residency for *moving* EU parents. The Charter of Fundamental Rights of the European Union (the Charter) and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will be

[13] Opinion of Advocate General Mengozzi in Case C-256/11 Murat Dereci v. Bundesministerium für Inneres [2011] points 37 and 38.
[14]Case C-34/09 Reference for a prelimanary ruling: Gerardo Ruiz Zambrano v. Office national de l'emploi [2011]
[15]Case C-434/09 Reference for a preliminary ruling: Shirley McCarthy v. Secretary of State for the Home Department [2011].
[16] Nathan Cambien "EU Citizenship and the ECJ: why care about primary carers?" *(EUSA Conference, 2013,Baltimore-Draft Paper)* p.2.

examined in order to understand the meaning of the right to family life in family unity provisions.

Problems of the research. Family members of the EU citizen constantly rely on family rights and require residency rights, however, the CJEU has not provided a clear answer to who is to be recognized as a family member. Moreover, the Court is of the opinion that the right to family life is not sufficient by itself to bring the cases within the scope of the EU law. This is clearly the obstacle for the TCN family members who cannot rely on Treaty and secondary EU legislation. On the other hand, in its recent case-law the Court follows a more generous approach towards the grant of family reunification rights, by bestowing such rights on *moving* Union citizens even where there is no link between the need to grant those rights and the aims of the Treaty. In order to make the CJEU jurisprudence more clear we will try to answer these questions: 1) who is a *family member* in the context of citizenship and free movement law?; 2) why the Court has moved towards more liberal approach when deciding cases on family unity of the EU citizen and his/her TCN family member?

Object of the research: a right to reside for TCN family members in the European Union.

Objective and tasks. Objective of the research – after the analysis of the CJEU jurisprudence and the EU law on family unity, to indentify the conditions and requirements applicable to the *family members* of the EU national in order to remain within the EU territory. To find out what is the competence of the Member States in the context of free movement and family unity provisions.

The tasks of the research:

1. to explain *the right to reside* in the context of free movement and family unity provisions;
2. to show the difficulty in defining family members;
3. to reveal the rights of residence for spouses, cohabitants, children and other family members;
4. to compare the CJEU case-law, on family reunification, prior and after the implementation of the Directive 2004/38; to reveal the interpretation of this Directive delivered by the Court;
5. to answer the question why the Court of Justice, in recent years, moves towards a more liberal approach when deciding cases concerning family unity.

Hypothesis - The Court, when deciding on family unity cases, constantly *operates* on three issues - 1) the right to free movement; 2) European Union citizenship; 3) and right to family life – and apparently he cannot *balance* them all.

Methods that will be used: 1) descriptive-analytical method; 2) comparative method; 3) analysis of legal documents; 4) analysis of scientific literature 5) analysis of the CJEU jurisprudence.

Keywords: the right to free movement; citizenship of the European Union; right of residence; family members; third country nationals; protection of the family life, family unity in the EU.

The structure of the Thesis. The Thesis is comprised of three parts. In the first part we will analyze the concept of the right to reside in the context of free movement provisions, taking into account the obstacles for the right to respect for family life and CJEU role in this area. In the second part we will find out what family members are being protected in the EU, and reveal the notion of spouse, dependent child and criteria's applicable to other family members. In the third part we will present three approaches of the Courts' judgments, which will help us to demonstrate that protection of the family life is being taken into account, even in situations not covered by a Treaty and secondary legislation, as the last source in order for TCNs to reside in the territory of the Union.

1. RIGHT OF UNION CITIZENS AND THEIR FAMILY MEMBERS TO MOVE AND RESIDE FREELY WITHIN THE TERRITORY OF THE MEMBER STATES

The right of entry and residence in other EU Member States is the corollary of the fundamental principles contained in the Treaty on the European Union (TEU)[17] and the Treaty on the Functioning of the European Union (TFEU)[18], for the purposes of establishing a common market and promotion of the harmonious developments of economic activities between Member States.[19] Basically this right was formed for the European Union citizens who go to other Member State as workers. European law on free movement provisions recognized this right for the TCNs family members of European citizens, and the Court of Justice brought a great number of rulings, where it has emphasized that free movement provisions must be interpreted in the light of human rights, in particular the right to family life. In this part of the Thesis, firstly, we will analyze the scope of the right to move under EU legislation; secondly we will answer the question why this right became available for *all* European citizens, and why it is possible for the TCN family members to rely on EU provisions which implement this right. In the second subparagraph we will reveal how this right is protected in the human rights (*right to family life*) context and in the end, we will present what challenges are there for the Court of Justice in order to assure the right to reside for TCN family members of European citizens.

1.1 Right of Entry and Residence as a Corollary of Right to Move in the EU law

The free movement is the right from which *right to reside* comes from. One of the main goals for the Members States and European Union law is to abolish the obstacles which would prevent the free movement of persons. This would be impossible without the right to enter and reside in other Members States.[20] Once the Union citizen exercises his right of freedom of movement, he has a right to reside in the host State. In the exercise of this right, the EU citizen may be joined or accompanied by his close family members.[21] However, the exercise of this right is conditional: it cannot be invoked by the Union national in his home State; unless his situation has a sufficient link with the EU law (for example he has previously resided in another Member State). The person shall be economically active or self sufficient, these means he needs to have comprehensive sickness insurance cover as well as recources to support his family and

[17] Treaty on European Union *(Official Journal of the European Union, C-191, 29 July 1992*).
[18] Consolidated version of the Treaty on the Functioning of the European Union (*Official Journal of the European Union, 30.3.2010, C 83-47*).
[19] Nicola Rogers, Rick Scanell, John Walsh "Free Movement of Persons in the Enlarged European Union" (*Sweet & Maxwell;2nd edition; 2012*) p.177
[20] *Ibid.*
[21] Nathan Cambien "EU Citizenship and the ECJ: why care about primary carers?" *(EUSA Conference 2013-Baltimore-Draft Paper)* p.1

himself.[22] Specific condition applies in the case of parents and other family members who accompany an EU national, they need do be financially dependent on him.[23] However the CJEU has recognised a *right of residence* for a family member of the EU citizen, despite the fact that one or more of the conditions mentioned above were not satisfied.[24] In order to understand the Courts reasoning, during the examination of family unity cases, firstly, we would like to reveal the notion of the *right of freedom of movement* under the European Union law.

When in 1957 the Treaty of Rome[25] established the European Economic Community (EEC), it referred to four fundamental freedoms of the common market, one of which was - free movement of workers.[26] It was primarily designed to support the economy of the European Union countries by providing mobile work force. European nationals did not want to move without *their families*. As a result The Council of Ministers was mandated to adopt measures to facilitate the right to free movement, any obstacles to the free movement of persons between Member States shall have been abolished. The important Regulation for our Thesis (as we will analyze CJEU decisions which were ruled according to it) is Regulation 1612/68[27] which stated that free movement is a fundamental right of workers and their families. So the first Regulations providing this right for the TCN family members was dated back in 1968. The Treaty of Rome did not provide a general right of movement for all people, but only for *workers*, being economically active persons and their family members. Two requirements should have been met: a worker needed to be a national of a Member State and be engaged in an economic activity as a worker or self-employed person. In order to enjoy the general right of residence as a self-sufficient economically inactive person, Union citizen needed to demonstrate that he has sufficient recourses, for him and his family, to avoid becoming a burden on the social assistance system of the host Member State.[28] The TCN family members' rights are of the *derivative nature*, as family members may rely on this right only *after* EU migrant worker exercised his

[22] Article 7(1) of the Directive 2004/38

[23] Article 2(2) of the Directive 2004/38; "Dependent" means financially or materially dependent (CJEU, Case C-1/05, *Jia* [2007] E.C.R para. 43)

[24] Nathan Cambien "EU Citizenship and the ECJ: why care about primary carers?" *(EUSA Conference 2013-Baltimore-Draft Paper)* p.2

[25] European Union, Treaty Establishing the European Community *(Consolidated Version), Treaty of Rome*, 25 March 1957

[26] Article 48 of the Treaty of Rome established the principle of free movement for workers

[27] Regulation 1612/68 Article 10 confirmed the workers right to be joined by his family in the host country. It required that obstacles to the mobility of workers be eliminated in particular as regards *the workers right to be joined by his family* and the conditions for the integration of that family into the host state.

[28] Directive 90/364 introduced general right of residence for economically self sufficient but inactive, was indeed to provide those EU nationals who were not covered by the provisions of any other Treaty or secondary law with right of residence

right to move.[29] The right was given only to EU migrant worker and his family members. However the situation changed significantly when the European Union brought up the notion of European citizenship.

1.1.1 European Citizenship: right to free movement for *all* European Union nationals

Since the 1957 there have been a series of Treaties extending the objectives of what is now the European Union beyond the economic sphere.[30] The introduction of the EU citizenship with the Treaty of Maastricht[31] extended the scope of application of family reunification right to Member State nationals that are not involved in economic activities.[32]

After 1993, the distinction between migrants engaging in economic activity and those European citizens not engaged in economic activity, who were just citizens, became one of the central questions in the development of rights for people moving within the EU.[33] Articles 17 and 18 ECC (now Article 21 TEU) opened the rights to freedom of movement and residence from *workers* to *every* citizen of the Union. The CJEU jurisprudence illustrates the development of citizenship case law as the Court displaced its focus from the rights of individuals derived from their economic status to rights derived from their status as European citizens.[34] In the case of *Martinez Sala*[35] the Court stated that the rights under Community law are often inter-dependant: "[…] the right to freedom of movement and residence would mean little if, once migrants settled in the host Member State they faced discrimination […][36]". Before the implementation of Maastricht Treaty this case would have fallen under the national legislation. This case illustrates that, after the codification of citizenship in the TEU, Community law (Union law), not national law, came to govern the relationship between member state legally resident nationals of another member state.[37] In its judgments the Court appeared to apply low thresholds for activating the applicability of the EU law and in so doing opened up greater possibilities for the CJEU rulings on matters of national law.[38]

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[29] Sergio Carrera and Anja Wiesbrock "Whose Citizenship to Empower in the Area of Freedom, Security and Justice?" (*The Act of Mobility and Litigation in the Enactment of European Citizenship, Centre for European policy studies, CEPS, Liberty and Securit in Europe, May,2010*) p.5

[30] Legal Annex p.20; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/199896/free-movement-legal-annex.pdf

[31] European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht,* 7 February 1992, *(Official Journal of the European Communities C 325/5).*

[32] Peter Van Elsuwege, Dmitry Kochenov "On the Limits of Judicial Intervention: EU Citizenship and family Reunification Rights" *Koninklijke Brill NV*. Leiden. [2011]

[33] Zoë Egelman "The Evolution of Citizenship Adjudication in the European Union" (*The Yale Review of International Studies; November.2012)*

[34] *Ibid.*

[35] Case C-85/96, Reference for preliminary ruling: María Martínez Sala v Freistaat Bayern [1998] para. 4;55;62;64.

[36] *Ibid.*

[37] Zoë Egelman "The Evolution of Citizenship Adjudication in the European Union " (*The Yale Review of International Studies; November. 2012)*

[38] *Ibid.*

Today, Article 21 (1) of the TFEU provides its citizens with the rights that form an essential element of European citizenship – the right to move and *reside* freely and to settle anywhere within the European Union's territory. Moreover, the new Directive 2004/38/EC came into force, which codified and reviewed the existing EU instruments in order to simplify and strengthen right of free movement and residence for all EU citizens and their family members.[39] The position of third country family members has been clarified. The Directive 2004/38/EC provides for rights of entry and residence for family members *irrespective of nationality*. The importance of family members is reinforced in Recital 5 and Article 3(1) of the Directive.[40] On the one hand, the Directive sets out the practical arrangements for residence. On the other hand, the CJEU has emphasized that it is the TFEU itself (or, depending on the case, by the provisions adopted to implement it) which is the source of the right to enter into and reside in the territory of another Member State. This means, that no relevant directives, neither national immigration policy of Members States relating to entry and residence rights, will justify the denial of these rights. This principle was confirmed in *Royer*[41] case, where French national faced criminal proceedings and expulsion arising from his illegal entry into and residence in Belgium, where his wife ran a café and dance hall. Since the right of residence is acquired independently of the issue of a residence permit, the grant of the permit itself does not give rights to all but simply a measure "[…] to prove the individual position of a national of another Member State with regard to provisions of Community law[…]."[42] The TFEU itself confers the right of residence directly on all within its territory, and Directive and Regulations determine the practical details how to exercise this right.

It is important to mention that the CJEU immediately asserted that EU citizenship was not intended to extend the scope *rationae materiae* of the Treaty also to internal situations which have no link with Union law.[43] The EU nationals could only rely on their EU citizenship rights, including a *right of residence* for their TCN family members, when they fall within the scope of application of the EU law. However, recently the CJEU ruled that securing *the genuine enjoyment of the substance of the rights attaching to the status of European Union citizenship* is

[39] Right of Union citizens and their family members to move and reside freely within the Union (*Guide on how to get the best out of Directive 2004/38/EC*; *Directorate - General Justice, Freedom and Security European Commission)* p.4

[40] The right for all union citizens to move and reside freely within territory of the member state should also be granted to their family members irrespective of nationality.

[41] Case C-48/75 Reference for a preliminary ruling: The State v. Jean Noel Royer [1976] E.C.R 497

[42] *Ibid.* Para. Aliens; Free movement; residence permits

[43] Joint Cases C-64/96 and C-65/96, Kari Uecker and Vera Jacquet v. Land Nordrhein Westfalen [1997] ECR I-3171, para.23

a sufficient condition to bring a case within the scope of the EU law.[44] Article 20 TFEU (on Union citizenship and European citizenship rights) can be invoked by EU citizens, "[…]even if they have *never exercised their free movement rights[…],* in order to challenge national measures,[45] which deprive EU citizens of enjoyment of their citizenship rights. Taking into account that this paragraph deals only with free movement rules, we will not examine the issue of *static* EU nationals and their family members at this point.

The first European laws on free movement provisions were designed to encourage European national workers to move within the Union in order to support the economic aims of the Treaties. Moreover, different regulations recognized European nationals related rights for his third country national family members. Since the introduction of the notion of European Citizenship the scope of the application of family reunification rights extended to non-economically active EU nationals. However the right to reside for third country national family members is of the derivative nature, as family member may rely on it only when: 1) there is a family relationship between third country national and EU citizen; 2) EU citizen exercised his right to move (moved to another Member State). EU citizen cannot invoke this right in his home State, unless his situation has a sufficient link with the EU law (he has previously resided in another Member State). The element of mobility which is exercised by the national of EU represents the condition for TCN family members to benefit from the freedoms and protection granted by the European Law.

1.2 The grant of residency in order to protect the right to family life

In a situation when a Treaty and secondary legislation do not directly confer a right of residence, the CJEU has in recent years through the use of human rights and the principle of proportionality inferred a right of residence, particularly in relation to TCN family members.[46] In series of cases decided since 2001 the CJEU has emphasised the importance of ensuring protection for *the right to respect for family* life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the TFEU.[47] The CJEUs judgment in *Carpenter*[48] is one of the examples, when the Court through the use of human rights granted a right of residence to TCN spouse. Mr. Carpenter, British, was exercising the right to freely *provide service*s, and his wife was Philippinese national. She could not obtain

[44] Case C-34/09 Reference for a prelimanary ruling: Gerardo Ruiz Zambrano v. Office national de l'emploi [2011] para. 42
[45] Chiara Raucea „Fundamental Rights: The Missing Pieces of European Citizenship" *(German law Journal Vol. 14, No 10 Special issue; Lisbon v Lisbon)* p. 2022
[46] Nicola Rogers, Rick Scanell, John Walsh "Free Movement of Persons in the Enlarged European Union" (*Sweet & Maxwell;2nd edition; 2012*) para.10-03
[47] *Ibid* p.157
[48] Case C-60/00 Reference for a preliminary ruling: Mary Carpenter v. Secretary of State for the Home Department [2002]

residence permit relying on relevant Treaty provisions. However, the Court decided that Article 49 EC (now Article 56 TFEU) shall be read in the light of fundamental right to respect for family life.[49] If not, "[…] the removal of a person from country where close members of the family are living, in circumstances such as those in the main proceedings, may amount to an infringement of the right to respect for family life […].[50] In order to understand why the Court invokes fundamental rights in the context of free movement cases, we find it relevant to examine the notion of the *right to family life*. The CJEU has consistently held that free movement provisions must be interpreted in conformity with Article 8 ECHR and the fundamental right to respect for family life contained in that provision.[51] Added to this the incorporation of the Charter, which strengthens the right to respect for family life in the context of free movements laws. The Court has indicated that the "[...] approach to Article 7 of the Charter will be the same as that taken to Article 8(1) ECHR.[...]"[52] Despite the fact, that Member States should refrain from interfering with the right itself, it is not absolute.

The right to respect for family life contained in Article 8 ECHR is not absolute right and thus the right to non-nationals to enter a country is not guaranteed by the ECHR.[53] However the only permissible interference with the Article 8(1) right are those outlined in Article 8(2).[54] Article 7 of the Charter itself contains no exceptions, although it does include similar, but less extensive *exceptions in European Union law to the enjoyment of rights given by the TFEU*.[55] When there is a family life under Article 8(2) ECHR the state must *establish legitimate* aim for *the interference* with the individual's right which in the present context will likely be sought to be justified by references to the needs to have fair and firm immigration control in the context of the maintenance of public order.[56] The States negative obligation under Article 8 precludes it from taking action, including expulsion or removals which will disproportionately interference with person's right to the enjoyment of family life. In assessing what is proportionate it will be

[49] *Ibid*. para. 45-46
[50] *Ibid*. para 42 (…)interference will infringe the Convention if it does not meet 3 requirements: "in accordance with the law", "legitimate aim", "necessary in a democratic society"
[51] For example in CJEU cases: *Baumbast, Ibrahim, Eind, Metock and others, Teixera, Zhu and Chen.*
[52] Aidan O'Neill "How the CJEU uses Charter of Fundamental Rights" (*Eutopia Law; Matrix Chambers, posted April 3,2012*)
[53] Hélène Lambert "The European Court of Human Rights and the Right of Refugees and other Persons in Need of Protection to Family Reunion" (*International Journal of Refugee Law*, Vol. 11, No. 3 (1999), 427-450.] p.427
[54] Article 8(2) of the ECHR: There shall be no interference by a public authority with the exercise of this right except such 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 country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[55] Nicola Rogers, Risk Scannel, John Walsh "Free movement of persons in the enlarged European Union" (*Sweet&Maxwell 2nd edition; London 2012*) p.157
[56] *Ibid*. The state must establish also that any interference is *proportionate* when the states interest in the interference in the family life is balanced against the effect that the measure would have on the individual's right to respect for that family life

necessary to: *examine whether there are obstacles to the family life being enjoyed outside the contracting State*. On this context it is to be recalled that the Strasbourg Court, has considered language and cultural difficulties as obstacles to family life being enjoyed elsewhere.[57] The ECHR thus imposes negative obligations on State to refrain from such interference.

Article 1 of the ECHR demands that States secure rights protected by the ECHR. The CJEU has therefore held in many cases that States are under a positive obligation to take steps to ensure that Convention rights are protected, not just to refrain from negative interferences. The State is obliged to have laws which grant individuals the legal status, rights and privileges required to ensure for example that their family life is properly respected.[58]

Article 8 also carries positive obligations for the State to protect all aspects of family life. The judgments of European Court of Human Rights *Rodriguez*[59] highlights that the State has positive obligations to facilitate family life which goes beyond protecting the family life that already exists in the territory of a state, but includes an obligation to permit the reunion of family members who have been living apart and to foster family life in the best possible environment. In this context failure to meet this obligation must be weighed against the States legitimate aims which will include immigration control.[60]

The significance of Article 7 of the Charter being an unqualified right with no equivalent to Art 8(2) included is yet "[…] to be examined by the CJEU, as there is nothing to prevent wider protection being granted under the Charter than under the ECHR. [...]"[61] This two Articles are going to give us better understanding during the analyzes of CJEU jurisprudence on family unity cases.

Despite those two Articles, discussed above, European Union law has always respected the notion of family life within the context of free movement provisions. It recognises that without the right to family unity the EU nationals would be deterred from exercising free movement rights. The Directive 2004/38, in its preamble,[62] emphasise the importance of ensuring protection for the family life of nationals of member states in order to "[…] eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the TFEU [...][63]". The CJEU in its jurisprudence[64] has made it clear that the integration of the EU nationals and their family members into the life of the MS in which they are resident is a fundamental objective of

[57] *Ibid.*
[58] *Ibid*. p 160
[59] Case of Rodrigues da Silva and Hoogkamer v. the Netherlands – App.No. 50435/99 [2006] ECHR para 38.
[60] *Ibid.*
[61] Nicola Rogers, Risk Scannel, John Walsh "Free movement of persons in the enlarged European Union" (*Sweet&Maxwell 2nd edition; London 2012*) p.158
[62] Recital 6 of the Directive 2004/38/EC
[63] *Ibid.*
[64] For example CJEU cases: *Zhu and Chen; Baumbast; MRAX; Metock*

the European Union. It is already obvious from the first CJEU cases on this matter, as in the light of that right the Court considered in *MRAX*[65] that it would be contrary to EU law to send back a TCN married to the EU national, who arrives at the border of a member state without the appropriate visa. In this case, the TCN was able to provide his identity and to prove the conjugal ties. Moreover there was no evidence to establish that he presents a risk to the requirements of public policy, public security or public health. In one of the most controversial case *Metock*,[66] the CJEU considered that it would be unlawful to refuse to recognise the right of residence to TCN married to a national of Member State, where the TCN had entered the territory unlawfully. In this case the Court demonstrated its flexible altitude towards the interpretation of family reunion provisions. The Court stated that the terms of Regulations, should not be defined restrictively in light of the principles (the principle of proportionality) indentified.[67]

The right to reside is subject to the limitations and conditions laid down by the TFEU and by the measures adopted to give it effect. Member States are competent, where necessary; to ensure that those limitations and conditions are applied in compliance with the general principles of EU law, and in particular the principle af proportionality. In a situation where the host State refuses entry or residence to the family member of moving EU national, it is not difficult to argue that exclusion of the family member would be a breach of European Union law when read in compatibly with the Charter and ECHR.[68] In this situation EU citizens' right to free movement would be breached, as he would have to leave the host State in order to enjoy his right to family life. On the other hand, there would be also a breach, when EU citizen can enjoy free movement rights without family members being present. The examples of Carpenter, MRAX, and Metock show that the CJEU interprets Treaty and secondary legislation in the light of the fundamental right to respect for family life so as to infer a right to reside for the family member.

1.3 Problems arising for the CJEU when deciding the cases on family unity

All nationals of a Member State are Union citizens, which shall mean that all of them fall within the scope of EU law *ratione personae.*[69] Although the protection of citizenship status is essential, still it is not a sufficient condition for enjoying European citizenship rights. In order to bring the case within its jurisdiction, the CJEU should also determine what is the link between

[65]Case C-459/99 Reference for preliminary ruling: Mouvement Contre Le Racisme, L'Antisemitisme et la. Xenophobie Asbl. (MRAX) v. Belgium. [2002]
[66] Case C-127/08 Reference for preliminary ruling: Blaise Benethen Metock and Others v. Minister for Justice [2008]
[67] *Ibid* para 4.
[68] Nicola Rogers, Risk Scannel, John Walsh "Free movement of persons in the enlarged European Union" (*Sweet&Maxwell 2nd edition; London 2012*) pp. 158-159
[69] Chiara Raucea "Fundamental Rights: The Missing Pieces of European Citizenship?' (*German Law Journal Vol.14 No.10 pp.2021-2039)* p. 2021

citizenship rights and the scope of EU law (*ratione materiae*)[70]. The CJEU jurisprudence on this matter appeared to be very diverse. The examination of family unity cases will show that there should have been a *cross-border element*, which absence would leave the case outside the scope of Union law. However, the recent CJEUs' judgments have proved, that even with no cross-border element present, a particular situation can *by reason of its nature and it consequences* fall within the ambit of EU law.[71] During the analysis of the relevant case-law, we will try to explain Courts reasoning when the cross-border element is not sufficient and why.

Another interesting issue which is decided by the Court is interpretation of the Directive 2004/38. The provisions describing family members are relevant for our Thesis. The CJEU case-law suggests that the term *spouse* refers to a *marital relationship* only. Does it mean that relationship outside the legal marriage will not fall under the scope of EU law? Moreover, the position of unmarried couples remained unclear. In the case of separation, the Courts decisions appear to be unreasonable, as it fails (even) to try to protect the right to family life.

Different scholars[72] are of the opinion that CJEU judgments became more and more unclear on the matter of family unity. The reason behind this might be that since the introduction of EU citizenship, the right to free movement is being exercised by a great number of people. We are of the opinion that the Court constantly needs to *operate* on three issues 1) the right to free movement; 2) European Union citizenship; 3) right to family life. The recent CJEU jurisprudence shows that the Court tries to *balance* them all.

[70] *Ibid.*
[71] Peter Van Elsuwege, Dimitry Kochenov "On the Limits of Judicial Intervention: EU citizenship and family reunification rights" *(European Journal of Migration and Law 13 (2011) pp.443-446)* p.450
[72] For example: Alina Tryfonidou, Nathan Cambien, Elaine Fahey etc.

2. FAMILY MEMBERS OF THE EUROPEAN UNION CITIZEN

The previous section has shown that European citizenship and free movement law has allowed TCN family members of EU nationals to accompany him when *moving* to another state and to enjoy rights once on residence.[73] However, since Member State share competence in the sphere of immigration, the CJEU jurisprudence reveals that States do not implement the Directive 2004/38 provisions, concerning family members, uniformly. The different appreciation of family members within the Union creates obstacles for them to exercise their fundamental freedoms. In the following part we would like to answer the question **who is a "family member" in the context of citizenship and free movement law?** After the analysis of relevant case-law, we will be able to see the Courts altitude towards marriage and partnership, which should help us to understand the position of homosexuals' couples in this sphere. Furthermore, we will analyze the jurisprudence concerning EU children, and try to prove that their TCN parents may remain in the Union relying on European legislation. The examination of the case-law on *other family members* will reveal the concept of *dependence*, which appears to be extremely important when deciding cases concerning family unity.

2.1 Why the definition of spouse shall be reconsidered?

Articles 2(2)(a) and 2(2)(b) of the Citizens Directive established that the definition of the family member includes, *irrespective of their nationality*, the spouse and registered partner. They have an automatic right for the purpose of the application of the Directive. However, the last one mentioned, is recognized only if the legislation of the host Member State treats registered partnerships as equivalent to marriage. Marriage which were validly contracted anywhere in the world must be recognized.[74] The problem is that the concept of marriage differs within each Member State and increasing number of States made or is in process of making it available to same-sex partners[75]. These means, if homosexual couples and those couples in partnership relation, who are not recognized under member states national legislation, may find themselves in a difficult situation. We believe that it is relevant to define the notion of marriage under EU law and to present the Courts case-law on this matter.

The concept of marriage is defined in Article 12 ECHR *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws*

[73] Catherine Barnard "The Substantive Law of the EU: The Four Freedoms" (*Oxford University Press; Paperback New edition, 08 August 2013*) p.539

[74] According to the European Commission in a Communication to the European Parliament and Council in July 2009 (*European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme*)

[75] Laima Vaigė "The problematic of recognition of same-sex marriages originating from member states according to the EU legal Regulation" (*Societal studies; 2012 4(2))* p.755

governing the exercise of this right"[76]. If we take into account the first part of the definition, it is apparent that only men and women can get married and this Article is not applicable to same-sex marriages. Article 9 of the Charter seems to be gender-neutral: "[…] the right to marry and the right to found a family are guaranteed in accordance with national laws governing the exercise of these rights.[…][77] The strong influence of the Charter is apparent in the case of *Schalk and Kopf v Austria.*[78] The Strasbourg Court admitted the right to marry under Article 12 as not always reserved to different-sex couples. However, it ruled that it is still for the states to decide whether they want to open doors for same-sex marriages within their jurisdiction. The reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it[79]. On the hand the right to marry is granted to same-sex couples, on the other hand this right cannot be exercised in countries, where it is not recognized. Can we presume that non-recognition of this right by the Member States automatically create obstacles in the field of freedom of movement for the homosexual couples? The automatic right to bring a spouse, which shall be unconditional under Article 2(2) (a), is, as a matter of fact conditional? Does EU law fail to provide same-sex couples legal certainty as regards their right of free movement under EU Treaties?

The ECHR, back in early 1990s, interpreted Article 12 of the Convention as applying only to the traditional marriage between two persons of opposite biological sex.[80] In the case of *D and Sweden v Council,*[81] the ECHR reiterated that: "[…] Community notions of marriage and partnership exclusively address a relationship founded on civil marriage in the traditional sense of the term […]"[82], and the CJEU upheld this judgment on appeal. It was held that the Court secured a privileged position to heterosexual marriages and this judgment is sometimes used to claim that CJEU upholds only *traditional* families. Still it is worth to mention that the case of *D and Sweden v Council* concerned the different-sex and same-sex *partnerships'* (non) equivalence

[76] Article 12 of the European Convention on Human Rights - Right to Marry
[77] Article 9 of the Charter - Right to marry and right to found family
[78] Case of Schalk and Kopf v. Austria – App. No. 30141/04 [2010] ECHR para. 54-63
[79] European Parliament Study "Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights" (*Directorate-general for Internal Policies; Policy Department; Citizens Rights and Constitutional Affairs, 2012)* p.100
[80] Case of Rees v. The United Kingdom – App. No.9532/81 [1986] ECHR para. 49: In the Court's opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.
[81] Joined cases C-122/99 and C-125/99 Reference for preliminary ruling: D. and Kingdom of Sweden v. Council of the European Union [2001]
[82] *Ibid.*

to marriage.[83] Let us presume that the CJEU recognizes only traditional marriages. Still the Courts position towards partnerships and homosexual partners remains unclear.

In the case of *Reed*[84] the CJEU was required to consider whether the term *spouse* included cohabitees. Miss Reed applied for the residence permit in the Netherlands, claiming that her right to remain was based on her cohabitation with the UK national working in the Netherlands.[85] The Court ruled that the term spouse refers to a *marital relationship only*.[86] Still, it found the right to remain for Miss Reed. The CJEU referred to the social advantage guaranteed under Article 7 of the Regulation as being capable of including the companionship of a cohabite, which could contribute to integration in the host country.[87] In the case of registered partnerships this is only to the extent that the CJEU had provided in this case, whereby states are obliged to recognize such relationships if they do so for their own nationals. Despite the fact, that decision in *Reed* is rather old, the CJEUs position on this appears to be the same.

We have mentioned before, that ECtHR recognized the right to marry, under Article 12, as not always reserved to different-sex couples. We may presume that ECtHR is heading towards liberal approach in recognition of homosexual marriages. The CJEU, however, is not legally bound to follow the ECtHR jurisprudence when interpreting the provisions of ECHR. In *Maruko*[88], the CJEU stated, that "[…] civil status is not an EU competence *per se* but member states, when exercising their competence must comply with EU law, and in particular with principle of non-discrimination […]".[89] One the one hand, the Court admits that different treatment on the basis of sexual orientation is discrimination and shall be prohibited. On the other hand, the CJEU jurisprudence appears to be silent on this issue in the light of free movement provisions, because most member states rely on the public order exception to refuse recognition to same-sex spouses. The example might be the Republic of Malta, which did not interpret the Citizenship Directive as granting same-sex spouses the freedom of movement.[90] According to Viviane Reding "[…] sexual orientation is irrelevant while exercising the freedom of movement, and the Commission believes that the exercise of the EU citizens' rights has to be

[83] Laima Vaigė "The problematic of recognition of same-sex marriages originating from member states according to the EU legal Regulation" (*Societal studies; 2012 4(2*)) p.763
[84] Case C-59/85 Reference for a preliminary ruling: State of the Netherlands v Ann Florence Reed [1986]
[85] Nigel Foster „Foster on EU Law" (*Oxford University Press; Paperback, 4th Edition, 30 May 2013*) p.295
[86] Nicola Rogers, Risk Scannel, John Walsh "Free movement of persons in the enlarged European Union" (*Sweet&Maxwell 2nd edition; London 2012*) p.163
[87] Nigel Foster „Foster on EU Law" (*Oxford University Press; Paperback, 4th Edition, 30 May 2013*) p.295
[88] Case C-267/06 Reference for a preliminary ruling: Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008]
[89] *Ibid.* para 73
[90] Gabriella Pace "Report on Free movement of workers in Malta 2011-2012" (*November 2012)* p.8

complied by the Member States, which are not obliged to provide any special rules for homosexual couples […].[91]

Some may claim that Articles 2(2) and 3(2) (b) of the Citizenship Directive are the solution for homosexual-couples and unmarried partners in order to move and reside within the Union. We can agree with this position only partly. Despite the fact, that registered partnerships and durable relationships are in a way protected under EU law, there are number of qualifications to the recognition of rights of registered partnerships which makes these provisions, as a result, not so effective. Member States have competence to implement their own immigration policy. The registered partnerships must be on the basis of legislation of a Member State, and are recognized only in States which treat them as equivalent to marriage.[92] In a case when Member state does not treat registered partnerships as equivalent to marriage, partner is to be considered under Article 3(2) as being in a durable relationship. Taking into account Recital 31 of the Preamble to the Directive, the Directive "[…] should be implemented without discrimination on grounds of sex and sexual orientation.[…]" [93]As a result, the state should recognize both same sex and heterosexual registered partnerships or marriages contracted lawfully in other member states. The examination of CJEU jurisprudence showed that reality is different. We already know that the meaning of *marriage* differs within each country. Despite the progress of this definition within the Union Member States, the EU legislation and CJEU appears to stick with traditional meaning of the family.

The situation of partnerships is even more complicated. The Directive does not require Member States to recognize registered partnerships. As a result not only homosexuals couples are disadvantaged, but also those who are not in marital relationship. They will continue to be disadvantaged as long as there are States which refuse to recognize their rights, relying on national legislation. The right granted for those in durable relationship is not automatic right of entry and residence that spouses enjoy. This means that, same-sex couples married or unmarried, together with those in registered partnerships, are left with less choice upon the decision to which Member State to move.

The obstacles which are met by family members, especially those in homosexual relationship or non-marital relationship are obvious. As we see, the CJEU interpreted the Directive in a rather reserved way. Member States are left with the opportunity to implement the

[91] Parliamentary question by member of the European Parliament, Oreste Rossi. The answer given by V.Reding on behalf of the Commission 1 December 2010; Laima Vaigė "The problematic of recognition of same-sex marriages originating from member states according to the EU legal Regulation" (*Societal studies; 2012 4(2*)) p.765

[92] More than a third of European Union Member States do not treat registered partnerships as being equivalent to marriage: Cyprus, Estonia, Greece, Bulgaria, Italy, Latvia, Liechtenstein, Poland, Malta, Romania, Slovakia

[93] Preamble of the Diractive 2004/38 Recital 31

Directive as they see it right. The Court tends to remind that the principal of non-discrimination shall be taken into account when implementing the EU legislation into national laws. Still, the states try to overcome this principle relying on the public order exception.

The possible solution would be for the CJEU to re-interpret the term *spouse,* including registered partnerships. In the light of social and legal developments the term *spouse* shall be given a more liberal meaning. Before the Citizenship Directive transposition into national legislation, the Economic and Social Committee proposed to avoid restrictive interpretations of this Directive. However, the Commission amended the Proposal and offered traditional interpretation of the family.[94] As to the position of the CJEU, its traditional interpretation of the family is likely to prevail, despite the more liberal approach of the ECtHR in this field. If the Court gives the new interpretation to the term of *spouse*, the member states would have to change their national legislation in the same direction. Taking into account the diversity of national regulations, we believe, the Court will leave this question to regulation by national law of the Contracting State.

The reference to domestic law of the Members States reflects the diversity of national regulations, which range from recognizing same-sex marriage and registered partners to explicitly forbidding it. The EU legislation and CJEU jurisprudence leave the decision for the Member States whether to recognize same-sex spouses and registered partners as equivalent to marriage for the purpose of the application of the Directive.

2.1.1 The rights of the spouse in the case of separation

In previous part we concluded that there is no uniformly acceptable definition of marriage. Despite this fact, we cannot deny that there are situations when couples separate or even divorce. What are the rights of the spouse then? Can a member of a family, in particular TCN spouse, remain in the Union? Does the existence of a child influence these rights? The great number of CJEU case-law with an element of separation and divorce, involve children. In this part of the Thesis we will not focus on these cases, as they will be examined later. We would like to compare two cases of separation, paying attention exclusively to the rights of the spouse.

Under Article 13 of the Directive, there is a possibility for family members to maintain of residence rights in the event of divorce, annulment of marriage or termination of registered partnership. They must, however, satisfy the conditions established in Article 7[95] of the Directive. As we see, the Article is silent on the issue of separation. The first case dealing with a

[94] Eugene Buttigieg "The Definition of "family" under EU law" (*Report on the theme of The Family in Europe and in Malta. the Civil Society Project, European Documentation and Research Centre, June, 2006*) p.105

[95] Article 7 of the Directive 2004/38/EC: They should be workers or self-employed, have sufficient recourses not to become a burden on social assistance, should be enrolled at public or private establishment or be family members of one of those groups

situation of separation in CJEU jurisprudence was *Diatta.*[96] The case concerned persons (Senegalese and French nationals) who were married, but no longer lived together. The Court stated that "[…] a marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that it is not the case where spouses merely live separately, even if they intended to divorce at a later date, so that the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence […]".[97] Consequently, to qualify for a right of residence as a family member under Regulation No 1612/68 (Article 10)[98], it was not necessary to live permanently with the worker.

Apparently the situation will differ when separated persons live in different Member States of the Union. The case of *Iida*[99] will be examined in context. Mr. Iida was a Japanese national married to national of Germany. They had a daughter of German, Japanese and American nationality. The family moved to Germany from the USA, where Mr.Iida obtained a residence permit as spouse of a Union citizen. Relations soured between the spouses, though it was categorically noted, not between Mr. Iida and his daughter.[100] Wife moved to Austria with their daughter and started full-time work in Vienna. Being permanently separated they enjoyed join custody. After separation, Germany revoked Mr. Iida's spousal residence permit. Mr.Iida (despite his renewable work permit) wanted a residence card of family member of Union citizen, however his application was rejected. In that context, German authorities referred the question of the meaning of family member under the Citizenship Directive, in situation when applicant is not citizen of the Union, and not the individual who *accompany or join.*[101] The Advocate General Trstenjak called this situation fairly unique[102] because applicant was claiming rights not upon the Member State of his daughter's residence (Austria), but rather her origin (Germany, where he lived). The wording of the Directive suggested that at those circumstances Mr. Iida do not confer a right of residence. Moreover, the Court did not establish a link to EU law. In our view, the Courts rejection to apply fundamental rights was not clear. We would like to prove our position by further examination of this case.

According to the Court, Mr. Iida did not satisfy the definition of *dependent family member* upon his daughter's rights, because she did not rely on him. However, he came under the *spouse* definition, because "[…] separation is not legally synonymous to divorce […].[103] The

[96] Case C- 267/83 Reference for a preliminary ruling: Aissatou Diatta v Land Berlin [1985]
[97] *Ibid* para. 20-22
[98] The case was ruled prior to the Directive 2004/38/EC
[99] Case C- 40/11 Reference for a preliminary ruling: Yoshikazu Iida v. Stadt Ulm [2012]
[100] *Ibid* para. 26
[101] *Ibid* para. 32
[102] Opinion of Advocate General Trstenjak in Case C-40/11 Yoshikazu Iida v. Stadt Ulm
[103] *Ibid* para. 60

Court Stated, that in order to benefit from Directives provisions, Mr. Iida had to reside with his Union citizen family members, which means he had to move together to Austria.[104] Is it correct to say, that in order to rely on the provisions of the Citizens Directive, the couple may not live together in one accommodation, but it shall live in one country? Moreover, the Court ruled, that his family was not discouraged of the *genuine enjoyment* of free movement rights, as they have already moved. The Court found it irrelevant to rely on hypothetical situations of discouragement of movement. Still, let us presume that Mr. Iida had to move further. It would definitely affect his daughter and wife, and we believe it would discourage them to move to Austria in the first place. We would like to support our position: the CJEU jurisprudence shows, that hypothetical situation was invoked in the cases of *Garcia Avello*[105] and *Carpenter.*[106] It is unclear, why the Court rejected the application of fundamental rights and did not establish a link to EU law. At this point, we would like to proceed to the case-law, which also involve children, and present the position of their TCN parents.

In the case where the couple have separated and even intend to divorce, for as long as they remain legally married, they should be regarded as spouses. TCN spouse may seek a right of residence only in the host Member State in which his EU national spouse resides. He cannot maintain of residence rights in the state of origin of his European spouse relying, on the provisions of the Citizenship Directive.

2.2 European Children: the derived right of residence for parents

"[…] Directive 2004/38/EC implicitly conceives family members in terms of their *dependence* upon the migrant citizen, who is the active party in the decision to migrate.[…]"[107] This means that EU citizen who is employed or self-employed person has responsibilities and ties to his family members and cannot leave them behind. The category of family members, in particular spouses, was discussed in previous section. In this section we will examine the CJEU jurisprudence which involve children, these types of cases require a more liberal approach in order to serve the best interests of the child.

We cannot deny the fact, that there might be situations, when it is the Union citizen, who might be dependent upon their TCN family members. The most obvious and common

[104]The directive requires that the family member of the Union citizen moving to or residing in a Member State other than that of which he is a national should accompany or join him

[105] Case C-148/02 Carlos Garcia Avello v Belgian State [2003] where hypothetical situations of free movement were invoked as a valid application of the Treaty to allow mutual recognition of double-barreled surnames

[106] Case C-60/00 Carpenter -where tenuous link with potential services to be provided overseas prevented a family from being deported

[107] Gareth Davies "The family rights of European children: expulsion of non-European parents" (*EUI Working Papers, EUDO Citizenship Observatory; RCAS 2012/04*) p.1

example of this situation is *European national child* dependent on his non-European parents. The Directive and Treaty appear to be silent on the situation of these parents. Can they enjoy a derivative right of residence analogous to that enjoyed by family members of adult migrants? The case-law of the CJEU filled this gap of the EU legislation. It was done in a series of cases, namely *Zhu and Chen, Baumbast, Ruiz Zambrano, Tijani, Alopka, Ibrahim, Teixera* which will be the subject of this section.

2.2.1 EU minor child: non-expulsion of third country national parents

It is obvious that children and parents should not be separated. However, when their situation is not ensured by Treaty and the Directive provisions they may rely on Article 7 of the Charter, as it contains the right to respect for private and family life. The Court regularly relies upon Article 8 ECHR in order to emphasize that the separation of family members, including parents and children, must be sufficiently justified.[108]

The case of *Zhu and Chen*[109] presents a parent-child situation, in which a Union citizen who was a child lived in the host Member State with parent who was not Union citizen. In this case the CJEU found the right to reside for an EU child and his TCN parent, after the examination of terms of Article 1(1) of the Directive 90/364. The terms of this Directive, provided the requirement to have sufficient recourses.[110] Catherine Zhu was born in Ireland to Chinese parents who were living in Wales and working for a Chinese firm in the UK. Mrs. Chen (mother) had selected Ireland as a birthplace for her child, so that she could gain Irish nationality. As Catherine's parents were not permanent migrants in the UK, she was not eligible for British citizenship simply by virtue of birth in the UK. As Catherine obtained Irish citizenship, her mother used her status as an EU national to move the family to Wales. British authorities rejected Chen's application for permits to reside in Britain.

The CJEU held that Directive 90/364 on the right of residence read in conjunction with Article 17(1) EC conferred on young minor who was EU citizen, a right to reside for an indefinite period in that State.[111] However, beneficiaries of the right of residence must not become an *unreasonable* burden on the public finances of the host Member State.[112] It is apparent that Catherine, being a minor, cannot have necessary resources on her own. On the other hand, her mother proved that Catherine is covered by appropriate sickness insurance and is

[108] For example in CJEU cases: *Carpenter, Akrich, Metock, MRAX*
[109] Case C-200/02 Reference for a preliminary ruling: Kungian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004].
[110] Now Article 7 of the Directive 2004/38/EC; previously Article 1(1) of the Directive 90/364 (amended)
[111] Dirk Vanheule "Immigration and Asylum Law Volume II: Cases" *(Erasmus Teaching Staff Mobility 2011-2012)* pp.17-18
[112] Case C-200/02 Zhu and Chen para. 32

in the care of a parent who is a TCN having sufficient recourses for her *EU child* not to become a burden on the public finances of the host State.

Article 1(2)(b) of Directive 90/364, guaranteed depended relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence.[113] According to CJEU's case-law, "[…] the status of *dependent* member of the family of a holder of a right to reside is the result of a factual situation, when material support for the family is provided by the holder of the right of residence.[…]"[114] In this case, the Catherine, as a holder of the right to reside, is dependent on her TCN parent (Mrs. Chen is not dependent relative within the meaning of Directive 90/364). Despite these circumstances, the Court ruled, that a refusal to allow the parent, who is the carer of a child, to reside with him or her in the host Member State would deprive the child's right of residence of any useful effect. Child has a right to be accompanied by his parents and they should be allowed to reside with the child in the host Member State.

Notable aspect of this case, is that Mrs. Chen had admitted that she had gone to Ireland solely in order to enable the child she was expecting to gain Irish nationality and in consequence to enable her to acquire the right to reside with her child. On this point, Advocate General Tizzano in his opinion to the case stated "[…] the family should not be criticized just because they overruled of opportunities created by Ireland national laws.[…]"[115] The *Zhu and Chen* case is an example of the CJEU's dynamically moving forward the notions of citizenship and human rights in the European Union context.

The reasoning of *Zhen and Chen* was further confirmed in *Ruiz Zambrano* case. The question for the CJEU in this case was whether a Colombian national and his young children, who had Belgian nationality, could invoke a right of residence in Belgium. Mr. Zambrano based his claim on *Chen*, which contained similar facts. However, the difference between these two cases was that Zambrano's Belgian children had *never resided outside* Belgium. Member States were of the opinion that this case fell outside the scope of EU law. Despite this opinion, the Court decided that Mr. Zambrano and his children had a right to reside under EU law.[116] It pointed out that the children "[…] would not be able to reside in Belgium independently and that consequently the refusal of a right of residence to their father would require them to leave the country and thereby deprive them of *genuine enjoyment of the substance of the rights conferred*

[113] *Ibid*. para 42
[114] *Ibid.* para. 43, see to that effect, in realtion to Article 10 of Regulation 1612/68 Case 316/85 Lebon [1987] para. 20 - 22
[115] Opinion of Advocate General Tizzano in Case C-200/02 Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department; points 108-125.
[116] The CJEU reasoning on the point was that Belgian children could not reside in Belgium independently, which was analogous to and inspired by the reasoning followed in *Zhu and Chen*

on them by virtue of their status as EU citizens. […]"[117] The fact that parental residence right is necessary for, and therefore entailed by a child's residence right is merely following of *Chen.* The novel of *Zambrano*, is that there is no need for migration for the right to be engaged. As a result, this expands the personal scope of citizenship rights, together with parental residence rights, because there are more citizens living in their own state than as migrants.[118]

However, the Zambrano is applicable only where the child is dependent on the parent without leave. In situation, when child receives support from another person (second parent) who is able to access work, then the Zambrano exception is not applicable.[119] In *Dereci and Others*, the CJEU ruled that "[…] the reasoning of *Zambrano* will only apply where a parent is refused the right to reside with his minor EU children, but not when a husband is refused a right to reside with his EU spouse.[…]"[120]

Children who posses European Union nationality, have a right to be accompanied by their parents or person who is his or her primary carer. Relying on the childs' citizenship status carer is in a position to reside with the child in the host Member State. The same right is applicable where the child is dependent on the parent without leave. The refusal to grant this right to the parent would deprive the child's right of residence of any useful effect. Article 20 of the Lisbon Treaty (TFEU) 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.

2.2.2 Children in education (Baumbast principle)

Following a number of CJEU decisions it has been established that where children of EU workers and non-EU workers, or former workers, are enrolled in the Unions education system, they and their main carer have the right to reside within the Union. The basic reasoning in these cases was that under EU legislation children of EU and non-EU national workers have the right to enter the education system of the State in which their parent is or has been working[121]. In the following paragraph we would like to examine the cases which established the right of residence on the basis of being a primary career of a child in education (the so called

[117] Nathan Cambien "EU Citizenship and the ECJ: why care about primary carers?" *(EUSA Conference 2013-Baltimore-Draft Paper)* p.5
[118] Gareth Davies "The family rights of European children: expulsion of non-European parents" (*EUI Working Papers, EUDO Citizenship Observatory; RCAS 2012/04*) p.4
[119] Applying *Dereci and others* (CJEU C-256/11, 15 Nov 2011), *Zambrano* does not apply simply because family unity and prosperity would otherwise be jeopardized.
[120] Case C-256/11 Reference for a preliminary ruling: Murat Dereci v. Bundesministerium für Inneres [2011]. para. 64-68
[121] Martin Williams "Right to reside-recent developments" (*Child Poverty Action Group; National Association of welfare rights advisers NAWRA workshop, June 2011*) p.4

"Baumbast principle") and ascertain what conditions must be met by a parent of a child in order to be entitled to a derived right of residence.

Mr. Baumbast was a German national who, after having pursued an economic activity in the UK, was employed by German companies outside the Union. The UK authorities refused to renew Mr. Baumabast's residence permit as he did not qualify as a migrant worker and failed to satisfy the conditions for a general right of residence. His family (Colombian national wife and two daughters) still lived in the UK, where his daughters went to school.

In this case, the children of the Union worker were allowed to remain in the UK in order to complete their education even after their father ceased to work there. Consequently, in order to protect the right to family life, children were allowed to remain in the UK, so as to continue their education. In addition, corresponding right of residency had to be granted to the primary carer of these children, even in situation, when the primary carer had no other basics to reside under EU law. The Court concluded that Article 12 of Regulation 1612/68[122] should be interpreted as: "[…] entitling the parent to reside with them. Child has the right to be accompanied by the person who is his primary carer and, accordingly, that person is able to reside with him in that Member State during his studies.[…]"[123]

Moreover, the Regulation must be interpreted in the light of the requirement to respect for family life laid down in Article 8 ECHR. The approach of Advocate General Geelhoed[124] in this case was emphasizing even more the right to respect for family life derived from the ECHR. The idea of family rights in free movement persons is reinforced rather than children's rights. According to him, the determining factor was "[…] whether the deportation of a parent would constitute a disproportionate interference with the right to respect for family life. […]"[125]

The line of *Baumbast* reasoning was confirmed in the case of *Ibrahim.*[126] This case concerned Ms. Ibrahim who was a Somali national married to a Danish citizen and who resided with him in the UK.[127] They had four children of Danish nationality aged from one to nine. After two years of residence the couple separated and Mr.Ibrahim left the UK. His wife was never self-

[122] Article 12 of the Regulation 1612/68: "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.

[123] Case C-413/99 *Baumbast* para. 73

[124] Opinion of Advocate General Geelhoed in Case 413/99 *Baumbast* (*delivered July 5 2001)*

[125] *Ibid.*

[126] Case C-310/08 Reference for a preliminary ruling**:** London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department [2010]

[127] The husband Mr. Yusuf arrived in the UK in the autumn of 2002 and worked in the UK for 8 months after which he was granted incapacity benefit. After being declared fit o work after 10 months he left the UK and returned after two years. His wife joined him shortly before he was granted incapacity benefit.

sufficient and relied on the social assistance. She also did not possess sickness insurance. Ms. Ibrahim was refused housing assistance after three years of independent residence on the grounds that neither she nor her husband was resident in the UK under EU law. The main question, in this case, was to what extent family may rely on rights enshrined in Article 12 of Regulation 1612/68 providing access of children to a State's general educational courses under the same conditions as the nationals of the host State.[128] The Court relied *inter alia* on conclusion already made in *Baumbast* and rights to family reunion included in Article 7 of Directive 2004/38.

According to the Court a child has an independent right of residence in connection with his right of access to education. This right is not dependent on the right of residence of the parents.[129] When examining the contents of Article 12 of the Regulation 1612/68, the Court emphasized that it should be applied irrespective of adoption of the Directive 2004/38.[130] Article 12 does not require fulfillment of a condition of sufficient recourses and comprehensive sickness insurance.

It should be noted that there is no requirement that the primary carer is, or was, a worker, or continues to reside with the parent who was the worker. Separated spouse can establish a right to reside on the basis of being alone parent of their child in education.[131]

In *Teixera* the situation concerned a couple of whom both were Portuguese nationals residing in the UK where their daughter was born.[132] After the divorce their daughter was ordered to live with her father but soon went to live with her mother who applied for housing assistance. Mrs. Teixera argued that her daughter was enrolled at school and thus she had an independent residence right in the UK. The UK authorities claimed that as she is not a self-sufficient she could not rely on Article 12.[133] The Court re-examined in detail its ruling in *Baumbast* and compared the provisions of Regulation 1612/68 and Directive 2004/38:

"[…] The interpretation that the right of residence in the host Member State of children who are in education there and the parent who is their primary career is not subject to the condition that they have sufficient recourses and comprehensive sickness insurance cover is supported by Article 12(3) of Directive 2004/38, which provides that the departure or death of

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128 Kristīne Krūma **"**EU Citizenship, Nationality and Migrant Status– An Ongoing Challenge" (*Immigration and Asylum Law and policy in Europe, Vol.32; Leiden: Martinus Nijhoff Publishers, 2014*) p. 229

129 Case C-310/08 *Ibrahim* para. 35- 40

130 *Ibid.* para. 42: Article 12 of Regulation No 1612/68 must therefore be applied independently of the provisions of the European Union law which govern the conditions of exercise of the right to reside in another Member state. That independence of article 12 from Article 10 of that regulation formed the basis of the judgments of the Court referred in *Baumbast*, and cannot but subsist in relation to the provisions of Directive 2004/38/EC

131Graham Tegg "Baumasted! The right to reside test for claimants with children in education" (*Child Poverty Group; Issue 215; April 2010*)

132Case C-480/08 Reference for a preliminary ruling: Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department [2010]

133 *Ibid.* para 14-19

the citizen of the Union does not entail the loss of the right of residence of the children or the parent who has actual custody of them, irrespective of their 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.[…]"[134]

The CJEU, by referring to its judgment in *Baumbast* noted that "[…] the right of residence accorded to the children and their mother in that case was not based on their self-sufficiency but on the purpose of Regulation 1612/68 to promote and facilitate freedom of movement for workers which necessitated the best possible conditions for the integration of the worker's family in the host State […].[135] The right of residence derived from Article 12, is not conditional so as for a parent having sufficient resources not to become a burden on the social assistance system of that Member State during the period of residence and having comprehensive sickness cover there.

The right of residence continues even after the child has reached the age of majority if the child continues to need the presence and the care of that parent in order to be able to pursue and complete their education. In *Tijani*[136] the Court stated that reaching "[…] the age of majority has no direct effect on the rights conferred on a child by Article 12 of Regulation 1612/68[…]".[137] Moreover, the scope of this article is also applicable when a child is in higher education.[138] Even if it is assumed that a child is capable of meeting his or her needs, still, the right of residence for parent may be extended beyond that age, if it is apparent that a child is in need of the presence and care of a parent in order to be able to pursue and complete his/her or her education[139]. National courts are competent to decide, whether an adult child is in need of the presence and care of his/her parent.[140]

Legal certainty in the case of children in education has been strengthened by both secondary law as well as subsequent interpretation by the CJEU. The residence rights of TCN parents are also strengthened. The fact that children possess independent residence rights and should be entitled to equal assistance if in need not only strengthens the status of citizenship in

[134] *Ibid.* para 68
[135]Graham Tegg "Baumasted! The right to reside test for claimants with children in education" (*Child Poverty Group; Issue 215; April 2010*)
[136]Case C-529/11 Reference for a preliminary ruling: Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department [2013]
[137] Having regard to their subject matter and purpose, both the right of access to education under that article and the child's associated right of residence continue until the child has completed his or her education; *Tijani* para 24; *Teixera* para 78-79
[138] *Tijani* para 25; *Teixera* para 80
[139] *Tijani* para 28
[140] Advocate General Opinion Bot in Case C-529/11 Alarpe and Tijani (*delivered 15January 2013*) points 35-37

cases of children but makes their movement rights more secure especially if their parents lose sufficient income to ensure that they can continue studies in the host Member State.

Article 12 of the Regulation 1612/68 provides that the children of a EU citizen who is, or has been, employed in the territory of another Member State shall be admitted to that State's education system under the same conditions as the nationals of that State. The child posses an independent right of residence. This is due to connection with his/her right of access to education. This Article shall be interpreted as entitling the parent to reside with his/her child. […]Child has the right to be accompanied by the person who is his primary carer and, accordingly, that person is able to reside with him in that Member State during his studies[…] [141]*The right of residence derived from Article 12, is unconditional. Parent is not obliged to have sufficient resources, in order not to become a burden on the social assistance system of the host State. "[…] The right of residence continues even after the child has reached the age of majority if the child continues to need the presence and the care of that parent in order to be able to pursue and complete their education […]* [142].

2.3 Other family members: obligation to *facilitate* and issue of *dependence*

In previous part we have examined direct family members, who enjoy automatic right of residence. In relation to *any other family members,* by contrast, the Member States enjoy a wider margin of discretion in relation to defined under article 3(2) of Directive 2004/38[143] and do not have to grant an automatic right of entry and residence for such family members. In the following part we will focus on the content of the obligation to *facilitate*, in accordance with national legislation, and clarify some matters on the situation of *dependence* that must be given for such family member under Article 3(2).

The Court in *Rahman*[144] noted that the provisions of the Directive oblige the host Member State to confer an advantage on TCNs who haave a relationship of *dependence* with a Union citizen, compared to a TCN with no such relationship.[145] Mr. Rahman was a Bangladeshi national who had married an Irish national working in the UK. Following the wedding, brother,

[141] *Baumbast* para 73
[142] *Tijani* para 28.
[143] Article 3(2) reads as follows: 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: (a)any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen; having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; (b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.
[144] Case C-83/11 Reference for a preliminary ruling: Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others [2012]
[145] *Ibid.* para 21

half-brother and nephew of Mr. Rahman applied for EEA family permits so as to obtain the right to reside in the UK as Mr and Mrs Rahman's dependants. The Entry Clearance Officer in Bangladesh refused the applications, however the three relatives won on appeal and arrived in the UK. They then applied for residence cards-but were refused on the basis that they had not proved their residency with the EU national, Mrs Rahman, in the same EEA Member State before she came to the UK. In addition they have not proved that they continued to be dependent on Mrs Rahman or were members of her household in the UK. The Upper Tribunal made a reference to the CJEU and asked whether it required the UK to make legislative provision to facilitate the entry/residence of TCNs who could meet the requirements of Article 10(2)[146] and whether it was of direct effect.

The Court distiguished the margin in the Directive between *close* and *extended* family members. Article 3(2) of the Directive does net oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words *shall facilitate* in Article 3(2).[147] This provision imposes an "[…] obligation on the Member Stetes to confer a certain advantage, in comparison with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen[…]"[148]. The question is what is to be considered as *particular dependence*?

According to the Court, in order to fall into the category of family members who have a relationship of *particular dependence* with an EU national it is not necessary for TCNs to have resided in the same State as the EU national and to have been a dependent shortly before or at the time when the citizen settled in a host Member State. The Court ruled that purpose of the Directive 2004/38 was to maintain the unity of the family in a broader sense, by facilitating entry and residence for persons who did not fall under Article 2(2) but who, however are in a close and stable *family ties.*[149] Such ties may exist without the family member of the Union citizen having

[146] Article 10 of Directive 2004/38, headed 'Issue of residence cards', states: '1.The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.
2. For the residence card to be issued, Member States shall require presentation of the following documents:
(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

[147] Christopher Brown, Anita Davies "Rahman-further fleshing out of the position of third country nationals under the Citizenship Directive *(EUtopia Law, posted November 29 2012)*

[148] *Rahman* Para 21

[149] The interpretation was borne out by Recital 6 in the preamble to Directive 2004/38 (…) 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.

resided in the same State or having been a dependent of that citizen shortly before or at the time when the latter settled in the host State[150]. The tie of *dependence* shall be established at the time of the application to join the citizen, rather than at the time when citizen decided to settle in the host State. The court gave an example of a situation when TCNs were independent at the time when Union citizen settled in the host State, but due to changing health or financial circumstances become dependent upon the EU citizen. On the other hand, Member States while establishing *dependence* have discretion as to the "[…] particular requirements of the nature and duration of dependence provided these are consistent with the normal meaning of *dependence* and do not deprive Article 3(2) of its effectiveness.[…]"[151] The Courts has noted some examples for factors to be taken into account: "[…]the extent of economic or physical dependence and the degree of relationship between the fomily member and the EU national whom he wishes to accompany or join[…].[152] The situation of *dependence* shall be genuine and stable. It should not have been brought with the sole purpose to obtain entry into and residence in the host Member State.[153]

This decision is being a real practical interest for practitioners in this area.[154] The Court left a margin of discretion as to the factors to take into account when deciding whether an individual is *dependent* or not. The competent authorities are left to demonstrate which factors were taken into account in making a finding of *dependence*. Moreover, the Court ruled that the decision brought by the competent authorities must be judicially reviewable. Taking into account Members States discretion in this situation, we may presume that there will be more references on this subject from the domestic Courts.

There is no requirement for the Member States to grant residence rights to family members who fall under definition in Article 3(2) of the Directive 2004/38. However, Member States national legislation shall contain criteria which enable other family members to obtain a decision on their application for entry and residence. The Member States have a wide discretion when selecting those criteria, but the criteria must be consistent with the normal meaning of the term "facilitate" and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness.[155] *In order to "[…] fall within the category, referred to in Article 3(2) family members who are 'dependants' of a Union citizen, the situation of dependence must exist in the country from which the family member concerned comes, at the*

[150] *Rahman* para.27
[151] *Ibid.* para. 36-40
[152] *Ibid*. para. 23
[153] *Ibid*. para. 38
[154] Christopher Brown, Anita Davies "Rahman-further fleshing out of the position of third country nationals under the Citizenship Directive *(EUtopia Law, posted November 29 2012)*
[155] *Rahman* case para 24.

very least at the time when he applies to join the Union citizen on whom he is dependent.[…]" [156]*The Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence. In the case of refusal to grant residence rights, other family members are entitled to a judicial review of whether the national legislation and its application is justified by reasons.*

[156] *Ibid.* para 27

3. THE CJEU CASE-LAW: THREE APPROACHES TOWARDS ARTICLE 8 AND THE CHARTER

3.1 The division of competence: EU law or Member States immigration policy?

There were different approaches in the case-law of the CJEU establishing the availability of family members of EU citizens to reside within the Union's territory. The question may arise: what was the reason for these different approaches? We would like to begin the analysis to this question by explaining what was and is the *division of competence* between EU legislation and Member States immigration policy. Further, we will find out how the case-law of the Court made changes to this division.

On the one hand EU law is competent to regulate the free movement of persons within the territory of the Member States. This follows from the Treaty provisions on the free movement in relation with the instruments of secondary legislation, which was adopted in order to give effect to these provisions.[157] These instruments provide rights for their family members, including third country nationals, to move and reside with them[158]. On the other hand, the ability of Member States to determine the rights of third country nationals to move and reside together with his or her citizen spouse used to be the heart of Member State sovereignty to control immigration matters.[159] After the introduction of the Directive 2004/38, EU law still did not regulate the important issues concerning entry and residence rights, and the case law of the CJEU had only recently began to form the basis for the conditions of such rights. Before the recent decision of *Metock* case, the EU Member States remained competent in respect of most aspects of immigration policy. A major issue of this section will be to reveal whether national law or secondary EU law govern entry and residence requirements?

Metock and Others is an important case in a line of cases in which third country nationals who are family members of a national of one of the Member States claim a right of residence in one of the Member States.[160] The Court, in its decision to the case, clarified the extent of Member States' competence to control the right of third country nationals to enter the Union for the first time.[161] Advocate General Poires Maduro described this issue as a sensitive one because it involved drawing a dividing line between that covered by the provisions on Union

[157] Blaise Benethen "Case Law Case C-127/08, Metock and Others v. Minister for Justice, Equality and Law Reform" *(Columbia Journal of European Law Vol.15 pp.321-341)* p.325
[158] EMN Synthesis Report "Report Intra-EU mobility of third-country nationals" (*European Migration Network Study; 2013)* p.18
[159] Elaine Fahey „Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*" p.1
[160] Blaise Benethen "Case Law Case C-127/08, Metock and Others v. Minister for Justice, Equality and Law Reform" *(Columbia Journal of European Law Vol.15 pp.321-341)* p.321
[161] Laura Elizabeth John "Case C-127/08 Metock and Others" *(Monckton Chamber; European Law Case note; August 2008)* p.1

citizens' freedom of movement and residence and that which comes under immigration control, a matter over which the Member States retain competence in so far as and to the extent that the European Union has not brought about complete harmonization.[162] The importance of this case is evident, as ten Member States[163] intervened to support Ireland.

Before presenting the judgment and the reasoning for the *Metock* case, we will analyze the CJEU's different approaches on this matter, prior to the *Metock* decision. Dr. Alina Tryfonidou[164] offered to divide the family reunification rights case-law into two categories, which follow two different approaches: moderate and liberal. However, we decided to group the case-law on this matter in three categories, namely: restrictive, flexible and generous. We believe that analyzing the granting of the right to reside for TCN family members on case-by-case basis will help us understand what the motives of the Court were in order to *widen* the competence of EU law in family reunification sphere.

In the first subparagraph we will present the main cases which covered the restrictive approach of the Court. Secondly, we will proceed with the judgments, which showed that the Court was eager to change some of its previous judgments, and we will answer what was the reason for that kind of change. And lastly, the third group of cases will be discussed, the analysis of which will answer how and why the protection of family life became a main factor in order to grant resident permit to TCN family members and why the Court had "reconsidered" its previous decisions. During the analysis the following questions are going to be answered: how the status of EU citizenship is related to the right of residence for the TCN family members, what is the effect of the date of marriage on the benefit of the right of residence conferred by Directive 2004/86, why the Member States were not satisfied with the Courts decision on *Metock.*

EU law is competent to regulate the free movement of persons within the territory of the Member States. This follows from the Treaty provisions on the free movement of EU citizens in relation with the instruments of secondary legislation adopted to give effect to these provisions. At first the ability of Member States to determine the rights of TCNs to move and reside together with his or her EU-citizen family member used to be the heart of Member State sovereignty to control immigration matters. After the introduction of the Directive 2004/38, EU law still did not regulate the important issues concerning entry and residence rights for TCNs family members, and the case law of the CJEU had only recently began to form the basis for the conditions of

[162] View of Advocate General Poiares Maduro in Case C-127/08 *Metock*

[163] States which supported Ireland: Chech Republic, Germany, The Netherlands, Greece, Cyprus, Malta, Denmark, Finland, United Kingdom, Austria.

[164] Dr Alina Tryfonidou, Lecturer in Law of University of Leicester presented the paper at the EUSA Conference in Los Angeles, "Family Reunification Rights of (Migrant) Union Citizens: Towards a more liberal approach" (*European Law Journal, Vo. 15, No. 5. 2009, pp. 634-653*)

such rights . The Court needed to draw a dividing line between that covered by the provisions on Union citizens' freedom of movement and residence and that which comes under immigration control, a matter over which the Member States retain competence in so far as and to the extent that the EU has not brought about complete harmonization.

3.2 *Morson* and *Akrich*: CJEU implementing restrictive conditions for the family members of the EU national

In this paragraph, we will firstly, take a chronological leap forward and begin the analysis of *Morson and Jharjan*[165]case. According to the settled case law Treaty rules on free movement of persons cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State.[166] The Court required that the grant of family reunification rights was necessary "[…] for enabling a Member State national to move between Members States and exercise one of the fundamental freedoms […]".[167] As a result of this doctrine, it was held that only EU nationals, who exercised their right to free movement, enjoy the right under EU legislation to be joined by his family member. The first Courts judgments on this matter were analyzed in early 1982. The issue was well illustrated by the *Morson and Jhanjan* case, where Mr Morson and Mrs Jhanjan had applied for permission to reside in the Netherlands in order to install themselves with their daughter and son respectively.[168]

The CJEU ruled that Dutch nationals of Surinam origin had no right under Community (EU) law to bring their parents, of Surinamese nationality, into the country to reside with them. The son and the daughter lived and worked in Holland their whole life and *had never used the right of freedom of movement within the Union's territory*. Because of that, they could not derive the right te be joined by their family, as this right was covered by Community (EU) law. In its reasoning the Court emphasized:

"[…] the refusal to grant a right of residence to the Surinamese women would not impact on the exercise by their children of the freedom of movement. […][169]

The Court determined that, Member States have no obligation under Community (EU) legislation to grant residency in situations falling outside the scope of Community (EU) law,

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[165] Joined Cases 35 and 36/82, *Morson and Jhanjan* [1982] ECR 3723

[166] Blaise Benethen "Case Law Case C-127/08, Metock and Others v. Minister for Justice, Equality and Law Reform" *(Columbia Journal of European Law Vol.15 pp.321-341)* p.336

[167] The observation of AG Tesauro in Singh: the simple exercise of the right of free movement within the Community is not in its self sufficient to bring a particular set of circumstances within the scope of Community law; there must be some connecting factor between the exercise of the right of free movement and the right relied on by the individual' (*point 5 of the Opinion*)

[168] Willy Alexander "Free Movement of Non-EC Nationals: A Review of the Case-Law of the Court of Justice" *(European Journal of International Law; 3 EJIL (1992)53 pp.53-64)* p.54

[169] Case Cases 35 and 36/82, *Morson and Jhanjan* [1982[ECR 3723, p.3

because it has no relation with an aim of the Treaty,[170] and thus the competence in this sphere belonged only to Member States. The problem with this decision was that immigration rules differed within each Member State and were more difficult to satisfy in comparison with the EU law which provided an *automatic right* to family reunification in situations falling within the scope of the free movement provisions.[171]

The difficulties as to the division of competence on this right were well illustrated in the case of *Akrich*[172]. This judgment used to be the basic case for the Member States to rely on in situations when TCN family members tried to obtain residence permit under EU law. We would call it, probably, the most restrictive judgment, as the requirement of a *lawful first point of entry* into the Union, was firstly introduced. The decision of *Akrich* was derived from Council Regulation 1612/68 and not the recent Directive 2004/38. The EU legislation, back then, allowed the Member States the freedom to shape their laws as they see fit[173], and the rights concerning rights of movement of workers were covered by EU law. The question to be resolved in *Akrich* was whether Regulation 1612/68 generated a right of residence in the UK for the third-country national spouse. Mr Akrich was a Moroccan spouse of a British citizen and had *never resided lawfully* in the UK. He had been deported twice from Britain for illegal entry, and finally by his request was deported to Ireland. His wife joined him in Ireland, where they lived together for a period of six months while she worked there. The applicant, came back to England, and applied for revocation of the deportation order, and asked for residence permit as a spouse of British national. The fact that Mrs Akrich had travelled to and worked in Ireland deliberately to glaze her situation with a cross-border dimension was acknowledged by all of the parties involved:[174] "[…] the purpose of her move was solely to regularize her husband's residence in the United Kingdom after their return. […]"[175] "[…] Mr Akrich contended that he should qualify for a right of residence in the UK pursuant to the *Surinder Singh* […]"[176] case of the CJEU. However, the Court held that in order to benefit from the *Singh* decision, it was necessary for Mr. Akrich to have been lawfully resident in another Member State.[177]

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[170] *Ibid.*
[171] Opinion of Advocate General Geelhoed in Case C-1/05 *Jia* (*delivered 27 April 2006*) points 26 and 36
[172] Case C-109/01 Reference for a preliminary ruling: Secretary of State for the Home Department v. Hacene Akrich [2003]
[173] Rosalind English "Akrich" *(Human Rights and Public Law Update; One Crown Office Row ; 1COR Resources*)
[174] Niamh Nic Shuibhne "The Coherence of EU free movement law: Constitutional responsibility and the Court of Justice" (*Oxford Studies in European Law; Hardback; Oxford University Press; 2013*) p.92
[175] *Ibid.*
[176] Case C-370/90 Reference for a preliminary ruling: The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department [1992].
[177] Elaine Fahey „Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*" p.2

At this point, it is relevant to look forward at the case of *Singh*, in order understand the outcome and the Courts reasoning in *Akrich* and the implication of the requirement *of lawful first point entry.*

The first cases considering family unity for TCN family members show that the Court did not oblige Member States to grant residency rights in situations falling outside the scope of EU law: in case when EU national had never used the right of freedom of movement within the Union's territory, he could not claim for the right to reside for his TCN family member under EU law, as it fell under the competence of the Member States. The problem was that immigration rules differed within each Member State and were more difficult to satisfy in comparison with the EU law which provided an automatic right to family reunification in situations falling within the scope of the free movement provisions. The CJEU decision in Akrich introduced the requirement of a lawful first point of entry into the Union, which is the first sings of EU being competent to regulate the conditions of entry and residence for family members of a Union citizen in the territory of the Member State.

3.2.1 The right to reside based on "*Surinder Singh* route"

Firstly we will remind that EU free movement law is principally concerned with the removal of obstacles that would deter a Union citizen from exercising the right to move and reside in another Member State. The landmark case of *Surinder Singh* established that a national of a Member State must not be deterred from exercising free movement rights by facing conditions *on return* to the national's own Member State which are more restrictive than EU law.[178] It should be recalled that the case was about Indian national Mr Singh who married a British citizen and was lawfully residing in the UK. In a couple of years, after their marriage, they both moved and worked in Germany. After two years in Germany, Singhs family decided to return to the UK. Being in the UK, Mr Singh applied to the States authorities in order to gain a residence permit, however his application was rejected. Mr Singh challenged the decision before the UK courts, which then decided to refer the matter for an opinion from the CJEU on whether Mr Singh had a right to reside in the UK on the basis of EU law. The Court ruled that Mr Singh had a right under EU law to reside in the UK on the basis that his wife had previously exercised her right to free movement by working in Germany. Here we once again would like to remind that, Union law can be invoked by nationals against their own Member State when they are exercising (or have exercised) their rights of free movement.[179] Even though, the situation in

[178] Nicola Rogers, Risk Scannel, John Walsh "Free movement of persons in the enlarged European Union" (*Sweet&Maxwell 2nd edition; London 2012*) p.81-83

[179] Catherine Barnard "The Substantive Law of the EU: The Four Freedoms" (*Oxford University Press; Paperback New edition, 08 August 2013*) p.235

Akrich and *Singh* are alike, the Court ruled differently in each of them. We can only presume, if the Court would change its judgment in *Singh* in the case if Singhs family went to another State for a short period of time (as Akrich family did) or their marriage had been one of the conveniences. The CJEU did not deal with these questions precisely in the case of *Singh*, and we believe that those questions were answered in *Akrich*.

In the words of the Court:

"[…] It is true to say, that a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person [...] in the territory of another Member State if, *on returning* to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, 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. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State. […]"[180]

However, the Court emphasized, that Article 10 of the Regulation of 1612 was not applicable if the spouse was not lawfully resident in a Member State, or if the marriage between the parties was one of convenience. "[...] The installation of Mr and Mrs Akrich in Ireland must be viewed as a use of EU law for a purpose not contemplated by the Union legislature but which is inherent in EU law. […]"[181] The EU legislature did not intend to create a right that can be used in order to evade national immigration laws but did create a right in favor of national of a Member State to install himself in another Member State together with his spouse. According to Advocate General Geelhoed, "[…] installation in that other Member State constitutes the key element of the freedom given by EU law to nationals of the Union […].[182]

If there was the refusal to grant Mr Singh a right to reside within the territory of the UK, that would hold Mrs Singh from moving in the first place *from the UK to Germany*. When the Singhs got married and lived in the UK, Mr Singh's right of residence in the UK was governed by UK law. When Mr Singh returned to the UK with Mrs Singh, his right was, again, governed by UK law. Therefore, the movement of the Singhs from the UK to Germany did not have any (negative) impact on Mr Singhs right of residence in the UK.[183] Mr Singh's position

[180] Case C-370/90 *Surinder Singh*, para. 19-20
[181] Opinion of Advocate General Geelhoed in Case C-109/01 *Akrich, (delivered 27 February 2003)* point. 180
[182] *Ibid.*
[183] Alina Tryfonidou "Family reunification rights of (migrant) union citizens: towards a more liberal approach" (*European Law Journal, 15 (5). pp. 634-653).* p.638

was exactly the same as would have been, had Mrs Singh remained confined within the territory of the UK and had not moved to Germany in order to work.

The reason for such a condition was, that if the aim of the right to entry and reside for a family member is only granted so as EU nationals were able to move freely within the Union's territory, the refusal of such rights can be held as preventing that movement only if a Union national who was, previously, residing lawfully with his family members in the territory of one Member State will as a result of his movement to another Member State, lose the right to live together with his close family members.[184] If no such right was enjoyed in the territory of the EU nationals home-State, then it might be presumed that the refusal of a *right of residence* for family members in the host State would not have any impact on the exercise of the freedom to move and thus would not have a sufficient link with the economic aims of the fundamental freedoms. The Court stated that "[…] there would be an abuse if the Community rights had been invoked in the context of marriages of convenience entered into in order to circumvent the national immigration provisions.[…]"[185] On the other hand, "[…] where a marriage is genuine, the authorities of the State of origin must take account of the right to *respect for family life* under Article 8 of the Convention on Human Rights […]".[186] The Court did not find a right of residence for Mr Akrich under Regulation 1612/68, holding that "[…] a precondition of prior lawful residence in an EU Member State could be attached to the spousal residence rights derived from that measure.[…]"[187]

At this point we face the problem, in particular, that the right to respect for family life in *Akrich* situation was breached. By proceeding further, we will see that the situation has changed since the CJEU strengthen the application of *the right to respect for family life* in the cases on family unity.

The case of Surinder Singh established that a national of a Member State must not be deterred from exercising free movement rights by facing conditions on return to the national's own Member State which are more restrictive than EU law. However, if free movement rights were exercised for the purpose to circumvent the national immigration rules (in the case of marriage of convenience) the EU law cannot be applicable. In case where a marriage is genuine, the authorities of the State of origin must take into account the right to respect for family life. In Akrich the Court did not find a right of residence for TCN spouse holding that a

[184] *Ibid.*
[185] European Migration Network Case Law: http://emn.ie/cat_search_detail.jsp?clog=6&itemID=156&item_name=
[186] *Ibid.*
[187] Niamh Nic Shuibhne "The Coherence of EU free movement law: Constitutional responsibility and the Court of Justice" (*Oxford Studies in European Law; Hardback; Oxford University Press; 2013*) p.93

precondition of prior lawful residence could be attached to the spousal residence rights derived from that measure.

3.3 *Jia* and *Carpenter*: Towards a flexible approach

In the cases of *Jia* and *Carpenter* the CJEU have followed a more liberal approach by accepting that EU law may require the grant of family reunification rights even in situations when this is not *necessary* for and *in any way linked to*, the exercise of free movement from one Member State to another.[188]

Since the CJEU's judgment in *Carpenter* there is no requirement for the EU national to exercise the right to live in another Member State before invoking EU law in their own Member State, provided that the EU national can show that failure to grant an equivalent to the EU law right in question would constitute an obstacle to the fundamental right of free movement.[189] Mr Carpenter was a British national who provided services to persons established in other Member States. His permanent residence and business was in UK, where he was living with his Philippines spouse. The British authorities refused to grant Mrs Carpenter a residence permit on the ground that she did not satisfy the requirement of the UK law on the issue, and they issued a deportation order against her. The CJEU concluded that Article 49 EC required the UK to give the right to Mrs Carpenter to reside on its territory together with her husband as otherwise the latter's right to provide services to persons established in the territory of another Member State would be interfered.[190] According to A.Tryfonidou this was "[…] clearly a case where the grant of residence to the non-EU spouse was not, in any way, necessary for allowing a Member State national to exercise an inter-state economic activity […]".[191] It is obvious from the circumstances of the case that Mr Carpenter was not intending to cease his travelling to other Member States in order to provide services (or even stop providing services), just because his was wife was refused a *right to reside* in the UK. "[…] Mr Carpenter was not given an option either not exercising his freedom to provide services and keep the right to reside with his wife, or exercising that freedom and as a result of that, losing that right […]".[192] There was clearly inter-state movement, that movement was for economic purpose (to provide services), however it is unlikely that Mr Carpenter would stop providing services from his Member State of nationality to other States, just because EU legislation does not grant him a right to be accompanied by his

[188] Alina Tryfonidou "Family reunification rights of (migrant) union citizens: towards a more liberal approach" (*European Law Journal, 15 (5). pp. 634-653)* p.638
[189] Nicola Rogers, Risk Scannel, John Walsh "Free movement of persons in the enlarged European Union" (*Sweet&Maxwell 2nd edition; London 2012)*
[190] *Carpenter* para 39
[191] AlinaTryfonidou "Jia or "Carpenter II": The edge of reason" (*European Law Review (2007)32*), pp.914-915
[192] Alina Tryfonidou "Family reunification rights of (migrant) union citizens: towards a more liberal approach" (*European Law Journal, 15 (5). pp. 634-653)* p. 640

spouse in his State of origin.[193] The Court had, as a result, been criticized for this judgment, as it created a situation whereby the limits of application of EU law have become very uncertain.

A very similar approach was followed by the Court subsequently in *Jia* judgment. In *Jia* the CJEU appeared to have a "[…] perfect opportunity to explicitly address the apparent contradiction of earlier CJEU judgments […]".[194] In this case, Chinese mother joined her son, also a Chinese national, who was living with his wife (German national), in Sweden. Ms Jia, as a mother-in-law, applied to the Swedish authorities for a residence permit on the grounds of relationship with an EU national and of financial dependence on her son and daughter-in-law. The application was rejected, on the grounds that she failed to prove financial dependence by way of providing a document from the country of origin. As a result Swedish authorities said that she did not satisfy a „lawful residence requirement". The court of Sweden referred several questions to the CJEU, asking as to whether the decision of the court in *Akrich* applied, specifically the requirement of *lawful residence*, as to Mrs *Jia* and whether the Swedish authorities were correct to require documentary proof from her country of origin.[195]

The Court ruled that *Akrich* judgment shall not be transposed to this case, as there was an important difference between the facts of the two cases. As the Court noted, Ms Jia was lawfully present in Sweden when she made her application, and she had not sought to evade the country's immigration laws. Furthermore, under the Swedish law the possibility that a *residence permit* would have been granted when she had been able to provide sufficient proof of her dependence. In *Akrich*, by contrast, the applicant had unlawfully entered the UK on two occasions and had been deported. After his removal to Ireland where his EU national wife joined him, it was done only with a view to in later re-enter the UK, as free movement in attempt to circumvent the difficulties created by Mr Akrich's previous evasion of immigration control and deportation from the UK. The Court concluded from this, that the grant of a residence permit in *Jia* case shall not be subject to the prior condition that the TCN has legally resided in another Member State.[196] The Court held that Ms Jia was entitled, under EU law, to be granted the right to *accompany* her daughter-in-law in Sweden. The Court held that Union law did not require a residence permit for TCN family members to be subject to a *lawful residence* requirement,

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[193] AlinaTryfonidou **"**Reverse Discrimination in EC Law**" (***Kluwer Law International, the Netherlands (2009))* p.102

[194] Opinion of Advocate General Mengozzi in Case 291/05 *Eind,* point.46

[195] Dirk Vanheule "Immigration and Asylum Law Volume II: Cases" *(Erasmus Teaching Staff Mobility 2011-2012)* p. 24

[196] T P Kennedy "European Law" (*Law Society of Ireland Manuals Fifth Edition; Paperback; 18 August 2011*) p.23

limiting the *ratio of Akrich*, in the words of certain commentators *meticulously and explicitly*[197]", but notably without overruling the *Akrich* judgment *ratio* itself.[198] As a result, the confusion regarding the scope of Member States' competence in relation to admitting TCNs' family members was still an issue.

If we compare the case of *Jia* and *Carpenter*, the main difference from *Carpenter* is that the State where the right of residence was claimed by the TCN, was not the State of nationality of migrant worker. Still, "[…] like in *Carpenter*, in *Jia* there was no link between the failure to grant *residence permit* and a deterrent effect on the exercise of inter-state movement in contribution of the EU economic aims.[…][199] The question may arise: "[…] how a person who has exercised her freedom to move and establish business in the territory of host Member State, would be deterred if her non-EU mother-in-law was not allowed to come directly to join her in the host state eight years after that initial movement?[…]"[200]

After Courts decisions brought in Jia and Carpenter cases, the mere proof of the existence of the necessary family link, together with the exercise of some kind of inter-state movement, suffices for the bestowal by the Treaty free movement of persons provisions of automatic family reunification rights on non-EU nationals and their EU national family members.

3.4 Generous approach: the significance of the *Metock and the Others* case

Given the obvious degree of confusion resulting from the case law just discussed, the importance of the *Metock and Others* judgment becomes apparent. Together with Courts decision in *Eind,*[201] it is visible that the Court moved towards *generous* judgments. In its reasoning the Court cleared up, that a "[…] situation involves the exercise by a Union citizen of one of the fundamental freedoms and *family members* who fall within one of the categories provided by secondary legislation, there is a sufficient link with EU law and thus the family members can automatically accompany or join the EU national in the host Member State, without any additional conditions being imposed by that State […]".[202]

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[197] In the words of Oliver & Reestman, "European Citizens' Third Country Family Members &Community Law",(2007) 3 EuConst 463. at 469; Elsmore and Starup,(2007) 44 Common Market Law Review 787

[198] Ewaen Fred Ogieriakhi „Union Citezenship: Impact, Influences and Challenges to Irish Immigration Laws" (*Dublin Institute of Technology) p.48*

[199] Alina Tryfonidou "Family reunification rights of (migrant) union citizens: towards a more liberal approach" (*European Law Journal, 15 (5). pp. 634-653)*

[200] Opinion of Advocate General Geelhoed in Case-C1/05 *Jia* points. 70-71

[201] Case C-291/05 Reference for a preliminary ruling: Mister voor Vreemdelingenzaken en Integraite v. R.N.G. Eind [2007]

[202] Alina Tryfonidou "Family reunification rights of (migrant) union citizens: towards a more liberal approach" (*European Law Journal, 15 (5). pp. 634-653)* p.341

Firstly the decision of *Eind* will be analyzed as it shows the first different approach taken by the Court in this type of cases. Mr Eind was a Dutch national, who went to the UK in order to work. His Surinamese daughter Rachel came directly from her country of origin and joined him in the UK. Mr Eind had a right to reside in the UK under Regulation 1612/68, and his daughter as a family member of Community (now Union) worker had the same right of residence. Few years later, Mr Eind returned to the Netherlands and Rachel joined him there. Mr Eind was not engaged in any economic activity. The Dutch authorities refused to issue a residence permit to his daughter, reasoning that she did not derive any rights from EU law, because her father ceased to be a worker within the meaning of Article 39 EC (now Article 48 TEU) nor a Union citizen that fell within the scope of EU law. The Court of Netherlands referred several questions to the CJEU, particularly to find out if Rachel had a right deriving from the EU law to remain in the Netherlands as a family member of her father. The Court applied the *principle of deterrence* in order to explain its reasoning[203]:

"[…] EU national could be deterred from leaving that Member State if he is not certain 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. That *deterrent effect* would also derive simply from the prospect for that same national of not being able on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification […]".[204]

The *right of residence* to which Rachel was entitled by virtue of EU law, was not affected by the fact that, prior to residing in the host Member State, Rachel did not poses a right of residence under national law in the Member State of her father's nationality. This was reasoned by the fact, that the *prior lawful* residence requirement is not implemented under EU law. Moreover such a requirement is contrary to the objectives of the Community (EU) legislation, which has recognized the importance of ensuring protection for *the family life* of nationals of the Member States in order for them to be able to exercise their fundamental rights guaranteed by EU law.

"[…] *Metock* case involves four cases lodged before the High Court in Dublin, which were joined for the purpose of convenience. […]"[205] Mr Metock and three other TCNs had arrived to Ireland from outside the European Union and had lodged an asylum application there,

[203] *Eind* para 32 The right of the migrant worker to return and reside in the Member state of his nationality, after his gainful employment in host Member state, is conferred by Community (EU) law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC and the provisions adopted to give effect to that right, such as those laid in Regulation 1612/38

[204] *Eind* para. 35-36

[205] Blaise Benethen "Case Law Case C-127/08, Metock and Others v. Minister for Justice, Equality and Law Reform" *(Columbia Journal of European Law Vol.15 pp.321-341)* p.322

which were refused. After the arrival, applicants had married Union citizens who were working and residing in Ireland. The Union citizen spouse had travelled to Ireland in exercise of their free movement rights *before having met* their future non-EU national husband. Applicants subsequently applied for residence cards as the spouses of EU citizens, under Directive 2004/38, but their applications were refused by the Irish Minister for Justice. The refusal was based on the European Communities Regulation 2006,[206] which transposed Directive 2004/38 into Irish legislation. This law required a family member of a Union citizen to *demonstrate* that they had been *lawfully resident* in another Member State prior to their entry into Ireland, if they wanted to benefit from a Community right to reside.[207]

The applicants argued that the condition of "[…] *prior lawful residence* of Regulation 3(2) of the 2006 Regulations was not compatible with Directive 2004/38. […]"[208] The High Court referred questions to the CJEU in order to clarify the interpretation of the Directive. Firstly, it was questioned whether under the Directive, a Member State is allowed to require that a non-EU spouse of an EU citizen must have been *lawfully resident* in *another* Member State *prior* to coming to the host Member State in order to benefit from the provisions of the Directive. Secondly, whether TCN spouse of an EU citizen can derive rights from the Directive, irrespective of when or where their marriage took place or when or how the TCN spouse entered the host Member State.[209]

According to Advocate Genaral Poiares Maduro, "[…] the Directive itself did not provide an explicit answer; therefore it became necessary to refer to its objectives […]".[210] "[…]The Court reiterated the terms of the Directive and its preamble that explicitly provided that the citizen directive is to *strengthen* free movement rights rather than weaken them[…]".[211] It noted, that the Courts "[…] previous decision in *Akrich must be reconsidered*. […][212] The CJEU held that none of the provisions of Directive 2004/38, "[…] concerning *family members*, makes the application of the Directive conditional on their having previously resided in a Member State.[…]"[213] In particular, Article 10(2) is an exhaustive list of the documents which Member States may require TCN family member to produce, and it does not include documents that demonstrate prior lawful residence.

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[206] Irish Regulation of 2006
[207] Laura Elizabeth John "Case C-127/08 Metock and Others*" (Monckton Chamber; European Law Case note; August 2008)* p.3
[208] *Metock* para 41
[209] *Ibid*. para 47
[210] View of Advocate General Maduro in Case C-127/08 *Metock* (delivered 11 June 2008)
[211] *Ibid. point.5*
[212] Elaine Fahey „Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock"* p.4; *Metock* para. 60
[213] *Metock* para. 39-49

According to the Court, the EU legislation was in fact competent, under the Treaties to regulate the conditions of entry and residence of family members of a Union citizen.[214] And what happened to the competence of the Member States on this issue? The Court was adamant, stating that "[…] to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to TCN, who are *family members* of Union citizens and have not already, resided lawfully in another Member State, would have the effect that […]"[215] the free movement rights would vary across the Union. If the ruling was different it would be more complicated for TCN spouse as the freedom of movement according to the provisions of national law concerning immigration, with one countries permitting entry and residence and other refusing them. In that context EU citizen would not be able to use his right to free movement, as he would lose his ability to choose the country of residence and have difficulties with the procedure of his family to join him. And we remember, what was pointed out at the beginning of this paragraph: EU law has competence if we talk about right to freedom of movement for EU citizens. This right would be *weakened* in a situation when Union citizen is not allowed (because of internal rules) to lead a normal family life in the host Member State. As a result, it is "[…] under EU competence to regulate the conditions of entry and residence for family members of a Union citizen in the territory of the Member State, where the fact that it is impossible for the Union citizen to be *accompanied or joined* by his *family* would be such as to interfere with his freedom of movement by discouraging him from exercising his right to entry and reside in the host Member State. […]"[216]

Here we would like to repeat, that ten Member States joined *Metock* case in order to support the position: that Member States shall remain competent to regulate the first access of non-EU family members to the Unions territory. The CJEU, however, did not accept the argument based on the *need to control immigration* and examine individually the circumstances of applicants. The Court was of the position, that the number of persons who would benefit from this case decision was limited by the restriction to *family members.*

On the one hand, it appeared to be easier for TCN to reside together with his EU national family member. On the other hand, the Court emphasized that the interpretation given in *Metock* on the Directive concerns only *non-EU family members* of a Union national *who*

[214] Elaine Fahey „Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*" p.5 .
[215] Rosaline Smith "European Union Citizenship: Freedom of Movement and Family Reunification. Reconciling Competences and Restricting Abuse?" (*Conference Paper for 10th Jubilee International Academic Conference, 'State, Society and Economy' - Globalisation in a Contemporary World, 13 - 15 June 2010*) p.5
[216] *Metock* para. 63

accompany or join him in addition to the other conditions of the Directive are also satisfied.[217] The conditions stated in Article 7(1) and (2) of the Directive, which provide that "[…] non-EU family members accompanying or joining the EU citizen shall have a right of residence in the host Member State for a period of longer than three months, provided that such EU citizen:

- is a worker or self-employed person in the host Member State;
- or, has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during their period of residence and has comprehensive sickness insurance coverage in the host Member State.[...]"[218]

The Directive does not prohibit Member States from imposing a condition of *prior lawful residence* with regard to TCNs who are not family members in a sense of Article 2(2) of the Directive. If there is a case of direct descendants who are over the age of 21 or direct relatives in the ascending line, this requires not only the existence of a family relationship, but also proof of *dependence.*

Taking into account that the Directive ensures the rights only to *family members* who *accompany or join* EU citizen; it limits the rights of entry and residence of these family members to the Member State in which that citizen resides. It means that the decision leaves the competence of Member States with regard to TCN family members of Unions citizen who does not reside in their territory unaffected. In *Eind*, the CJEU noted, that "[…] the right to family reunification under Article 10 of Regulation 1612/68 does not entail for members of the families of migrant workers any autonomous right to free movement and that it followed from this that: "the right of a TCN who is a member of the family of a Community worker to install himself with that worker may be relied on only in the Member State where that worker resides.[…]"[219] Lastly, the judgment does not influence the competences of the Member States with regard to TCN family members when the situation is purely internal.

Even when the host State is permitted to restrict the rights of entry and residence of TCN family members, it might do so only with limitations provided under the Directive. Under Article 27 the host Members State may restrict the free movement rights of TCN family members on grounds of public policy, public security or public health,[220] taking into account that these measures are in compliance with *principle of proportionality* and must be based

[217] Blaise Benethen "Case Law Case C-127/08, Metock and Others v. Minister for Justice, Equality and Law Reform" *(Columbia Journal of European Law Vol.15 pp.321-34)* p.339
[218] Article 7 of the directive 2004/38/EC
[219] *Eind* para. 23-24
[220] Chapter VI of the Directive 2004/38/EC is entitled "Restrictions on the right of entry and the right of residence on grounds of public policy,public security, public health"

exclusively on the personal conduct of the individual concerned. This was stated by the Court in the case of *Orfanopoulos*[221] where the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Under Article 35 of the Directive the host State may refuse, terminate, or withdraw residence rights in the case of abuse of rights or fraud[222] such as marriages of convenience. The marriages in *Metock* case were not marriages of convenience, and if they were, then Ireland would not have been obliged under the Directive to grant *residence rights* to the TCN spouses concerned.[223]

The CJEU in Metock succeeded at striking a balance between the legitimate interests of the Members States in ensuring safe and effective immigration control. Member States could not refuse a TCN family member a residence permit purely for entering into, residing in its territory in breach of national immigration law[224] but only to do so if such is in "[…]compliance with the strict conditions of Article 27 of the Directive[…]".[225] As a consequence for Member State, they will have to grant a residence permit to TCNs whom they would have previously preferred to refuse one. Members States with immigration rules similar to the Irish 2006 regulations will be required to remove certain restrictions to the residence rights of TCN family members of EU citizens.

3.4.1 Scope of Article 3(1) of the Directive 2004/38/EC: Accompany or join

The second question of the High Court concerned the interpretation of Article 3(1) of the Directive. The Article 3(1) reads as follows: "[…] this Directive shall apply to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members ... who *accompany or join* them.[…]"[226]

In each of the four cases before the Court a TCN had entered Ireland *before* marrying an EU citizen there. In this section we will focus on the interpretation of this Article and the meaning of the definitions *accompany* and *join*.

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[221] Case C-482/01 and Case C-493/01 Reference for a preliminary ruling: Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg [2004] para 66.
[222] Member states could do so provided that these measures would be proportionate to and respect the procedural safeguards provided for in Articles 30 and 31 of the Directive 2004/86/EC
[223] *Metock* para 46
[224] *MRAX* para 73-80
[225] *Metock* para 95
[226] Art 6(1) And Art 7(1) of Directive 2004/38/EC, relating respectively to the right of residence for up to three months and the right of residence for more than three months, require that non-EU members of a Union citizen „accompany" or „join" him in the host member state in order to enjoy a right of residence there, as the CJEU pointed out in *Metock* paras 39 and 86

The Court was asking, whether applicants (TCN spouses) can be treated as *accompanying and joining* the EU citizen in a sense of Article 3(1) of the Directive. CJEU had to rule and explain whether the EU citizen must already have founded a family at a time when he moves to the host State in order to his TCN family members to be able to enjoy the rights established in the Directive. And secondly, whether TCN who has entered a Member State before becoming a family member of an EU citizen residing in that Member State, accompanies or joins that EU citizen within the meaning of Article 3(1) of the Directive.

Both questions were answered in the affirmative. The Court held that *accompany or join* in Article 3(1) includes TCNs who reside with their Union citizen spouses in the host State, and it does not matter whether the marriage took place before or after the Union citizen exercised their free movement rights.[227] Advocate General Maduro presented the meaning of the word *accompany* in his view to *Metock* case, and offered functional interpretation in order to remove ambiguity in the wording:[228]

"[...] it can indicate a movement and be understood as meaning to go with but can also have static connotation and mean to be with [...]"[229]

If the attention was placed only on the mobility of EU nationals (on their freedom to move to another Member State), that could mean that EU law does not guarantee *a right to reside* to family members in the host State, where family relations are not yet established until only the freedom of movement was exercised. Yet, the Advocate General Maduro brings up the notion of the status of the Union citizen. He explains that "[…] the rights attached to this status, encompass the right to reside freely within the Member States.[…]"[230] As the Directive seeks to regulate the exercise of a Union citizens' "[…] fundamental right of movement and *residence*, applies, by virtue of Article 3 thereof, to all Union citizens who move to or reside in a Member State other than that of which they are nationals […]".[231] If Union citizen would be unable to live together with his family members in the host State, his permanence would be undermined. The point when a person became a family member is of little importance. The Court considered that "[...] the purpose of the Directive requires that when Union citizens establish a family *after* moving to another Member State they should be permitted to have their family join them in the host Member State. Otherwise they would be deterred from continuing to reside there.[...]"[232]

[227] Laura Elizabeth John "Case C-127/08 Metock and Others*" (Monckton Chamber; European Law Case note; August 2008)* p.3
[228] View of Advocate General Maduro in Case C-127/08 *Metock* (*delivered 11 June 2008*) point 17
[229] View of Advocate General Maduro in Case C-127/08 *Metock* (*delivered 11 June 2008*) point 17
[230] *Ibid.*
[231] *Ibid*, point 18.
[232] Laura Elizabeth John "Case C-127/08 Metock and Others*" (Monckton Chamber; European Law Case note; August 2008)* p.4

"Article 3(1) must therefore be interpreted widely, so as not to render the rights provided for ineffective".[233] Moreover none of the Directive provisions require that Union citizen must already have founded a family at a time when he moves, in order to TCN be able to enjoy the rights provided by the Directive. The Court justified its wide reading of Article 3(1) by referring to the objectives of the Directive, namely to "[…] facilitate the exercise of the right of EU national to move and reside freely within the territory of the Member States […]".[234]

In *Metock* the Court held that *accompany or join* in Article 3(1) includes TCN who reside with their Union citizen spouses in the host Member State, *irrespective* of whether the marriage took place *before or after* the Union citizens exercised their free movement rights, irrespective of whether the TCN entered the host Member State before or after the marriage, and irrespective of where the marriage was solemnised. The arguments of the Member States that „[...] those terms were directed at family relationships existing at the time when the Union citizen exercises their right of free movement were rejected [...]".[235]

If the Article would be interpreted in a more restrictive way, it would allow host Member State, under certain circumstances, to refuse TCN family members to join the EU citizen. For example, a TCN who entered a host State before marrying an EU citizen residing in that Member State or who married an EU citizen before the latter established himself in the host State, could be refused a right of residence. "[…] Such situation would discourage EU citizen from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or even in non Member State country […]".[236] "[…] That would contradict to the objectives of directive. For the applicability of art 3 it was not relevant when and where the marriage took place or how the latter entered the host Member State. […]"[237]

In Metock the CJEU held that terms accompany or join of Article 3(1) of the Directive 2004/38, include TCN who reside with their Union citizen spouses in the host Member State, irrespective of :

- *whether the marriage took place before or after the Union citizen exercised their free movement rights,*
- *whether the TCN national entered the host Member State before or after the marriage*
- *where the marriage was solemnized.*

[233] *Ibid* .
[234] *Metock* para 38-39; Directive 2004/38/EC reffering recitals 1, 4, 11
[235] Laura Elizabeth John "Case C-127/08 Metock and Others*" (Monckton Chamber; European Law Case note; August)* p.3
[236] View of Advocate General Maduro in Case C-127/08 *Metock* (delivered 11 June 2008)
[237] *Ibid.* point 33; Case *Sahin* para 32-33

CONCLUSIONS AND RECOMMENDATIONS

1. TCN *family member* rights are of the *derivative* nature, and they can be exercised:
   - only *after* EU citizen exercised *his* right to move;
   - when they fall into one of the categories of family members provided in the Directive 2004/38/EC.
2. The right of residence is subject to certain conditions. European Union citizen:
   - cannot invoke this right in his home State (unless his situation has a *sufficient link* with EU law);
   - shall be economically active or;
   - self sufficient and have comprehensive sickness insurance.

Conditions No.2 and No.3 ensure that EU citizen and his family will not become a burden on the social services of the host Member State. However, the analysis of the CJEU jurisprudence proved that the Court has recognised a *right of residence* for *family member* even when one or more of the conditions mentioned above were not satisfied. We believe that there are two main reasons for this change:

- introduction of European citizenship which displaced the Courts‘ focus from the rights of individuals derived from their *economic* status to the rights derived from their *status as EU citizen;*
- Courts‘ intention to protect the right to family life when neither the Treaty, nor secondary legislation confers a right of *residence* to TCN *family members*.

3. Child posses an independent right of residence. This is due to connection with his/her right of access to education. Article 12 of the Regulation 1612/68 is interpreted as entitling the parent to reside with his/her child. The right of residence derived from this Article is unconditional. Parent is not obliged to have sufficient resources, in order not to become a burden on the social assistance system of the host State. This right continues even after the child has reached the age of majority: if the child continues to need the presence and the care of his parent.
4. After the comparison of various case-law considering family-unity, we were able to ascertain, that cases, which involve minor children require a more liberal approach. Jugdments of *Chen* and *Zambrano* are the examples of the CJEU‘s dynamically moving forward the notions of citizenship and human rights, however, we are of the opinion that the Court failed to *protect* both notions in the case of *Iida.* We would suggest to take into account even *hyphothetical* situations in cases involving minor children. The Court should ensure childs’ right to family life, even when parents are separated *or* divorced. The rights of

separated parent, who does not live with his family, but still retain family links with them, should be *also* protected by EU law.

5. The CJEU recognises only traditional *marriage* and interprets the definition of *spouse* in rather reserved way. Analysis of Member States national legislation revealed that there are States which recognize same-sex marriage and registered partners and those which explicitly forbid it. The Court leaves the decision to the Member States whether to recognize same-sex spouses and registered partners as equivalent to *marriage* for the purpose of the application of the Directive 2004/38/EC. We think that the Court, taking into account social and legal developments across the Union, should re-interpret the definition of *spouse*, including (at least) registered partnerships. In the case of homosexual partners, the Court should ensure that Member States would not impose discriminatory measures upon them. Member States national legislation should not contain provisions which application would result in homosexual couples *expulsion* from the State. The denial of entry into the host State on the basis of public policy would constitute unreasonable measure.

6. The Court regularly addresses the issue of *dependency*. This issue is analyzed in the cases involving *children* and *other family members*. When we talk about children, their dependence upon parents is clear. Therefore, Member States would rarely forbid for this kind of family to reside within its territory. One the other hand, situation of *other family members* is not so obvious. Individuals, who fall under definition in Article 3(2) of the Directive, should prove their *dependency*. Moreover, Member States, in the exercise of their discretion, may impose particular requirements of the nature and duration of *dependence*. We agree with the Courts' ruling in *Rahman*, that in the case of refusal to grant residence rights, they are entitled to a judicial review of whether the national legislation and its application were justified. We believe it adds *extra layer* for the protection of the right to family life of those *other family members.*

7. The analysis of the CJEU jurisprudence appeared to be very diverse. First of all the Court gave numerous interpretations on Treaty and secondary legislation provisions concerning freedom of movement. Secondly it strengthend the status of EU citizenship – as a result there is no necessity of a cross-border element when TCN family members of EU citizens seek to get residence rights relying on this status, as this requirement is no longer present in the EU Treaties. Thirdly in situation when neither Treaty, nor secondary legislation confers a right of residence to TCN family members, the CJEU infers this right through the use of the *right to family life*. The Court, when deciding on family unity cases, constantly *operates* on three issues - 1) the right to free movement; 2) European Union citizenship; 3) and right to family

life – and apparently he cannot *balance* them all. Our hyphothesis proved out completely because comparison of the CJEU jurisprudence revealed that the Court frequently tries to *combine* all of these interrelated issues. As a result the judgments appear to be unclear, uneven and provide new conditions, which Member States and individuals are obliged to follow.

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ANNOTATION

In this Master Thesis we have analyzed the notion of family as a basis to reside within the territory of the European Union; we have examined relevant CJEU case-law in order to learn how TCN family members of European Union citizens might get residence rights by relying on EU law. We have distinguished problematic aspects related to the definition of family member and proposed theoretical solutions. In the first part of the Master Thesis we have revealed the concept of the right to reside in the context of free movement provisions and its link with the right to family life. In the second part we have discovered difficulties in defining family members of European citizens and we have revealed their unequal treatement even in the same situations. In the third part we tried to distinguish the division of competence between Member States national legislation and EU law. The examination of different case-law concerning family unity, has revealed that the CJEU tries to balance three issues: 1) right to free movement; 2) right to family life; 3) and European citizenship.

Key Words: European Union citizenship, family members, right to family life, residence rights, third-country nationals.

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ANOTACIJA

Magistro baigiamajame darbe išanalizuoti šeimos ryšiai kaip pagrindas leidimui gyventi Europos Sąjungos teritorijoje; išnagrinėtos su tema susijusios ESTT bylos, kurios padėjo sužinoti kada Europos piliečio trečiųjų šalių šeimos nariai gali remtis ES teise tam kad jiems būtų suteikti leidimai gyventi šalyje. Darbe pažymėti probleminiai aspektai susiję su šeimos nario sąvoka ir pasiūlyti galimi sąvokos pakeitimai. Pirmoje Magistrinio darbo dalyje atskleista domicilės koncepcija jūdėjimo laisvės nuostatų kontekste ir jos ryšis su teise į šeimos gyvenimo apsauga. Antroje dalyje atskleisti sunkumai susiję su Europos piliečio šeimos nario sąvokos interpretacija, bei įrodyta kad jų teisės nėra vienodai užtikrinamos net ir labai panašiose aplinkybėse. Trečioje dalyje analizuojamas kompetencijos paskirtymas tarp Sąjungos Narių nacionalinės teisės ir ES teisės. Skirtingų bylų, susijusių su šeimos vienybe, analizavimas atskleidė kad ESTT stengiasi subalansuoti tarpusavyje 1) teisę laisvai judėti; 2) teisę į šeimos gyvenimo apsaugą; 3) Europos Sąjungos pilietybę.

Pagrindiniai žodžiai: Europos Sąjungos pilietybė, šeimos nariai, šeimos gyvenimo apsauga, teisė gyventi šalyje, trečiųjų šalių piliečiai.

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SUMMARY

In this Master Thesis we have analyzed the notion of family as a basis to reside within the territory of the European Union. The Thesis is relevant bacause the case law of the Court determining the availability for family unity under EU law, has changed significantly since the introduction of the notion of the European citizenship. Status of Unions‘ citizens guarantees the right to free movement not only for workers, but to all European citizens and their family members. This Thesis is novel because scholars often focus only on the European Union citizen and his right to free movement. However we decided to focus on *family members* who can accompany or join him. We would like to analyze the following **problems**: 1) who is a *family member* in the context of citizenship and free movement law?; 2) why the Court has moved towards more liberal approach when deciding on cases concerning family unity of EU citizen and his/her TCN family member? **Objective** of the Thesis: to find out what are the obligations for the Member States in the context of free movement and family unity provisions. Taking into account the jurisprudence of the CJEU and legal framework of EU law we have formulated the following **hypothesis:** The Court, when deciding on family unity cases, constantly *operates* on three issues - 1) the right to free movement; 2) European Union citizenship; 3) and right to family life – and apparently he cannot *balance* them all. In order to prove the hypothesis we have used the following methods: descriptive-analytical method; comparative method; analysis of legal documents; analysis of scientific literature; analysis of the CJEU jurisprudence. The first part reveals the concept of the right to reside in the context of free movement provisions and its link with the right to family life. The second part discovers difficulties in defyining family members and reveals their unequal treatement even in the same situations. The third part distiguishes the division of competence between Member States national legislation and EU law.

After the examination and comparison of the CJEU juriprudence we have proved that the Court recognises only traditional marriage and interprets the definition of *spouse* in rather reserved way. Moreover, we have found the right to reside for TCN parents. The latest jugdments have showed that the Court is moving towards more liberal approach when deciding on case concerning family-unity, in order to protect the right to family life.

Šovkovaja J. Šeima kaip gyvenimo šalyje pagrindas Europos Sąjungos Teisingumo Teismo jurisprudencijoje / Tarptautinės teisės magistro baigiamasis darbas. Vadovė Prof. dr. L.Jakulevičienė – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2014 – 66 p.

SANTRAUKA

Magistro baigiamajame darbe išanalizuoti šeimos ryšiai kaip pagrindas leidimui gyventi Europos Sąjungos teritorijoje. Tema yra aktuali, kadangi ESTT jurisprudencija ženkliai pasikeitė po Europos Sąjungos pilietybės įvedimo. ES pilietybės statusas suteikia teisę laisvai keliauti ne tik darbuotojams, bet visiems ES piliečiams ir jų šeimos nariams. Tema yra nauja, kadangi mokslinikai dažniausiai akcentuoja tik ES pilietį ir jo teisę laivai keliauti. Tačiau mes nusprendėme rašyti apie *šeimos narius* kurie turi teisę lydėti arba prisijungti prie ES piliečio. Šiame darbe ketiname išanalizuoti tokias **problemas**: 1) kas yra laikomas *šeimos nariu* pilietybės ir laisvo asmenų judėjimo teisės kontekste; 2) kodėl ESTT pasirinko liberalų bylų, susijusių su šeimos vienybe, traktavimo būdą? Darbo **tikslas:** išsiaiškinti kokius įsipareigojimus turi Valstybės Narės laisvo asmenų judėjimo ir šeimos vienybės nuostatų kontekste. Atsižvelgiant į ESTT jurisprudeciją ir ES teisinę sistemą, buvo suformuluota ši **hipotezė**: Teismas spręsdamas bylas, susijusias su šeimos teisę į vienybę nuolat atsižvelgia į trys dalykus 1) teisę į judėjimo laisvę; 2) Europos Sąjungos pilietybę; 3) ir šeimos gyvenimo apsaugą – ir akivaizdu jis negali visų jų subalansuoti. Tam, kad įrodytume hipotezę ir pasiektume numatytą tikslą, naudojome šiuos metodus: aprašomąjį-analytinį metodą; lyginamąjį metodą; teisinių dokumentų analizės metodą, mokslinės litaratūros analizės metodą, ESTT jurisprudencijos analizės. Pirmoji Magistrinio darbo dalis atskleidžia domicilės koncepciją jūdėjimo laisvės nuostatų kontekste ir jos ryšį su teise į šeimos gyvenimo apsaugą. Antroji dalis atskleidžia sunkumus susijusius su *šeimos nario* sąvokos interpretacija, bei įrodo kad jų teisės nėra vienodai užtikrinamos net ir labai panašiose aplinkybėse. Trečioji dalis analizuoja kompetencijos paskirtymą tarp Valstybės Narių nacionalinės teisės ir EU teisės.

Po ESTT jurisprudencijos palyginimo ir analizės įrodyta kad Teismas pripažįsta tik tradicinės šeimos sąvoką ir ribotai interpretuoja sutuoktinio sąvoką. Darbe įrodyta kad trečiųjų šalių tėvai turi teisę gyventi ES. Naujausi ESTT sprendimai rodo, kad Teismai vis dažniau pasirenka liberalų bylų, susijusių su šeimos vienybe, traktavimo būdą, tam kad užtikrintų piliečių teisę į šeimos gyvenimo apsaugą.

Forma patvirtinta Mykolo Romerio universiteto
Senato 2012 m. lapkričio 20 d. nutarimu Nr.1SN-10

PATVIRTINIMAS APIE ATLIKTO DARBO SAVARANKIŠKUMĄ

2014 - 05 - 26
Vilnius

Aš, Mykolo Romerio universiteto (toliau – Universitetas),
Teisės Fakulteto, Tarptautinės Teisės (anglų kalba) programos

(fakulteto / instituto, programos pavadinimas)

Studentė_____ JANA ŠOVKOVAJA_____
(vardas, pavardė)

patvirtinu, kad šis rašto darbas / bakalauro / magistro baigiamasis darbas

„Family as a basis of residence in the jurisprudence of the Court of Justice of the European Union;“

1. Yra atliktas savarankiškai ir sąžiningai;
2. Nebuvo pristatytas ir gintas kitoje mokslo įstaigoje Lietuvoje ar užsienyje;
3. Yra parašytas remiantis akademinio rašymo principais ir susipažinus su rašto darbų metodiniais nurodymais.

Man žinoma, kad už sąžiningos konkurencijos principo pažeidimą – plagijavimą studentas gali būti šalinamas iš Universiteto kaip už akademinės etikos pažeidimą.

_____ _____

(parašas) *(vardas, pavardė)*

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