



HELLENIC REPUBLIC

**National and Kapodistrian
University of Athens**

EST. 1837

LAW SCHOOL

POSTGRADUATE PROGRAM: LL.M IN INTERNATIONAL AND EUROPEAN LAW

SPECIALIZATION: EUROPEAN LAW

ACADEMIC YEAR: 2023-2024

**POSTGRADUATE THESIS
ALEXANDRA MICHAIOVITS
R.N.: 7340202302016**

**The right of entry and residence for third-country nationals
who are family members of EU citizens**

Supervisors:

Names of the supervisors

- a) Papadopoulou Revekka –Emmanuela, Associate Professor, NKUA (Supervisor)
- a) Perakis Emmanouel, Associate Professor, NKUA
- c) Kouskouna Metaxia, Assistant Professor, NKUA

Athens, 29 September 2024

*“The strength of a society lies in the rights it protects,
not just for its citizens but for those who find a home within its borders.”*

-unknown

Copyright © [Michailovits Alexandra, 2024]

All rights reserved.

It is prohibited to copy, store and distribute this work, in whole or in part, for commercial purposes. Reprinting, storing and distributing for non-profit, educational or research purposes is permitted, provided the source is acknowledged and the present message retained.

The views and positions contained in this paper express the author and should not be construed as representing the official positions of the National and Kapodistrian University of Athens.

Abstract

Citizenship invariably involves the protection of the rights of a person both in his own country and abroad. While EU citizenship is not viewed as equated to nationality, it increasingly embraces elements that were traditionally considered linked with nationality, such as entry, residence, and protection rights. Within the European Union, such protection also extends to family members of EU citizens, including third-country nationals, particularly when EU citizens avail themselves of their free movement rights. This thesis, therefore, endeavors to analyze in depth the rights of entry and residence for TCN family members of EU citizens, which are secondary and derivative from the status of the EU citizen. It will also describe the various categories of non-EU nationals who are granted these rights, including spouses, partners in a durable relationship, children, and other dependents, examining how they fit within the legal framework. The paper principally focuses on the legal framework controlling these rights and the restrictions and limitations imposed by EU law and the national laws of the Member States. It examines the opportunities available to such persons and the challenges they face, as well as the legal mechanisms designed to balance individual rights with the sovereignty of the Member States.

The motivation for this research is family unity and the protection of family rights, which are fundamental to guaranteeing the free movement of EU citizens. A comprehensive understanding of the processes through which non-EU national family members can secure and maintain residency rights is crucial for safeguarding the rights of EU citizens, whether they choose to move within the Union or remain in their home state. This perspective highlights the supranational nature of the EU, where citizens have rights and obligations across Member States, contributing to a shared legal order. The protection of the right of abode for EU citizens and their families, both in their state of nationality and across the wider Union, is thus an important part of EU law. The legal landscape of such rights has evolved over time, particularly with the introduction of Directive 2004/38/EC, which sets conditions for TCN family members to join and reside with EU citizens in different Member States. This thesis will adopt the methodologies of legal interpretation, focusing on key legislation, landmark CJEU rulings, and the European Commission's 2023 Guidelines on the Free Movement Directive, while also placing these developments in the broader context of EU citizenship law, including the protection afforded by the Charter of Fundamental Rights and the consequences of major developments such as the loss of EU citizenship.

Table of Contents

List of abbreviations.....	1
Introduction.....	2
PART I Subjective scope of right of entry and residence under EU citizenship law for TCN family members.....	3
CHAPTER A) Derivative residence rights for TCNs under the Free Movement Directive and Article 21 TFEU.....	3
A.1 Understanding the intersection of EU citizens and those of third-country nationals family members' rights.....	3
A.1.1 Derived right of residence for family members of EU citizens returning to their home state.....	6
A.2 Distinguishing privileged and non-privileged family members of EU citizens.....	8
A.2.1 Definition of "Spouse": Recognizing different-sex and same-sex spouses.....	9
A.2.2 Registered partner.....	10
A.2.3 Direct descendants.....	11
A.2.4 Direct ascendants as primary carers.....	13
A.2.5 Other family members.....	14
A.3 Interim Conclusion.....	15
CHAPTER B) Right of entry and residence under Art. 20 TFEU: Eliminating the cross-border requirement.....	16
B.1 Zambrano Principle: Reshaping residence rights in the EU.....	16
B.1.1 Test of "genuine enjoyment of the substance" of citizenship rights.....	19
B.2 Concept of dependency between EU citizens and TCN's family members.....	21
B.2.1. Relationship of dependency to adults.....	21
B.2.2. Relationship of dependency to children.....	23
B.3 Interim Conclusion.....	27
PART II Objective scope of right of entry and residence under EU citizenship law for TCN family members.....	28
CHAPTER A) Categories of residence right under Directive 2004/38: Secondary rights for TCNs.....	28
A. Types of residence rights.....	28

A.1 Right of residence for up to three months.....	29
A.1.2 Right of residence for more than three months.....	30
A.1.3 Right of permanent residence.....	33
A.2 Retention of the residence status in cases of death, departure of the EU citizen, divorce, annulment, or termination of a registered partnership.....	35
A.3 Interim Conclusion.....	36
CHAPTER B) Restrictions on residence rights for TCN family members in the EU: Directive 2004/38 Clarifications.....	36
B.1 Limitations based on grounds of public policy, public security, and public health.....	37
B.2 Restrictions on the right of residence based on grounds beyond public policy, security, and health.....	40
B.3 Abuse and fraud in residency rights.....	41
B.4 The specific situation of Brexit: Ex-EU citizens' and TCNs family members' rights.....	43
B.5 Interim Conclusion.....	45
Conclusion.....	46
Bibliography.....	48

List of abbreviations

Art.	Article
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EU	European Union
EUSS	EU Settlement Scheme
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCNs	Third Country Nationals
WHO	World Health Organization

Introduction

Freedom of movement and residence within the EU is a basic component of EU citizenship, a concept created in 1992 upon the signing of the Maastricht Treaty. The Maastricht Treaty instituted the notion of EU citizenship, a status automatically conferred upon all citizens of the Member States. The idea is further reinforced through the Lisbon Treaty, in which it was put into the broader framework of the Area of Freedom, Security, and Justice¹. These elementary liberties, identified within the basic framework of EU law, find further articulation in Article 20 TFEU², which links Union citizenship to Member State nationality, and Article 21 TFEU, which guarantees that “*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States*”³. Article 45 CFR⁴ further reinforces these rights, and Article 3(2) TEU⁵ provides that the Union should promote the free movement of persons. This framework of rights was further consolidated with the adoption of Directive 2004/38/EC⁶, also known as the Free Movement Directive or the Citizens' Rights Directive, which established a single and coherent legislative framework for the movement and residence rights of EU citizens and their family members throughout the Union. The purpose of this directive, therefore, was to bring all different instruments and case law in the field of free movement and residence into a single instrument, by simplifying administrative procedures, clarifying the status of family members, and reducing the grounds for refusal of entry or residence.

While EU citizens have extensive rights under EU law to move and reside freely, family members who are not themselves EU citizens do not obviously benefit from those rights. Derogating from their relationship with the EU citizen, TCNs can only derive residence rights. Secondary rights of family members of EU citizens to a life in the host Member State, not being EU citizens themselves, are hence subject to the same rules as those given by Directive 2004/38/EC. "Family members" for the purposes of the EU citizens' free movement rights under Article 2⁷ and 3⁸ of Directive 2004/38/EC include: the spouse of the Union citizen, registered partners treated as equivalent to spouses under the host Member State's laws, direct descendants under the age of 21 or those who are dependants (including those of the spouse or registered partner), and dependent direct relatives in the ascending line (also including those of the spouse or registered partner). It also requires the host Member State to facilitate entry and residence for any other family members

¹Ottavio Marzocchi, 'Fact Sheets on the European Union - 2024' (European Parliament, April 2024) <www.europarl.europa.eu/factsheets/en> accessed 23 July 2024.

² TFEU, Art. 20.

³ TFEU, Art. 21&1.

⁴ CFR, Art. 45.

⁵ TEU, Art. 3&2.

⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

⁷ Directive 2004/38/EC, Art. 2.

⁸ Directive 2004/38/EC, Art. 3.

not falling within the narrow definition in Article 2(2) but who are either dependants or members of the household of the Union citizen, or where serious health grounds require their personal care by the Union citizen. It also includes the freedom of movement and residence for partners with whom the Union citizen has a durable relationship, duly attested.

In line with this approach, Part I of this dissertation will focus on the derived right of entry and residence for non-EU national family members of EU citizens and the conditions for its acquisition. Chapter A will examine the derivative rights under Article 21 TFEU in conjunction with the Free Movement Directive, particularly in cases where the EU citizen has exercised their right of free movement, thereby creating a cross-border element. Chapter B will delve into the Zambrano principle according to which residence rights are extended to family members even in the absence of cross-border movement by the Union citizen, with protection grounded in Article 20 TFEU. Emphasis will be placed on ensuring that EU citizens can fully enjoy their citizenship rights, which includes the right for their family members to move and reside with them. This prevents any restriction on the rights granted by EU law or forced departure of family members from EU territory, thereby safeguarding the core substance of EU citizenship.

Part II of this dissertation will concentrate on the rights and restrictions that TCN family members obtain under the Citizens' Rights Directive. This analysis will be relevant to both categories of protection discussed earlier. Specifically, Chapter A will examine the different types of residence rights available: the right of residence for up to three months, the right of residence for more than three months, and the right of permanent residence. In this context, particular attention will be given to cases where residence rights are retained following the death or departure of the EU citizen, or in instances of divorce, annulment, or termination of a registered partnership, as a means of safeguarding these rights for affected individuals. Chapter B will then delve into the limitations on these rights, as stipulated by the Directive, particularly focusing on the withdrawal of residence rights for TCN family members. This includes grounds related to public policy, public security, and public health, as well as restrictions beyond these grounds. Additionally, the chapter will examine issues such as fraud, abuse of rights, and the potential loss of Union citizenship, all of which negatively impact the residence rights of TCN family members. The emphasis will be on highlighting the practical implications and constraints that TCN family members may face in these circumstances.

PART I Subjective scope of right of entry and residence under EU citizenship law for TCN family members

CHAPTER A: Derivative residence rights for TCNs under the Free Movement Directive and Article 21 TFEU

A.1 Understanding the intersection of EU citizens and those of third-country nationals family members' rights

Directive 2004/38/EC traditionally applies to EU citizens who have exercised their right to move and reside freely within the territory of EU Member States. Article 3(1) of the Free Movement Directive clearly states: “*This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national.*”⁹. This cross-border element is crucial because it activates the application of EU law over national laws. In other words, without such a ‘cross-border connection,’ the situation of EU citizens is governed by the laws of their Member State of residence. Hence, when EU citizens exercise their freedom of movement and residence within the EU, their family members are granted protection under the Free Movement Directive and Article 21 TFEU¹⁰. Understanding the intersection of these rights, their application is not absolute. TCN family members can only derive residence rights if they accompany or join their EU citizens family members, and only when the latter have exercised their right to free movement. The derivative nature of these rights means that TCN family members cannot independently claim the same rights as they are contingent upon the status and actions of the EU citizen. As a result, the EU citizens come as “sponsors” to their family members -non-EU nationals-.

The primary rationale behind allowing EU citizens to bring their family members to a new state of residence is to prevent any potential restriction of the citizens' rights under EU law. The European legislator aimed to exclude the situation where a European citizen is discouraged from exercising the right of movement and residence under the Residents' Rights Directive and Article 21 TFEU if their family members, who are not European citizens, cannot accompany them. Furthermore, the protection of family life is essential *'to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the [Treaties]*¹¹, ensuring that citizens are not deterred from moving to another Member State due to concerns about family separation. This principle is also guaranteed by the Article 7 CFR which assures that every person has a right to respect for his/her family life¹².

⁹ Directive 2004/38/EC, Art. 3&1.

¹⁰ Martijn van den Brink, 'Is It Time to Abolish the Substance of EU Citizenship Rights Test?' (2021) 23 *European Journal of Migration and Law* 13, p. 3.

¹¹ Case C-127/08 *Metock*, EU:C:2008:449, para 56.

¹² CFR, Art. 7.

Indeed, long before the adoption of Directive 2004/38/EC, the then Community legislator had already recognized the value of protecting family life in various decisions¹³.

Almost twenty years ago, in the *Carpenter* case¹⁴, the court declared that TCNs do not automatically have a right of residence and movement within the Union. Nevertheless, the removal of an individual from a country where close EU family members reside constitutes an infringement of the right to family life as guaranteed by the CFR. Such interference constitutes a breach of the Convention unless it is 'in accordance with the law,' motivated by one or more of the legitimate aims specified in the Convention, and 'necessary in a democratic society.' This means it must be justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued¹⁵. In this case, Mrs. Carpenter, a non-EU national was married to a British citizen. The problem she addressed was that while she entered the UK legally only for six months, when she married her husband her stay was unlawful. Thus, when she applied to remain in the UK as the spouse of a British citizen her application was refused. Mr. Carpenter, meanwhile, traveled to other Member States to sell advertising space in medical and scientific journals. He argued that the refusal of leave infringed upon his rights under Article 49 EC (now Article 56 TFEU), which guarantees the freedom to provide services, and Directive 73/148/EEC, which abolishes restrictions on movement and residence¹⁶. Notably, in this case, known for the *Carpenter* doctrine, the Court also considered whether a non-EU national family member could be granted rights despite having stayed unlawfully in the territory of the Member State. The Court emphasized that the only prerequisite for such rights is the EU citizen's exercise of cross-border movement, thereby reinforcing the principle that the rights of non-EU family members are derived from the EU citizen's movement. The same position of the Court was established 10 years earlier in the *Singh* doctrine. It is worth recalling that the CJEU held in *Surinder Singh*¹⁷ that Member State nationals and their spouses, who had moved to a host Member State to reside there, could not later be faced with a refusal of entry to their spouse in their home State, even if the spouse's residence was unlawful. Such a refusal would deter them from returning to their home State with their spouse, thereby discouraging them from exercising their free movement rights.

¹³ Case C-60/00 *Carpenter* [2002] ECR I-6279, para 38; Case C-459/99 *MRAX* [2002] ECR I-6591, para 53; Case C-157/03 *Commission v Spain* [2005] ECR I-2911, para 26; Case C-503/03 *Commission v Spain* [2006] ECR I-1097, para 41; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, para 109; and Case C-291/05 *Eind* [2007] ECR I-0000, para 44.

¹⁴ Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department* [2002], ECLI:EU: C:2002:434.

¹⁵ Storey, T, 'Freedom of Movement for Persons: *Baumbast v Secretary of State for the Home Department* (Case C-413/99), *Carpenter v Secretary of State for the Home Department* (Case C-60/00)' [2002] *Journal of Civil Liberties* 152, p. 7.

¹⁶ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172, 28 June 1973, 14–16. Repealed by Directive 2004/38/EC.

¹⁷ Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [1992] ECLI:EU: C:1992:296.

The issue of the lawful residence of a TCN as a family member of a European citizen has continued to draw the court's attention. Specifically, in C-109/01 *Akrich*¹⁸, the Court introduced a controversial requirement that TCN spouses must have had a lawful initial point of entry into the then Community, a condition not included in the existing Directive at that time¹⁹. In this case, the Moroccan spouse of a British citizen, who had been deported twice from the UK for illegal entry, was deported to Ireland at his request. Mrs. Akrich sought to join him in Ireland and argued that he should qualify for a right of residence in the UK under the *Surinder Singh* doctrine. However, the Court held that to benefit from *Surinder Singh*, Mr. Akrich needed to have been lawfully resident in another Member State. Particularly, the Court stated that the rights of residence from *Surinder Singh* would not apply in cases of marriages of convenience. Since Mr. Akrich was not in the EU lawfully at the time of his initial admission, it was determined that the applicants were not discouraged from using their right to free movement²⁰. It is worth mentioning that this conclusion faced extensive criticism. Advocate General Geelhoed noted the apparent contradiction between *Akrich* and other case law due to the court's varying approaches to immigration, an area of Member State competence under the shadow of Community competence for free movement of persons. However, the Court did not acknowledge this tension and instead limited the ratio of *Akrich* without overruling it²¹.

The Court overturned this case law in its decision in the *Metock*²² case. It acknowledged that in *Akrich*, it had required lawful residence in a Member State for a non-EU spouse to benefit from the rights in Article 10 of Regulation No 1612/68. However, the Court reconsidered this conclusion, ruling that such rights cannot depend on prior lawful residence in another Member State. The requirement for prior lawful residence before moving to and residing in the host State (Ireland in this case) to join an EU citizen spouse was part of Article 3(2) of the Regulations, and that was precisely the subject of the preliminary reference in *Metock*. In a notable breach of precedent, the Court ruled that the prior lawful residence requirement from *Akrich* had to be reconsidered and could not be a condition for free movement rights. The Court emphasized that Directive 2004/38/EC and its preamble aimed to strengthen free movement rights²³. It was within the Community legislature's competence to regulate entry and residence conditions for family members of Union citizens. The Court held that allowing Member States exclusive competence in this area would result in varied free movement rights across the Union.

¹⁸Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003], ECLI:EU: C:2003:491.

¹⁹ In *Akrich*, the analysis was derived from Council Regulation (EEC) No. 1612/68 of 15 Oct. 1968 on the free movement of workers within the Community and not the more recent Free Movement Directive.

²⁰ Elaine Fahey, 'Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*' (2008) Case C-127/08, *Metock & Others v Minister for Justice, Equality & Law Reform*, Judgment of the European Court of Justice of 25 July 2008, nyr, p. 2.

²¹Olivier & Herman Reestman, 'European Citizens' Third Country Family Members & Community Law', *EuConst* 3 (2007): 463 at 469.

²²Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008], ECLI:EU: C:2008:449.

²³ *Supra* note 19, p. 5.

A.1.1 Derived right of residence for family members of EU citizens returning to their home state

As we have analyzed so far, a key element in acquiring the right of residence for TCNs is the mobility of their family members who are EU citizens. This "cross-border element" within the EU significantly impacts the rights afforded to TCN family members. But what happens when an EU citizen exercises his/her right to free movement and then returns to his/her Member State of nationality? Do their family members retain their derived rights of residence in this scenario? To address these questions, examining the jurisprudence of the CJEU is essential, particularly focusing on two joined cases: C-456/12²⁴ O and B, and C-457/12²⁵ S and G. These cases seek to establish the conditions under which TCN family members can claim residence rights within an EU citizen's home state by exploring different connections to EU law.

The case of O and B involved TCN family members residing with their Dutch sponsors in the Netherlands, where the sponsors had no ongoing links to another Member State but had previously lived with the TCN family member in another Member State. In contrast, the case of S and G dealt with TCN family members asserting residence rights based on their relationship with Dutch citizens currently working in another Member State as frontier workers. Advocate General Sharpston delivered a joint Opinion for both cases in 2013, in which she encouraged the Court to "*provide clear and structured guidance regarding the circumstances under which the TCN family member of an EU citizen, who is residing in their home Member State but exercising their rights of free movement, can claim a derived right of residence in the home Member State under EU law*"²⁶. In both cases, the CJEU agreed with the referring court that Directive 2004/38 does not establish a derived right of residence for TCN family members in the Member State of which the Union citizen is a national (see O and B, paras 37-43; S and G, para 34). As a result, the Treaty provisions became the only potential source of granting residence rights under EU law for these individuals²⁷.

In O and B, the focus was on whether previous residence in another Member State could grant residence rights to TCN family members upon the EU citizen's return to their home Member State. The CJEU concluded that such previous residence, if genuine and effective, could indeed form the basis for a derived right of residence, provided it was in accordance with the free movement rights

²⁴ Case C-456/12, *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014], ECLI:EU:C:2014:135.

²⁵ Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G* [2014], ECLI:EU:C:2014:136.

²⁶ Advocate General Sharpston, Opinion of 12 December 2013, *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B and S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G*, Joined Cases C-456/12 and C-457/12, para 158.

²⁷ Taroni, C., 'Rights of Residence of TCN Family Members within a Union Citizen's Home State: Comment on Cases C-456/12 O and B and C-457/12 S and G, Judgment of the Court (Grand Chamber)' (EUtopia Law, 3 April 2014) <<https://www.ein.org.uk/blog/rights-residence-tn-family-members-within-union-citizens-home-state-comment-cases-c-45612-o-an>> accessed 08 August 2024.

exercised by the EU citizen. Particularly, the CJEU emphasized that the reason for which residence rights of TCNs may be derived from Article 21(1) TFEU was the fact that a refusal to allow such a right of residence would interfere with the Union citizen's freedom of movement by discouraging them from exercising rights of entry into and residence within the host Member State. This principle aligns with the precedent set in *Singh* doctrine, where Union citizen workers returning to their Member State of origin after a period of working in another Member State can have the residence rights of their family members recognized within their home Member State. Actually, the Court determined that the principle developed in relation to workers was capable of general application to family members of Union citizens who had resided in another Member State exercising rights under Article 21(1) TFEU²⁸. The obstacle to be removed was the genuine deterrence of a Union citizen exercising their rights to free movement. Thus, conditions to be fulfilled to grant TCN family members rights of residence within a returning Union citizen's state of origin should not be more stringent than those applied by Directive 2004/38 in situations where a Union citizen and family member live in a host Member State²⁹. When considering whether these rights may be acquired, it is important to remember that only a period of residence meeting the requirements outlined in Articles 7(1)³⁰ and (2) and Article 16(1) and (2)³¹ of Directive 2004/38 will result in the creation of such a right. That being said, even when taken collectively, brief stays—such as weekends or vacations—in a Member State other than the one where the citizen in issue is a citizen fall under Article 6 of Directive 2004/38 and do not meet the requirements. As a result, the Directive should be applied by analogy³².

On the other hand, in *S and G*, the situation involved TCN family members of EU citizens who were frontier workers, meaning they worked in one Member State while residing in another. The Court recognized that these EU citizens were still exercising their free movement rights, and thus, their TCN family members could derive residence rights based on this ongoing cross-border activity. The Court emphasized that denying these rights would effectively restrict the EU citizens' ability to move and work freely across Member States. Specifically, it referred to the *Carpenter* case, in which Article 56 TFEU had granted the right to reside to a TCN spouse within the service provider's state of origin. In this case, the Court had found a link between family life and the conditions under which a Union citizen exercised his (economic) free movement rights. As a result, the refusal to grant the residence permit to the spouse of an own citizen providing services in another Member State was construed as an obstacle to the freedom to provide services, which therefore had to be justified and comply with fundamental rights³³. The Court applied similar

²⁸ Supra note 23, para 47-49.

²⁹ Court of Justice of the European Union, 'Judgment in Cases C-456/12 and C-457/12 *O., B., S. and G. v Minister voor Immigratie, Integratie en Asiel*' (Press Release No 32/14, 12 March 2014) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-03/cp140032en.pdf> accessed 08 August 2024, p. 2.

³⁰ Directive 2004/38/EC, Art. 7&1.

³¹ Directive 2004/38/EC, Art. 16&1,2.

³² Supra note 26.

³³ E Spaventa, 'Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G' (2015) 52 *Common Market Law Review* 753–778, p. 4.

reasoning to Article 45 TFEU³⁴, concluding that denying such residence rights would unduly restrict the Union citizen's ability to exercise their free movement rights³⁵. This revision clarifies that the Court is applying a similar logic from Article 56 TFEU to Article 45 TFEU, emphasizing the importance of maintaining the Union citizen's free movement rights without unnecessary restrictions.

As a concluding remark, both cases represent significant developments in the CJEU's approach to protecting the free movement rights of EU citizens and their TCN family members. S and G extended the Carpenter principles from the freedom to provide services to the freedom to work, requiring TCN family members to demonstrate that denying them residence would discourage the EU citizen from working in another Member State. O and B further solidified the legal framework by building on the Singh and Eind doctrines, clarifying that genuine family life established in a host Member State under Directive 2004/38 can give rise to residence rights under Article 21(1) TFEU upon the EU citizen's return to their home Member State. The Court's emphasis on preventing restrictions on free movement and its careful delineation of qualifying residence periods underscores its commitment to ensuring that EU citizens can fully exercise their rights by unnecessary or overly burdensome national regulations.

A.2 Distinguishing privileged and non-privileged family members of EU citizens

When discussing the rights of TCNs' family members of EU citizens, it is essential to analyze the categories of family members that grant these rights. As far as the Directive 2004/38/EC is concerned, the latter categorically distinguishes between two categories: *privileged family members and non-privileged family members*. Their distinction is important in order to take into account which particular rights and procedures will be applicable to which group of persons under EU law. Privileged family members are those referred to in Article 2(2) of the Free Movement Directive³⁶: the spouse, registered partner, in cases where the host Member State provides for the registration of partners, direct descendants under the age of 21 or who are dependent, and also dependent direct relatives in the ascending line. This latter category of family members is in possession of an automatically derived right of residence - that is to say, the right to reside in the host Member State as long as the EU citizen exercises his or her free movement rights. In contrast, non-privileged family members are covered under Article 3(2) of the same Directive³⁷. This category includes other family members who do not fall under the definition provided in Article 2(2), such as dependants or household members of the EU citizen, or those who need personal care due to serious health grounds. It also covers partners with whom the EU citizen has a durable relationship, duly attested. For these individuals, the host Member State is required to facilitate their entry and residence, but they do not have an automatic right. Instead, their circumstances

³⁴ Supra note 24, para 40.

³⁵ Supra note 28, p. 3.

³⁶ Directive 2004/38/EC, Art. 2 para 2.

³⁷ Directive 2004/38/EC, Art. 3 para 2.

must be thoroughly examined, and any refusal must be justified. Once residence is granted to a family member under Article 3(2), they enjoy the same rights as those in the privileged category, including access to employment, social benefits, and other rights associated with residence³⁸. The Free Movement Directive, in conjunction with Art. 21 TFEU, applies to all those people when granting residence rights within the EU.

A.2.1 Definition of "Spouse": Recognizing different-sex and same-sex spouses

The analysis of derived rights of residence for TCN beneficiary family members necessarily starts with the term "spouse", referring to a person with whom the EU citizen has entered into marriage. Since the concept "spouse" refers without distinction to gender, and because the Free Movement Directive does not provide any express indication on the issue, one will immediately conclude from this that its meaning includes both different-sex and same-sex spouses. Indeed, this understanding was reaffirmed by the CJEU in the landmark Coman case³⁹, in which it said that if the term "spouse" is utilized in the Directive, it will involve same-sex spouses, too, even in member states where the marriage of individuals with the same sex is forbidden.

Coman was a citizen of Romania who married in Belgium, where same-sex marriage is permitted. When returning to Romania, where the rights of those who marry same-sex couples are not recognized, the Romanian authorities refused his spouse's application for a residence permit. The CJEU held that EU law on free movement for EU citizens and their family members requires that a marriage conducted lawfully in another member state be recognized for the purposes of residence, regardless of the sex of the spouses. The Court also observed that Article 21(1) TFEU also provides that a third-country national of the same sex as a Union citizen, with whom that citizen has contracted a marriage under the legislation of a Member State, has the right to reside in the territory of that Member State of the Union citizen nationality for a period exceeding three months. That derived right of residence cannot be subject to stricter conditions than those laid down in Article 7 of Directive 2004/38⁴⁰.

This landmark judgment consolidates the principle of non-discrimination on grounds of sexual orientation in the EU context and confirms that the same rights accorded to spouses of European Union citizens under the Directive are equal for both different-sex and same-sex spouses. Put simply, what this means is that once recognized, same-sex spouses become part of the same class as different-sex spouses under Article 2(2)(a) of the Directive, having an automatic derived right

³⁸ David De Groot and Jacques Gerard, *Free Movement of EU Citizens and Their Family Members: An Overview* (European Parliamentary Research Service, PE 762.303, May 2024) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762303/EPRS_BRI\(2024\)762303_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762303/EPRS_BRI(2024)762303_EN.pdf) accessed 09 August 2024.

³⁹Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

⁴⁰ Ibid, Judgment of the Court (Grand Chamber) paras 1-2.

of residence. This ruling is a major step towards ensuring that the rights of all family members of EU citizens are respected within the EU, irrespective of the domestic legal systems of individual Member States concerning marriage⁴¹. Following this decision, the Court succeeded in guaranteeing supranational rights to its citizens, rights that cannot be easily undermined by often conservative national laws⁴². However, in light of this landmark decision, significant discussion has been sparked among legal scholars, with various perspectives ranging from supportive to critical. The common criticism is the Court's limited use of human rights arguments, as it primarily focused on technical aspects of free movement rather than broader human rights issues. The ruling's impact is also seen as narrow, specifically requiring Member States to recognize same-sex marriages only for residence purposes and primarily in cross-border situations. However, this case is undoubtedly viewed as a significant but initial step toward greater equality for same-sex couples, potentially pushing Member States towards broader recognition of marriage equality and further protection of their family rights⁴³.

A.2.2 Registered partner

A registered partnership is considered to be a "core family member" under Article 2 of the Free Movement Directive when three specific conditions are fulfilled. First, the partnership must be concluded based on the legislation of a Member State, meaning that registered partnerships formed outside the EU are not covered by the Directive. Second, the host Member State must treat the registered partnership as equivalent to marriage. Where any Member State does not recognize registered partnerships in its national legislation, it shall not be obliged to recognize a partnership concluded in another Member State as equivalent to marriage. Third, the registered partnership must meet the criteria established in the relevant legislation of the host Member State. Member States have little discretion when determining the terms under which they view a registered partnership as comparable to marriage. The result is that a registered partnership may be considered in one Member State for the purposes of the Directive and not in another.⁴⁴

It is noteworthy that no case law has been established with respect to this category of family members. If, however, the registered partnership does not satisfy those three conditions, the

⁴¹ Tryfonidou A, 'The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The *Coman* Ruling' (2019) 44(5) *European Law Review* 663, 663-679 <https://centaur.reading.ac.uk/87173/1/Tryfonidou%20A%20-%20Case-note%20on%20Coman%20DRAFT%202%20-%20ELRev.pdf> accessed 13 August 2024, p. 3.

⁴² Laura Gyeney, 'Same-Sex Couples' Right to Free Movement in Light of Member States' National Identities: The Legal Analysis of the *Coman* Case' (2018) 14 *Iustum Aequum Salutare* 149, https://heinonline.org/HOL/Page?handle=hein.journals/iaesal14&div=33&g_sent=1&casa_token=&collection=journals accessed 16 August 2024, p. 2.

⁴³ Lenka Kříčková, 'Three Years with *Coman*: How Much Has Changed?' (2022) 16(2) *ICL Journal* 263, 284 <https://doi.org/10.1515/icl-2021-0039> accessed 16 August 2024.

⁴⁴ *European Commission*, 'Guidance on the Right of Free Movement of EU Citizens and Their Families' (Commission Notice C/2023/1392, 22 December 2023), <http://data.europa.eu/eli/C/2023/1392/oj> accessed 16 August 2024.

partner's possible right of entry and residence needs to be assessed under Article 3(2)(b) of Directive 2004/38/EC. For instance, in the guidance of the European Commission dated 2023, there is a case study highlighting this point: *T. is a non-EU citizen and P. is an EU citizen who holds the nationality of Member State A. In 2020, they concluded a registered partnership on the basis of the legislation of Member State A. They now intend to relocate to Member State B which does not provide for registered partnership under its national legislation. Member State B does not have to recognize the registered partnership. However, a potential right of entry and residence of T. should be assessed under Article 3(2)(b) of Directive 2004/38/EC*⁴⁵.

On the other hand, one should consider that in the case when Member State B would not allow same-sex marriages, it may infringe the ECHR itself, which demands from a Member State at least registered partnerships for the same-sex couples if a marriage is not allowed. This ambiguity arises partly because the conditions and rights attached to certain partnerships are weaker and might not be deemed equivalent to marriage. Most Member States apply private international law to the recognition of registered partnerships, but some have specific lists of partnerships they consider equivalent. This situation can lead to indirect discrimination based on nationality, as nationals from Member States that introduced registered partnerships later may find their partnerships unrecognized for free movement purposes. Additionally, the recognition of different-sex registered partnerships remains uncertain, as several Member States only recognize same-sex registered partnerships. In any case, if a registered partnership is not recognized for the purposes of Article 2(2)(b), it should still be considered for durably attested relationships under Article 3(2)(b), as recommended by the European Commission. This provision ensures that even if the partnership is not acknowledged as equivalent to marriage, the relationship is still recognized and respected under EU law⁴⁶.

A.2.3 Direct descendants

Another category of privileged family members concerns direct descendants, meaning children under the age of 21 or those who are dependent. As the primary aim of the Free Movement Directive is to strengthen the fundamental right of movement, its provisions must be interpreted broadly. In this context, the term “direct descendants” encompasses both biological and legal parent-child relationships. In other words, direct relatives in descending line include not only biological children but also those in adoptive relationships. Specifically, direct descendants are considered to be the common children of an EU citizen and their spouse/partner; the children of an EU citizen; and the children of the spouse/partner. Adopted children are also covered, but relations of mere legal guardianship, such as those entailed by the Algerian kafala, are not. This was confirmed in the *SM* case⁴⁷, where the Court recognized that the latter category does not

⁴⁵ Ibid, para 2.2.2.2.

⁴⁶ Supra note 37, p. 8.

⁴⁷ Case C-129/18 *Entry Clearance Officer, UK Visa Section, in the presence of Coram Children’s Legal Centre (CCLC) and AIRE Centre* [2019], ECLI:EU:C:2019:248, paras 50-54.

qualify, as no parent-child relationship is established. However, the Court concluded that it is up to the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a Union citizen, pursuant to Article 3(2)(a) of the directive, read in conjunction with Article 7 and Article 24(2) CFR, particularly by considering the best interests of the child concerned⁴⁸. Notably, while the Commission's 2009 guidelines⁴⁹ initially considered that children under permanent guardianship were covered under the beneficiary's rights, the Court in the SM case determined that such children should be treated under 'other family members' as specified in Article 3(2)(a)⁵⁰.

Regarding children aged 21 or over who are considered "dependent" on their EU citizen family member, the derivative right of residence may also be granted. However, this right hinges on the establishment of a situation of "real dependence" on the EU citizen or their spouse/partner. Indeed, for those children, determining this dependency becomes crucial in securing their right to reside with the EU citizen in another Member State. Dependency is not presumed and must be demonstrated with evidence that the material support provided by the EU citizen is essential for the child's basic needs, such as housing, food, and healthcare. This dependency must exist in the country of origin or the country from which the child is coming at the time of the application to join the EU citizen in the host Member State. Even though the child is legally an adult, if they rely on financial support from their EU citizen parent or stepparent, they may still qualify as a dependent.

A key case in this context is *Jia v. Migrationsverket*⁵¹, where the CJEU established that dependency is a factual situation requiring evidence that the material support provided by the EU citizen is necessary for the adult child's basic needs. The ruling emphasized that the reasons for the dependency are irrelevant; what matters is whether the support is necessary for the child to live at a subsistence level in their home country. Similarly, the case of *Reyes*⁵² clarified that a Member State cannot require an adult child to prove unsuccessful attempts at employment or obtaining social assistance as a precondition for establishing dependency⁵³. This decision reinforced the principle that regular financial support from the EU citizen parent is sufficient to demonstrate dependency if it meets the child's essential needs. Both of these cases are particularly relevant for adult children of EU citizens who are financially or socially dependent on their parents. They provide a legal foundation for challenging restrictive national practices that may attempt to limit

⁴⁸ Ibid, Judgment of the Court (Grand Chamber) of 26 March 2019.

⁴⁹ Commission of the European Communities, 'Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' COM (2009) 313 final, 2 July 2009 (Commission Guidelines of 2009) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:en:PDF> accessed 17 August 2024, p. 5.

⁵⁰ Supra note 37, p. 9.

⁵¹ Case C-1/05 Yuning Jia v Migrationsverket [2007] ECR I-00001, ECLI:EU:C:2007:1.

⁵² Case C-423/12 Flora May Reyes v Migrationsverket [2014] ECLI:EU:C:2014:16.

⁵³ Ibid, Judgment of the Court (Fourth Chamber), 16 January 2014.

the right of residence for such dependents. The consistent theme in these judgments is that dependency should be assessed based on the factual reality of the adult child's situation, rather than on hypothetical future possibilities or additional criteria imposed by Member States. The focus remains on the actual financial and social circumstances of the adult child at the time of the application.

A.2.4 Direct ascendants as primary carers

Dependent direct ascendant family members, such as parents and grandparents of an EU citizen, are considered privileged family members and automatically granted the right of residence within the EU, provided that their EU relative has exercised the right of free movement to another Member State. According to the 2023 guidelines, the same principles of dependency that apply to dependent children over the age of 21 also extend to these individuals. This dependency must be established at the time the family member accompanies or joins the EU citizen⁵⁴.

Minor EU citizens possess full free movement rights, even though they are not capable of independently deciding where to reside or travel. This principle was clearly articulated in the *Baumbast* case⁵⁵, where the Court held that the capacity of an EU citizen to enjoy rights guaranteed by the Treaty and secondary law on free movement cannot be contingent on reaching a certain age or legal capacity to exercise those rights personally. Decisions regarding the residence and movement of minor children are typically made by their parents or primary carers, who hold legal custody. The Court's primary objective is to ensure that the rights of the EU citizen are fully protected, both directly and indirectly. It is evident that a minor child would be compelled to leave the EU if their parent could not reside with them. The Court further extended its reasoning by asserting that the primary carer of these children, regardless of nationality, has the right to reside with them to facilitate the exercise of their right to access education, even if the parents are divorced⁵⁶.

In the *Zhu and Chen* case⁵⁷, the Court established that when minor EU citizens exercise their free movement rights, their non-EU primary carers—who are not dependent on the child, but upon whom the child is dependent—must be granted the right of residence in the host Member State. Failure to grant this right would render the child's right of residence ineffective. The Court applied the provisions of Directive 2004/38/EC by analogy to such primary carers, thereby ensuring that the child's free movement rights are fully realized⁵⁸.

⁵⁴ Supra note 37, p. 9.

⁵⁵ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:493.

⁵⁶ Ibid, Judgment of the Court of 17 September 2002.

⁵⁷ Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECLI:EU:C:2004:639.

⁵⁸ Supra note 43, para 2.2.2.5.

A.2.5 Other family members

According to the Free Movement Directive, "other family members" under Article 3 refers to those who are not classified as "core" family members under Article 2 but still maintain significant ties with a Union citizen. The CJEU emphasizes maintaining family unity, extending this notion to include family members who may not be directly related but share close, stable ties with the EU citizen. This group can include dependents, household members, or those needing personal care due to serious health conditions. While core family members have an automatic right to entry and residence, extended family members do not enjoy the same rights. Instead, Member States are required to "facilitate" their entry and residence. This facilitation involves giving some advantage to these applications by conducting a thorough examination of personal circumstances. It is interesting, however, that Member States retain discretion in deciding whether to grant admission to these extended family members, as outlined in Article 3 of the Directive. This discretion, though, must not undermine the Directive's effectiveness⁵⁹. The criteria set by Member States should align with the ordinary meaning of "facilitate" and must not impose unnecessary barriers to the right of residence. The key factor here is the degree of dependency or the existence of a durable relationship, which must be factual and substantiated with substantial evidence. Dependency should be ongoing at the time of the application and must have existed in the country of origin⁶⁰.

As mentioned earlier, in the *SM* case the CJEU expanded the notion of "other family members" to include children under legal guardianship, such as in the Algerian kafala system. This decision reflects the Court's acknowledgment of diverse family structures, where legal guardianship and shared household responsibilities warrant the inclusion of such individuals in this category. For these extended family members, Member States must facilitate their entry by carefully assessing all relevant factors, including the family's interests and the child's best interests, as protected by the CFR.

Similarly, in the *Rahman* case, the CJEU highlighted that Member States must give particular consideration to applications involving individuals with a dependent relationship with an EU citizen. This case involved a Bangladeshi national married to an Irish citizen working in the UK, along with his brother, half-brother, and nephew, who claimed dependency under Article 3(2) of the Free Movement Directive. The Court emphasized that Member States must thoroughly examine the applicant's personal circumstances and ensure that any refusal is well-founded and

⁵⁹ Georgios Milios, 'Defining "Family Members" of EU Citizens and the Circumstances under Which They Can Rely on EU Law' (2020) 39 *Yearbook of European Law* 293, doi:10.1093/yel/yeaa009, p. 11.

⁶⁰ Francesca Strumia, 'The Family in EU Law After the SM Ruling: Variable Geometry and Conditional Deference' (2019) 4(1) *European Papers* 389, 389-393, https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2019_I_013_Francesca_Strumia_00296.pdf accessed 17 August 2024, p. 1-2.

justified.⁶¹ Additionally, the decision must be open to appeal, with the review process ensuring that the decision is based on solid factual evidence, as further reinforced by the *Banger* case⁶².

At this point, it is important to add that the facilitated family members under Article 3(2)(a) include dependent members of the EU citizen's household or those needing personal care due to serious health grounds. The dependency rules are similar to those for relatives in the ascending or descending line as defined in Article 2(2)(c) and (d). Membership in the household refers to a relationship of dependence within a shared domestic life that goes beyond mere temporary cohabitation, as clarified in the *Minister for Justice and Equality* case⁶³. Lastly, the partner with whom the EU citizen has a durable relationship, duly attested under Article 3(2)(b), constitutes a category of facilitated family members. While Member States have some discretion in setting the conditions for what constitutes a durably attested relationship, leading to many different standards that typically require a certain duration of relationship or cohabitation, when a registered partnership is not considered for the purpose of Article 2(2)(b), it must be taken into account for the purpose of Article 3(2)(b)⁶⁴.

A.3 Interim Conclusion

To sum up, Directive 2004/38/EC, in conjunction with Article 21 TFEU, provides the basic legal framework that ensures derivative rights for TCN family members of EU citizens, contingent upon the EU citizens exercising their right to free movement by traveling to a Member State other than their country of origin. Specifically, the main aim of the Directive is to ensure that EU citizens who exercise their right to move and reside freely within Member States are accompanied by their family members, including TCNs, without undue restrictions. It is obvious that these people do not possess these rights independently but rather through their relationship with the EU citizen, who acts as a "sponsor" for their residence. This derivative nature ensures that the EU's free movement principles are upheld while protecting the right to family life, as enshrined in Article 7 of the CFR and the jurisprudence of the CJEU. Thus, the EU has adopted a holistic approach to these rights, reflecting a careful balance between upholding the core principle of free movement and recognizing the diverse family structures within the Union. The distinction between privileged and non-privileged family members, as outlined in the Free Movement Directive has practical importance. Privileged family members, such as spouses, registered partners, direct descendants, and direct ascendants, enjoy an automatic derived right of residence, ensuring that the family unit can move and reside freely across Member States. However, the EU also acknowledges the complexity of modern family dynamics by extending certain rights to non-privileged family members. These individuals, although not automatically entitled to residence, must have their

⁶¹ Ibid, Judgment of the Court (Fourth Chamber) of 12 July 2018, para 3.

⁶² Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger* [2018] ECLI:EU:C:2018:570.

⁶³ Case C-22/21 *Minister for Justice and Equality (Ressortissant de pays tiers cousin d'un citoyen de l'Union)* [2022] ECLI:EU:C:2022:683.

⁶⁴ Supra note 37, p. 10.

circumstances carefully considered by Member States to ensure that decisions are both fair and justified. This dual approach—automatic rights for privileged family members and facilitated rights for non-privileged ones—highlights the EU's effort to maintain a flexible yet consistent legal framework that respects the rights of all family members while accommodating the varying legal and cultural contexts of Member States. While this legal framework ensures residence rights, questions arise when the EU citizens have not exercised their right to free movement. How can the same rights be assured in the EU citizen's state of origin? These are some of the questions that will be discussed in the next Chapter.

CHAPTER B: Right of entry and residence under Art. 20 TFEU: Eliminating the cross-border requirement

B.1 Zambrano Principle: Reshaping residence rights in the EU

More than a decade has passed since the CJEU took a landmark decision concerning the protection of the European citizenship and its connected rights. The Court, in the *Zambrano*⁶⁵ judgment, for the first time, recognized the right of residence of TCNs as family members of EU citizens in the absence of a cross-border element. It should be underlined that the main purpose of the Court was not to guarantee European citizens' right to family life nor to ensure family reunification. Instead, the Court focused on ensuring that the genuine enjoyment of the substance of the rights conferred by EU citizenship was not impaired⁶⁶. Specifically, the case added a crucial layer of protection by deciding that non-EU nationals with dependent minor children who are EU citizens enjoy a derived right of residence, even when the children have not exercised their free movement rights. Denying this right would force the children to leave the territory of the Union in order to accompany their parents, thereby depriving them of the ability to exercise the substance of the rights conferred by their status as EU citizens. The ruling was grounded in Article 20 TFEU, which states that the Union citizenship is an addition to national citizenship; hence reiterating that any person with the nationality of a Member State should be a Union citizen. In respect of the above, such an individual shall enjoy certain specific rights, including that of free movement and residence within the Member States.

In *Zambrano's* case, in 1999, two Colombians, Mr. Ruiz Zambrano and his wife, arrived in Belgium and sought asylum and refugee status; their applications were denied. However, due to the civil war in Colombia, on the premise of a non-refoulement clause invoked by the Belgian court, they were not obliged to quit the territory. They were thus continuing their sojourn in

⁶⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177, ECLI:EU:C:2011:124.

⁶⁶ Adrian Berry, 'The EU after *Zambrano*: Adrian Berry analyses recent judgement on EU rights of residence' (2011) 59 *Socialist Lawyer* 34, 34-36 <https://www.jstor.org/stable/10.13169/socialistlawyer.59.0034> accessed 01 September 2024.

Belgium and were making a number of applications for a residency permit with the idea of enabling them to legally stay there, although they had been rejected. During this time, despite their unlawful residence, Mr. Ruiz Zambrano commenced full-time employment without holding a work permit, and his family was self-sufficient. In 2003, while irregularly residing in Belgium, Mrs. Ruiz Zambrano gave birth to their second child and in 2005 their third child was born. According to Belgian national law, both of these children acquired Belgian nationality at birth, as they were considered stateless. Belgian law includes an anti-statelessness provision that grants Belgian nationality to children born in Belgium who have not acquire any other nationality. Thus, these children automatically acquired EU citizenship. The problem arose when Mr. Zambrano was caught working unlawfully and was forced to terminate his employment. As a result, he applied for unemployment benefits, but his application was refused due to his lack of a residence and work permit in Belgium. He then decided to challenge this decision before the Belgian employment tribunal, which, having to interpret EU law, referred preliminary questions to the CJEU. The Court was asked whether Mr. Ruiz Zambrano had derived a right of residency in Belgium under Union law following the birth of his EU citizen children in 2003 and 2005, notwithstanding that they had yet to exercise their right of free movement within the Union. Finally, the Court reached a conclusion well known as the Zambrano Principle: *Under Article 20 TFEU, a Member State cannot refuse 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. Additionally, it cannot refuse to grant a work permit to that third-country national, insofar as such decisions would deprive those children of the genuine enjoyment of the substance of the rights attached to their status as European Union citizens*⁶⁷.

The CJEU in the *Zambrano* case developed a new approach that went beyond the cross-border element traditionally required in previous rulings. The EU citizenship of the two minors, Diego and Jessica, was crucial in this decision. The Court reasoned that if their father, Mr. Ruiz Zambrano, were forced to leave the EU by national authorities, the children would lose their ability to benefit from their rights as EU citizens⁶⁸. Consequently, the Court concluded that Mr. Zambrano could derive both work and residence rights from EU law. It emphasized that denying him these rights could lead to a situation where the children, as EU citizens, would be compelled to leave the EU to accompany their parents. Additionally, refusing a work permit could leave the family without sufficient resources, further forcing them to exit the EU⁶⁹. This ruling underlined the CJEU's commitment to ensuring the effective exercise of EU citizenship rights, highlighting that measures which undermine the "genuine enjoyment of the substance of rights" tied to EU citizenship, as outlined in Article 20 TFEU, must be prevented. In this case, the Court ruled that

⁶⁷ Supra note 66, Judgment of the Court (Grand Chamber) of 8 March 2011.

⁶⁸ Palumbo, P., 'European Citizenship and Fundamental Rights: The Zambrano Case' *King's C&F Law Blog* (4 January 2012) <https://blogs.kcl.ac.uk/kslr/2012/01/04/the-zambrano-case/> accessed 01 September 2024.

⁶⁹ Anja Lansbergen and Nina Miller, 'European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*' (2011) 7 *EuConst* 287, p. 290.

such substantial rights were at risk, and no cross-border movement was necessary for EU law to apply.

It's obvious that the decision in *Ruiz Zambrano* significantly broadened the scope of European citizenship rights. Traditionally, EU citizenship rights were tied to cross-border movement within the Union, but the *Zambrano* ruling suggests that such rights can now be enforced even against a citizen's home Member State, without the need for cross-border movement. This expansion of rights largely depends on how the Court interprets what constitutes deprivation of the substance of EU citizenship. Before *Zambrano*, the relationship between national and EU citizenship had been explored in the *Rottman* case⁷⁰, which addressed the issue of nationality deprivation. The Court held that losing Member State nationality, and therefore EU citizenship, fell within the scope of EU law, as it would put the individual at risk of losing the rights associated with EU citizenship. This case indicated that EU citizenship rights might apply even without cross-border movement, setting the stage for the *Zambrano* decision. In *Rottmann*, the Court recognized the unique nature of EU citizenship rights and their link to Union law. *Zambrano* then applied this principle to Article 21 TFEU, affirming that EU law protects citizens' rights even in internal situations where cross-border movement is not a factor⁷¹. Furthermore, the Court's reliance on Article 20 TFEU in *Zambrano* aligns with its reasoning in *Rottmann* and emphasizes that its decision is confined to European citizenship rights. However, the Court notably refrained from addressing the human rights implications, such as the right to family life, despite the Belgian authorities' actions potentially breaching Mr. Zambrano's fundamental rights⁷². The European Charter of Fundamental Rights, which includes provisions on family life and children's rights, was not applied in this case. This omission may be due to the limits imposed on the Charter, which can only be invoked in matters within the scope of EU law. Despite these restrictions, the CJEU has used the Charter in other instances as an interpretative tool to shape legal outcomes and guide administrative discretion, even though the Charter remains subject to the principle of conferral that governs EU competencies⁷³.

However, Advocate General Sharpston, in her opinion on *Zambrano*⁷⁴ took a broader view of the relationship between EU law and fundamental rights. She argued that the protection of EU citizens' fundamental rights should not depend solely on whether the Union's legislative competencies had been exercised in a particular area. According to Sharpston, once powers are conferred on the Union, the EU should have both the competence and the responsibility to safeguard fundamental rights across its Member States. This interpretation challenges the traditional boundaries of EU law by suggesting that EU fundamental rights protection should be available regardless of whether a situation falls strictly within the existing legislative framework. Sharpston's view highlights a

⁷⁰ Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI:EU:C:2010:104.

⁷¹ *Supra* note 68, p. 293.

⁷² *Supra* note 67.

⁷³ D Chalmers, G Davies & G Monti, *European Union Law*, II ed. (Cambridge 2010) 248.

⁷⁴ Opinion of Advocate General Sharpston, Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2010:560.

potential reorientation of EU law, where the protection of citizens' rights, particularly in areas such as family life, could be guaranteed even in situations where no direct EU action has been taken. Furthermore, this interpretation reflects an expansive approach to the Union's role in protecting fundamental rights, aiming to ensure that EU citizens can enjoy these protections irrespective of whether their situation involves cross-border movement or other typical triggers of EU law. Pushing for broader EU involvement in fundamental rights, this perspective underlines that such protection should not be conditional on the actual exercise of the Union's legislative competence⁷⁵. In her view, once Member States have transferred certain powers to the Union, it is the Union's responsibility to ensure that those powers are used to guarantee fundamental rights, regardless of whether they have been directly exercised⁷⁶. This principle, if adopted, could significantly expand the reach of EU law in protecting fundamental rights, offering a more robust framework for safeguarding citizens' rights in purely internal situations as seen in *Zambrano*.

B.1.1 Test of "genuine enjoyment of the substance" of citizenship rights

Since the *Ruiz Zambrano* ruling, the CJEU has sought to clarify the application of the "substance of rights" test, though certain ambiguities persist, particularly regarding its scope. The main question has been whether the *Zambrano* principle applies broadly or is restricted to cases with similar facts. Initially, *Zambrano* suggested that EU citizens could not be deprived of their core citizenship rights, but subsequent case law has shown that such deprivations can occur under specific conditions. Although the Court initially positioned the substance of rights test as distinct from free movement rights, it has become clear that it is closely tied to the EU's free movement provisions. Consequently, it has been argued that the same protection offered by the test could be achieved simply by applying EU free movement law. Early uncertainty over whether the test would be limited to the facts of *Zambrano* has since been addressed by later rulings, which have demonstrated that the test is confined to specific situations, particularly involving the derived residence rights of TCNs who are primary carers of EU citizens⁷⁷.

After *Zambrano*, the CJEU narrowed the scope of the test in *Dereci*⁷⁸, where the Court clarified that *the test applies only in cases where an EU citizen would be forced to leave the Union if the derived right of residence were denied*⁷⁹. Specifically, Mr. Dereci like Mr. Ruiz Zambrano, was a TCN (Turkish) living illegally in an EU Member State, in this case, Austria, where his children, who were minors, held EU citizenship. However, unlike Mr. Zambrano's spouse, who was also a TCN, Mr. Dereci's wife was an EU citizen with the legal right to remain in the Union with their children. In this case, the CJEU clarified that a national measure results in a "deprivation effect"

⁷⁵ Supra note 68, p. 289-290.

⁷⁶ Supra note 73, paras 171-173.

⁷⁷ Supra note 10, p. 4.

⁷⁸ Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734.

⁷⁹ *Ibid*, para 66.

only when the EU citizen is forced to leave not just their home Member State, but the EU entirely⁸⁰. It also highlighted that *economic desirability or family unity alone were deemed insufficient to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted*⁸¹. This restrictive interpretation was reaffirmed in *K.A. and Others*⁸², where the Court held that the dependency between the EU citizen and the TCN must be such that the EU citizen would be compelled to leave the EU if the TCN were denied residence⁸³. As it stands now, the substance of rights test has become a residual mechanism, invoked when no other legal grounds are available. Typically, the Court first assesses whether Article 21 TFEU or Directive 2004/38, which governs the free movement and residence rights of EU citizens and their families, applies⁸⁴. The Directive, however, only covers those who move to or reside in a Member State other than their own⁸⁵. When these provisions are inapplicable, the Court turns to Article 20 TFEU to protect EU citizens from being forced to leave the EU as a result of decisions regarding the residence rights of their TCN family members.

Initially, the CJEU appeared to suggest that the substance of rights test provided absolute protection against the deprivation of citizenship rights. However, subsequent rulings, like *Rottmann*, clarified that EU citizenship and the associated rights could be lawfully restricted under certain conditions⁸⁶. In *Rottmann*, the CJEU ruled that Member States must adhere to EU law when determining the acquisition or loss of nationality. Although the Court limited Member States' discretion in denaturalization cases, it accepted that EU citizenship could be revoked if a proportionality test was met⁸⁷. This principle was further developed in *Tjebbes*⁸⁸, where the Court required a proportionality assessment to determine whether the loss of nationality disproportionately affected an individual's rights⁸⁹. National authorities must consider personal circumstances such as family and professional life, as well as the best interests of the child, when making such decisions. Thus, while the CJEU has established safeguards for protecting EU citizenship, it has also recognized that these rights are conditional.

Both *Rottmann* and *Tjebbes* demonstrate that EU citizenship rights can be lawfully curtailed if the principle of proportionality is respected. Likewise, the derived residence right under Article 20

⁸⁰ Koen Lenaerts, 'The Concept of EU Citizenship in the Case Law of the European Court of Justice' (2013) 13 ERA Forum 569, 583, DOI: 10.1007/s12027-013-0279-y, p. 575.

⁸¹ Ibid, para 68.

⁸² Case C-82/16 *K.A. and Others v Belgische Staat* [2018] ECLI:EU:C:2018:308.

⁸³ Ibid, para 52; (see, to that effect, judgments of 15 November 2011, *Dereci and Others*, [C-256/11](#), [EU:C:2011:734](#), paragraphs 65 to 67; of 6 December 2012, *O and Others*, [C-356/11](#) and [C-357/11](#), [EU:C:2012:776](#), paragraph 56; and of 10 May 2017, *Chavez-Vilchez and Others*, [C-133/15](#), [EU:C:2017:354](#), paragraph 69).

⁸⁴ Case C-165/14 *Rendón Marín*, EU:C:2016:675, para 35; Case C-133/15 *Chavez Vilchez*, ECLI:EU:C:2017:354, para 49.

⁸⁵ Supra, note 9.

⁸⁶ Supra note 10, p. 7.

⁸⁷ *Rottmann* para 42.

⁸⁸ Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] ECLI:EU:C:2019:189.

⁸⁹ Ibid, para 44.

TFEU, which protects the substance of EU citizenship rights, is not unconditional. National authorities can restrict these rights based on several groups such as public policy or security concerns⁹⁰, highlighting the conditional nature of EU citizenship rights. These exceptions apply equally under Article 21 TFEU and Directive 2004/38. Ultimately, the substance of rights test has proven to be a limited tool. While it has provided residual protection in cases where other EU law provisions do not apply, it has not revolutionized the protection of EU citizens' rights. The overlap between the rights conferred by Articles 20 and 21 TFEU, particularly regarding TCNs' residence rights, suggests that the test is not as essential as initially thought. In practice, the rights of EU citizens could likely be fully safeguarded under Article 21 TFEU and free movement principles, without the need for a separate test under Article 20⁹¹. Reconsidering this artificial distinction could simplify the legal framework and enhance the coherence of EU citizenship rights across Member States⁹².

B.2 Concept of dependency between EU citizens and TCN's family members

To prevent EU citizens from being forced to leave the Union and losing their rights under Article 20 TFEU, understanding the concept of dependency is essential. It is generally important to determine which parent is the primary caregiver and whether there is a genuine dependency relationship between the child and the non-EU national parent. The CJEU has explored this issue in various cases, clarifying situations where such dependency relationships might allow TCNs to obtain residence rights, while also distinguishing between dependency relationships involving adults and minors. These rights aim to ensure that EU citizens are not compelled to leave the Union and lose their entitlements under Article 20.⁹³

B.2.1. Relationship of dependency to adults

In cases involving adult EU citizens, the CJEU has consistently maintained that deriving residence rights for TCNs is possible only in exceptional circumstances. The dependency between the TCN and the EU citizen must be so substantial that the removal of the TCN would effectively force the EU citizen to leave the Union entirely. As mentioned before, this principle was initially established in the landmark *Ruiz Zambrano* case, which laid the foundation for interpreting Article 20 TFEU. In *Zambrano*, the Court concluded that denying residence to the Colombian parents of Belgian children would compel the children to leave the EU, thus depriving them of their EU citizenship rights. However, the Court has made a clear distinction between adults and children when evaluating relationships of dependency. Adults are generally considered capable of leading independent lives, and as a result, they can only derive a right of residence from Article 20 TFEU

⁹⁰ Case C-304/14 CS, EU:C:2016:674, para 36.

⁹¹ Hester Kroeze, 'The Substance of Rights: New Pieces of the Ruiz Zambrano Puzzle', (2019) 44 *European Law Review*, p. 249.

⁹² *Supra* note 10, p. 10.

⁹³ *Supra* note 10, p. 5.

in rare and extraordinary circumstances. Specifically, the Court has stated that a derived right of residence can be granted to an adult TCN only when no form of separation between the EU citizen and their family member is possible⁹⁴. This reflects the understanding that adults, as a rule, can maintain an independent existence separate from their family members⁹⁵. The existence of a mere familial link, whether legal or biological, does not suffice to justify the grant of a derived right of residence under Article 20 TFEU. For instance, financial dependency alone is insufficient to establish a relationship of dependency that would trigger the protection of EU citizenship rights⁹⁶. In most cases, adults will be denied a derived right of residence unless the circumstances are extraordinary, such as when an EU citizen suffers from a severe disability and is wholly reliant on the care of their TCN family member⁹⁷. Even then, the Court applies the dependency test strictly, ensuring that the TCN's removal would genuinely compel the EU citizen to leave the EU, thus preventing their enjoyment of the substance of rights conferred by their Union citizenship⁹⁸.

An important case that followed was the *McCarthy* case⁹⁹, which illustrated key limitations on the concept of dependency, particularly for adult EU citizens who have not exercised their rights to free movement. Specifically, the *McCarthy* case involved a dual British-Irish national who had never exercised her right to free movement within the EU. She sought a residence permit for her Jamaican husband in the United Kingdom, arguing that her EU citizenship entitled him to a right of residence. In this context the CJEU ruled that Article 20 TFEU does not grant an automatic right of residence to TCN family members of EU citizens who have never moved to another Member State. In its reasoning, the Court emphasized that for Article 20 to apply, the dependency must be such that it would compel the EU citizen to leave the Union if the TCN were removed. Since Ms. McCarthy had not exercised her free movement rights, and her life remained entirely within the UK, the Court deemed her situation a purely internal matter, not engaging EU law¹⁰⁰. This decision is significant because it underscored the limits of EU law in purely internal situations, where no cross-border element exists. *McCarthy* highlighted that, unlike in cases involving minors or situations where the EU citizen has exercised free movement, an adult EU citizen's relationship with a TCN must involve exceptional circumstances of dependency for a derived right of residence to arise under Article 20. The ruling made it clear that being married to a TCN or having ordinary family ties with a non-EU national does not automatically result in a right of residence under EU law. For adult EU citizens who have never exercised their free movement rights, a derived right of residence for a TCN will only be recognized in exceptional cases where refusal would compel the EU citizen to leave the Union¹⁰¹. Actually, the McCarthy decision confirms the Court's established

⁹⁴ Supra note 80, para 52.

⁹⁵ Supra note 80, para 65.

⁹⁶ Case C-836/18 *Subdelegación del Gobierno* [2020] EU:C:2020:119, para 58.

⁹⁷ Supra note 89, p. 244.

⁹⁸ Supra note 10, p. 5.

⁹⁹ Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375, ECLI:EU:C:2011:277.

¹⁰⁰ *Ibid*, Judgment of the Court (Third Chamber) of 5 May 2011.

¹⁰¹ Supra note 68, p. 297-298.

position that Treaty provisions on EU citizenship cannot be applied to purely internal situations which have no link to EU law.¹⁰²

In a more recent example, the case *Subdelegación del Gobierno en Ciudad Real v RH*¹⁰³, the Court further clarified the criteria for establishing dependency to adults. In this case, RH was a Moroccan national who sought a residence permit in Spain as the spouse of a Spanish national who had never exercised their free movement rights. The Spanish authorities rejected RH's application on the grounds that his wife did not have sufficient financial resources, as required by Spanish law, which had incorporated the provisions of Directive 2004/38. However, the CJEU ruled that the authorities should have assessed whether the refusal of residence would compel RH's wife, an EU citizen, to leave the Union due to the dependency between the spouses. The Court emphasized that merely applying financial criteria without examining the specific circumstances of the couple's relationship was insufficient. Instead, the authorities should have considered whether denying residence would result in a violation of Article 20 TFEU by forcing the Spanish national to leave the Union to preserve her family life. The decision reinforced that dependency must be evaluated on a case-by-case basis, and rigid application of financial rules may not be appropriate where the refusal of residence would result in the departure of an EU citizen from the Union. This case reaffirms the Court's approach that while the threshold for establishing dependency in adult cases remains high, authorities must thoroughly examine the potential consequences of separation, particularly within the context of family life, to ensure that EU citizens are not deprived of their rights under Article 20 TFEU¹⁰⁴. However, this decision reinforced the strict criteria for proving a "relationship of dependency" between two adults. The Court made clear that, unlike cases involving children, adults can only claim protection under Article 20 TFEU in exceptional circumstances. The threshold for establishing such dependency remains high, suggesting that it would only apply in extreme situations—such as when a TCN is seriously ill and wholly reliant on their EU citizen family member for essential care and daily needs. This case reaffirms the limited scope of Article 20 for adult claimants¹⁰⁵.

B.2.2 Relationship of dependency to children

In contrast, the CJEU has consistently adopted a more protective approach when the relationship of dependency involves minor EU citizens, placing particular emphasis on the best interests of the child and the rights guaranteed under the EU CFR. In the course of a number of landmark cases,

¹⁰² Peter Van Elswege, 'European Union Citizenship and the Purely Internal Rule Revisited: Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department' [2011] (*published online 15 September 2011*) Cambridge University Press <https://doi.org/10.1017/S1574019611000252> accessed 12 September 2024.

¹⁰³ Supra note 94.

¹⁰⁴ Supra note 94, Judgment of the Court (Fifth Chamber) of 27 February 2020.

¹⁰⁵ Silvia Bartolini, "Another Piece of the Puzzle Surrounding the Application of Article 20 TFEU", EU Law Live, 2 March 2020, https://dial.uclouvain.be/pr/boreal/object/boreal%3A237133/datastream/PDF_01/view accessed 12 September 2024.

the Court has ruled that no Member State is able to refuse residence to a TCN parent of an EU child in circumstances where such refusal would force the child to leave the territory of the EU, thus restricting the rights conferred on the child by virtue of their status as a Union citizen. However, such an examination shall always be qualitative and provide an assurance that the child would indeed be compelled to leave the EU with the TCN parent, with the result that the child would be deprived of the substance of his rights as an EU citizen. For that to be established, it is necessary that the TCN parent must be the primary carer of the child, the child can show legal, financial, and emotional dependency from that parent, and a relationship of dependency between the two exists. In this way, any decision made considers the child's right to remain within the Union and benefit from their status as EU citizens.

In its landmark *Chavez-Vilchez* case¹⁰⁶, the CJEU developed its interpretation of the derived right of residence for TCN parents of EU citizen children under Article 20 TFEU, emphasizing the need to protect the rights of EU citizens, particularly children, from being effectively deprived of their Union rights. The case centered around Ms. Chavez-Vilchez, a Venezuelan national and mother of a Dutch child, and seven other mothers in similar situations, all of whom were TCNs with children holding EU citizenship (Dutch nationality). While the children had been acknowledged by EU citizen fathers, most lived only with their mothers. Following her separation from the child's father Ms. Chavez-Vilchez became solely responsible for the child's care resulting to her applications for social assistance and child benefits in the Netherlands being rejected due to lack of a residence permit. Finally, the Court held that Article 20 TFEU prevents the national authorities from refusing a residence permit which would be issued to a TCN parent of an EU citizen child, having the effect of forcing that child to leave the EU, hence denying the child his rights as an EU citizen. It follows that any refusal of a residence permit may be justified only after a careful examination of the family situation, in other words with regard to whether or not the child would have to leave the EU if the TCN parent is expelled¹⁰⁷.

A key consideration is whether there is a "relationship of dependency" between the child and the TCN parent¹⁰⁸. The authorities must evaluate factors such as the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the TCN parent, and the risks that separation from the latter might entail for that child's equilibrium¹⁰⁹. The CJEU clarified that even if the other parent, the EU citizen, is willing and capable of assuming full responsibility for the child, this is not a sufficient ground to deny residence to the TCN parent. In *Chavez-Vilchez*, the CJEU relied extensively on Article 24 (2) of the CFR of the EU. The child's right to have one's best interests treated as a primary

¹⁰⁶ Case C-133/15 H.C. *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECLI:EU:C:2017:354.

¹⁰⁷ *Ibid*, Judgment of the Court (Grand Chamber) of 10 May 2017.

¹⁰⁸ Court of Justice of the European Union, 'Press Release No 48/17: Judgment in Case C-133/15 H.C. *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*' (Luxembourg, 10 May 2017).

¹⁰⁹ *Supra* note 103, para 71.

consideration – as laid down in article 24 (2) of the Charter – is rooted in the particular nature of childhood rather than in the child’s citizenship status¹¹⁰.

It should be noted that, while dependency between a TCN and an EU citizen can create a right of residence under Article 20 TFEU, public policy and security considerations often weigh heavily in these cases. In *Rendón Marin* case¹¹¹, the CJEU emphasized that public policy concerns, such as criminal records or security risks, must be considered when evaluating an application for residence. Nevertheless, the Court ruled that such concerns cannot automatically override the rights of EU citizens, particularly minors, whose best interests must be taken into account. According to the facts of the case, Mr. Rendón Marin, a Colombian national, was the sole custodian of his two children who were EU citizens. His son was Spanish, and his daughter was Polish. Despite their long-standing residence in Spain and his children’s status as EU citizens, Mr. Rendón Marin faced a significant hurdle due to his criminal record, which involved a nine-month imprisonment in Spain. Although he was granted a provisional two-year suspension of his sentence, his application for a temporary residence permit was rejected, based on his criminal record. The National High Court dismissed his appeal, and the Supreme Court referred the case to the CJEU.

The CJEU had to address whether national legislation that automatically denies residence permits based solely on a criminal record is consistent with Article 20 TFEU, especially when it could force EU citizen children to leave the EU. It concluded that any refusal to grant residence must be based on a genuine, present, and sufficiently serious threat to public policy or security, not merely a criminal record. In *Rendón Marin*, the Court found that the automatic refusal of residence based solely on Mr. Rendón Marin's criminal record, without a thorough assessment of the impact on his children’s rights, was incompatible with EU law¹¹². This judgment underlines the necessity of balancing public policy concerns with the fundamental rights of EU citizens and their families, ensuring that the genuine enjoyment of EU citizenship rights is not undermined by national regulations that fail to consider the individual circumstances of the family. The reasoning also elevates the protection of TCN parents of minor EU children to a higher level, ensuring that national legislation cannot automatically negate the rights of EU citizens based solely on a criminal record¹¹³.

More recently the Court expanded the scope of dependency in certain contexts. Specifically, in the *K.A. and Others* case, the CJEU clarified the role of dependency in granting residence rights under Article 20 TFEU, emphasizing that dependency remains central even when other legal obstacles,

¹¹⁰ Nissen E, ‘A Children’s Rights Perspective to Ruiz Zambrano and Chavez-Vilchez: An Examination in Light of Theory, Practice and Child Development Research’ (2021) 23 *European Journal of Migration and Law* 68–101, https://brill.com/view/journals/emil/23/1/article-p68_5.xml accessed 12 September 2024, p. 85.

¹¹¹ Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] ECLI:EU:C:2016:675.

¹¹² *Ibid*, Judgment of the Court (Grand Chamber) of 13 September 2016.

¹¹³ Dunja Duic, Tunjica Petrusevic & Ena Buljan, Recent Issues of the Right to Family Reunification within EU Law - Analysis of the Case C-165/14 Alfredo Rendon Marin v. Administracion del Estado, 5 SE. EUR. L.J. 8 (2019), p. 19-22.

such as entry bans, are present. This case involved several applicants, including adults claiming a right to stay in Belgium based on their family relationships with adult Belgian citizens. All of these TCNs were subject to entry bans due to past immigration violations. Belgian authorities refused to assess their applications for family reunification, arguing that the TCNs needed to comply with the entry bans first by leaving the EU and then applying from abroad. However, the CJEU held that *even in cases where a TCN is subject to an entry ban, national authorities must assess whether a relationship of dependency exists that would compel the EU citizen to leave the Union if the TCN were removed*¹¹⁴. The Court also highlighted that the fundamental rights of EU citizens, particularly their right to remain within the Union, must be weighed against any immigration enforcement measures¹¹⁵.

An interesting recent example that further expands the discussion of dependency and residence rights is the *Pancharevo* case¹¹⁶, where the CJEU addressed the rights of a Bulgarian child born in Spain who had two mothers, a Bulgarian national and a UK national. The Spanish authorities issued a birth certificate recognizing both women as the child's parents, but Bulgarian authorities refused to issue a Bulgarian birth certificate, citing that their national laws did not allow recognition of same-sex parents. The refusal made it difficult for the child to obtain a Bulgarian identity document, which is essential for the exercise of her EU citizenship rights, including the right to free movement. The CJEU ruled that Bulgaria's refusal to issue the birth certificate could impede the child's rights under Articles 20 and 21 TFEU, which protect the right of EU citizens to move and reside freely across the Member States¹¹⁷. The Court stated that while Bulgaria has the discretion to decide whether or not to allow same-sex marriage and parenthood under its national law, *it should do so in accordance with EU law, by recognising the civil status of persons that has been established in another Member State for the purposes of free movement*¹¹⁸. Such discretion cannot override the child's best interests. The *Pancharevo* case demonstrates how the relationship of dependency can extend beyond mere financial support or ordinary family ties, focusing on the broader implications of denying residence rights or legal recognition on the exercise of fundamental EU citizenship rights. The Court underscored that the refusal to recognize both parents would create barriers to the child's ability to enjoy her rights as an EU citizen, thus reinforcing that dependency, in this case, involves ensuring that EU citizens can fully exercise their rights across borders, even when Member States' national identities are involved.

¹¹⁴ Supra note 80, Judgment of the Court (Grand Chamber) of 8 May 2018.

¹¹⁵ Sarah Progin-Theuerkauf, 'K.A and Others – The Zambrano Story Continues' (European Law Blog, 22 May 2018) <https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues/> accessed 02 September 2024 <https://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/>.

¹¹⁶ Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo”* [2021], ECLI:EU:C:2021:1008.

¹¹⁷ Dafni Lima, 'Towards Cross-Border Recognition of Same-Sex Parenthood' (2022) published online by Cambridge University Press, 22 September 2022, <https://www.cambridge.org/core/journals/cambridge-law-journal/article/towards-crossborder-recognition-of-samesex-parenthood/42DC183F94BF93907ADD2C1C073331E3> accessed 12 September 2024, p. 240.

¹¹⁸ Ibid. para 52.

B.3 Interim Conclusion

Overall, from the moment of the *Ruiz Zambrano* ruling, the CJEU signaled a pivotal transformation in the interpretation of EU citizenship. This case demonstrated that the rights conferred by EU citizenship could be invoked even in the absence of a cross-border element, fundamentally broadening the application of EU law. The Court moved beyond the traditional reliance on free movement as a prerequisite for the exercise of EU citizenship rights. By introducing the "substance of rights" doctrine under Article 20 TFEU, the CJEU ensured that Member States could not take actions that would effectively deprive Union citizens, particularly children, of the genuine enjoyment of their EU citizenship. In this context, the criterion of "dependency" became crucial for applying the genuine enjoyment test, explaining why residence rights derived from Article 20 TFEU are strongly connected to the right to care for (minor) EU citizens¹¹⁹. While the threshold for establishing dependency for adults is high, requiring extraordinary circumstances where the EU citizen could not remain in the Union without the TCN family member, the Court adopted a more protective stance regarding children, focusing on safeguarding the best interests of the child, as outlined in Article 24 of the EU CFR. However, subsequent case law refined the application of the *Zambrano* principle by narrowing its scope. The CJEU clarified that the "substance of rights" test only applies when an EU citizen, typically a minor, would be forced to leave the Union if a TCN family member were expelled. The Court emphasized that mere economic or familial desirability for the TCN to stay is insufficient to invoke EU citizenship protection. This shift affirmed EU citizenship as an autonomous and fundamental status, underscoring its constitutional significance within the Union's legal framework. By recognizing citizenship as an autonomous concept, the Court has created a broader framework for protecting the rights of EU citizens, especially children, even in purely internal matters. This development highlights the progressive nature of EU law, ensuring that the essential rights of Union citizens are safeguarded across all Member States, regardless of whether a cross-border element is involved¹²⁰.

¹¹⁹ Sarah Progin-Theuerkauf, 'K.A and Others – The Zambrano Story Continues' (European Law Blog, 22 May 2018) <https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues/> accessed 14 September 2024, p. 12.

¹²⁰ *Supra* note 79, p. 582.

PART II Objective scope of right of entry and residence under EU citizenship law for TCN family members

CHAPTER A: Categories of residence right under Directive 2004/38: Secondary rights for TCNs

As already discussed in a previous Chapter ((Part I, Chapter A), the right of entry and residence in the EU granted to TCN family members of EU citizens is secondary and derived from the rights of EU citizens themselves, as established under the Free Movement Directive. That is to say that family members enjoy such rights only as a derivative of their relationship with an EU citizen rather than as an independent or autonomous right to reside in the EU. It is important though to examine the different categories of residence rights, both short-term and long-term, available for EU citizens and their family members exercising their right to free movement under Article 21 TFEU. These residence rights determine the length and under what conditions an EU citizen and his or her family members may remain in the host Member State. Moreover, the same principles may apply by analogy when Article 20 TFEU, which relates to EU citizenship, is relevant, further expanding the legal protections in specific cases.

A. Types of residence rights

Firstly, under Article 6 of Directive 2004/38/EC, TCN family members in possession of a valid passport and accompanying or joining an EU citizen are entitled to reside in an EU Member State for up to three months, known as "short-term residence." During this period, their residence is contingent on the Union citizen's exercise of free movement rights, without additional conditions attached to the TCN. Beyond the three-month period, Article 7 extends the right of residence to TCN family members for periods longer than three months, provided certain conditions are met. These include that the EU citizen is either a worker, self-employed, has sufficient financial resources, or is a student with health insurance. The primary goal is, as a rule, to avoid placing an unreasonable burden upon the finances of the host Member State due to the free movement of EU citizens and their family members, balancing individual rights against state interests. Finally, Article 16 of the Directive introduces the right of permanent residence given to TCN family members who have legally resided with the EU citizen in the host Member State for a continuous period of five years. This status offers a significant level of integration, giving the TCN family member a more secure legal footing and greater autonomy, independent of the EU citizen's situation. Achieving permanent residence marks a crucial step towards long-term stability within the host Member State¹²¹.

¹²¹ Ottavio Marzocchi, 'Free Movement of Persons', *Fact Sheets on the European Union* (European Parliament, 04-2024) <https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons> accessed 15 September 2024.

Given the significance of distinguishing between the different categories of residence rights, it is crucial to examine the specific conditions required for each category to be granted.

A.1 Right of residence for up to three months

To begin with, Article 6 of the Citizens' Rights Directive specified that so far as the EU citizens and their TCN family members are concerned, for stays that will be less than three months, the only formal requirement is that they should have a valid identity document or passport. The short-term residence would be provided for a period of three months, providing the right to reside in another Member State irrespective of the intention with which they enter the host Member State, whether it is for tourism, seeking employment, or seeking to reside in the host Member State. Notably, during this period, the host Member State may require the individuals to register their presence within the country but are not expected to comply with any other formal requirements. That is to say, the TCN family members accompanying or joining the EU citizen have equal rights to short-term residence, provided they have valid identification documents.

Nevertheless, during this three-month period, neither EU citizens nor their TCN family members are entitled to social assistance or welfare benefits from the host Member State. This rule reflects the understanding that short-term residence is temporary in nature and does not impose any obligations on the host state to provide financial support. The focus is primarily on facilitating free movement and family reunification for limited durations, without additional burdens on the welfare systems of the host state. To that end, this provision ensures flexibility for EU citizens and their family members to move freely across the Union for short stays while maintaining a balance with the host state's national resources¹²².

Additionally, under Article 6, EU citizens and their TCN family members are not required to leave the host Member State for a specified period, such as three months, before applying for a new right of residence. Systematic checks to enforce this condition are not allowed, as it is presumed that individuals claiming short-term residence rights are in compliance with the Directive unless there are substantial reasons to doubt otherwise. For instance, repeated contact with national authorities over a period exceeding three months may raise concerns, at which point the host Member State could request evidence to confirm the duration of the stay. In any case, assessments of whether an individual has exceeded the permitted stay must be based on objective criteria, including the individual's intent and any relevant evidence provided¹²³.

¹²² Supra note 37, p. 3.

¹²³ European Commission, 'Guidance on the Right of Free Movement of EU Citizens and their Families (Text with EEA relevance)' (Communication) [2023] OJ C 1392/03, 22 December 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202301392 accessed 15 September 2024, p. 28.

A.1.2 Right of residence for more than three months

Under Article 7 of Directive 2004/38/EC, Union citizens and their TCN family members are entitled to reside in a Member State for more than three months, provided they meet specific conditions. One such condition is active participation in the local labor market, either through employment or self-employment in the host Member State. According to established case-law, a worker is any person who carries out actual and genuine economic activities under the direction of another person in return for remuneration. For those people, Article 7(3) of the Directive allows them to retain their status as workers or self-employed persons, under certain circumstances, even when they are no longer employed, which ensures continued entitlement to equal treatment under Article 24 of the Directive¹²⁴. These respectively are: temporary incapacity for work caused either by illness or accident; involuntary unemployment subsequent to having had an employment contract for more than a year, provided they are registered as jobseekers with the relevant employment office; involuntary unemployment after completing a fixed-term employment contract of less than a year or within the first twelve months of employment, where the status of worker is retained for at least six months, subject to registration as a jobseeker; and in vocational training, though retention of the status as worker is conditioned by the training being related to previous employment unless the person is involuntarily unemployed. In all these cases, TCN family members are protected and do not lose their right to reside in the Member State for more than three months, ensuring their continued legal stay alongside the Union citizen¹²⁵.

Alternatively, Union citizens can reside in a Member State even if they are economically inactive (such as pensioners, frontier workers, or EU citizen children living with a TCN carer), provided they have sufficient resources to support themselves and their TCN family members without relying on the host state's social assistance. They must also have comprehensive sickness insurance coverage in the host Member State. The notion of "sufficient resources" should be understood within the framework of Directive 2004/38/EC, which aims to facilitate free movement, provided that these individuals do not place an undue burden on the host state's social assistance system. Sufficient resources can include personal savings, pensions, or financial support from a TCN family member, such as a parent or spouse¹²⁶. The host Member State must assess each individual's situation on a case-by-case basis and cannot impose a fixed minimum amount for sufficient resources. However, these resources should not exceed the threshold for social assistance eligibility or the minimum social security pension set by the host Member State. It is important to note that the Court, in the *Dano* case¹²⁷ ruled that Member States may refuse social benefits to economically inactive Union citizens who seek residence solely to access social assistance without

¹²⁴ Supra note 122, p. 27-29.

¹²⁵ Directive 2004/38/EC, Art. 7 para 3.

¹²⁶ See Case C-200/02 *Zhu and Chen*, C-86/12 *Alokpa*, C-218/14 *Kuldip Singh*.

¹²⁷ Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

having sufficient resources.¹²⁸ Such individuals do not meet the criteria for residence or equal treatment under EU law, which also affects the residence rights of their TCN family members.

Specifically, for primary carers of minor EU citizens, the Court has determined that, in addition to the individuals listed in Article 2(2) of Directive 2004/38/EC, where minor EU citizens exercise their right of free movement, their non-EU primary carers must be granted the right of residence in the host Member State. The right of residence for minor EU citizens and their primary carers for periods exceeding three months but less than five years is subject to specific conditions. Typically, minors exercise their right of free movement without engaging in economic activities. Therefore, it is necessary to verify whether the minor EU citizens and their primary carers meet the conditions of having sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay and having comprehensive sickness insurance coverage for themselves and their primary carers, as detailed in Article 7(1)(b) of the Free Movement Directive. In this regard, minor EU citizens can meet the sufficient resources requirement through their non-EU primary carers. This requirement as to comprehensive sickness insurance in such cases may be considered as met where the minor EU citizens have comprehensive sickness insurance covering their primary carers or vice versa, their primary carers have comprehensive sickness insurance covering the minor EU citizens. A citizen of the EU, who is a minor and has acquired the right of permanent residence, and his main carers are from that date no longer subject to the requirements for sufficient resources and comprehensive sickness insurance¹²⁹. It is also to be declared that primary carers of children have rights of residence under Article 12(3) of Directive 2004/38/EC where the child is resident and attending an educational establishment in the host Member State.

Another requirement for long-term residence is the Union citizens who relocate to a Member State as jobseekers and are allowed to stay for a period exceeding three months provided that they show they are actively seeking employment and have a real chance of employment. However, in the *Alimanovic* case¹³⁰, the Court ruled that these individuals are not entitled to receive social assistance from the host Member State during this time. This situation differs from that of EU citizens who were previously employed or self-employed and then become involuntarily unemployed. These individuals retain their worker status and associated rights if they were employed for at least a year and have registered as jobseekers. If their employment lasted less than a year, they retain their worker status for up to six months, provided they register as jobseekers¹³¹. Moreover, according to the *G.M.A.* case¹³², Article 45 TFEU in conjunction with Article 14(4)(b) of Directive 2004/38/EC provide that the host Member State must grant EU citizens a "reasonable period" to search for employment, starting from when they register as jobseekers. This period

¹²⁸ Ibid, para 78.

¹²⁹ Supra note 122, p. 36.

¹³⁰ Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* [2015], ECLI:EU:C:2015:597.

¹³¹ Supra note 37, p. 4.

¹³² Case C-710/19 *G. M. A. v État belge* [2020], ECLI:EU:C:2020:1037.

should allow individuals to explore potential job opportunities and take appropriate steps to secure employment. During this time, the host Member State may require evidence of ongoing job search efforts¹³³. A period of six months from the date of registration would normally be considered as reasonable. Whereas, after the expiry of a reasonable period to try to find employment, the jobseeker shall also be able to demonstrate that they have a genuine chance of being employed. Whenever there is an EU citizen moving into a Member State to look for work, then, during the initial period of three months, their right of residence comes under the application of Article 6 of Directive 2004/38/EC. During this period, which is three months, the only condition that shall be met by the citizen is having a valid identity document; no other condition should be imposed¹³⁴.

The final condition for acquiring the right to reside for more than three months is if Union citizens are enrolled in an educational institution that is accredited or financed by the host Member State, for the purpose of pursuing a course of study or vocational training—referred to as mobile EU students. In this scenario, they must have comprehensive sickness insurance and must assure the relevant national authorities, through a declaration or equivalent means, that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence¹³⁵.

In conclusion, the right of residence for TCN family members in a Member State for periods exceeding three months is contingent upon meeting the conditions set out in the Free Movement Directive, which pertain to their EU citizen relative. Once one of these conditions is satisfied, the TCN family member should promptly apply for a residence card. The administrative procedure for issuing this card requires national authorities to verify that the applicant proves their status as a "family member" of a Union citizen under Article 10(2) of the Directive¹³⁶. The Court in the *Diallo* case¹³⁷ affirmed that non-EU citizens meeting this definition must be issued a residence card without undue delay¹³⁸. Non-EU family members are eligible to apply for a residence card upon arrival in the host Member State if they plan to stay for longer than three months. According to Article 10(1), the residence card must be issued within six months of the application. This timely issuance is crucial as the residence card facilitates the exercise of residence rights and integration into the host Member State¹³⁹. It also exempts the holder from visa requirements for entry and can facilitate the right to work under Article 23 of the Directive¹⁴⁰. Therefore, national authorities must ensure that residence cards are issued within the prescribed time limits to support the rights and integration of non-EU family members effectively¹⁴¹.

¹³³ *G.M.A.* case, Judgment of the Court (First Chamber) of 17 December 2020.

¹³⁴ *Supra* note 131, para 35-36.

¹³⁵ *Supra* note 129, para 35-36.

¹³⁶ Directive 2004/38/EC, Art. 10.

¹³⁷ Case C-246/17 *Ibrahima Diallo v État belge* [2018], ECLI:EU:C:2018:499.

¹³⁸ *Ibid*, paras 63-65.

¹³⁹ *Diallo* case, paras 66-67.

¹⁴⁰ Directive 2004/38/EC, Art. 23.

¹⁴¹ *Supra* note 122, p. 39-42.

A.1.3 Right of permanent residence

Under Article 16(2) of Directive 2004/38/EC, TCN family members of EU citizens acquire the right of permanent residence in a host Member State after legally residing there continuously for five years. This period of residence must comply with the legal conditions set out in the Directive, ensuring that TCNs live in the Member State in accordance with the EU citizen's right of residence and the administrative formalities set out in Articles 7, 8, 14, and 22 of the Directive¹⁴². Once the five-year period is completed, TCNs are no longer subject to the initial residence conditions, such as proving sufficient resources or possessing comprehensive health insurance. However, this right can also be granted in less than five years under specific conditions outlined in Article 17 of the Directive¹⁴³. These conditions include situations like early retirement, where the TCN or the EU citizen has resided in the Member State for at least three years and worked for the last twelve months. Permanent residence can also be granted if a person stops working due to permanent incapacity after two years of residence, or immediately if the incapacity resulted from a work-related accident or occupational disease. Additionally, TCNs who become frontier workers after three years of residence can acquire permanent residence. In any case, this long-term status provides added security and safeguards against expulsion, reinforcing their legal standing and integration into the Member State¹⁴⁴.

Long-term residency allows TCNs to remain in the host Member State indefinitely. Temporary absences from the host country do not disrupt the continuity of residence, provided these absences do not exceed six months per year¹⁴⁵ or fall under specific exceptions, such as compulsory military service, pregnancy, serious illness, study, or vocational training. Additionally, a single absence of up to 12 consecutive months for important reasons like childbirth or a posting abroad is allowed without affecting the continuous residence requirement. However, as the Court held in *Onuekwere*, continuity of residence can be interrupted by imprisonment or a lawfully enforced expulsion before the five-year requirement is met, which restarts the residency clock¹⁴⁶. Once acquired, permanent residence can only be lost through an absence exceeding two consecutive years. In *ZK*, the CJEU clarified that even brief periods of presence during a two-year period, as short as a few days, are enough to prevent the loss of permanent residence. However, this must be distinguished from cases where the individuals have misused their rights.¹⁴⁷

Importantly, the qualifying period of residence does not need to directly precede the claim for permanent residence, and periods of legal residence start to confer the right from the moment they are completed. To determine whether a right to permanent residence has been acquired, Member

¹⁴² Directive 2004/38/EC, Art. 7, 8, 14, & 22.

¹⁴³ Case C-32/19 *AT v Pensionsversicherungsanstalt* [2020] ECLI:EU:C:2020:25.

¹⁴⁴ *Supra* note 122, p. 44.

¹⁴⁵ Case C-325/09 *Dias* [2011], ECLI:EU:C:2011:498, para 57.

¹⁴⁶ Case C-378/12 *Onuekwere* [2014] ECLI:EU:C:2014:13, para 32.

¹⁴⁷ Case C-432/20 *ZK* [2022], ECLI:EU:C:2022:39, paras 46-47.

States have the authority to verify several factors: the continuity of residence, the length of stay, and whether the residence can be deemed "legal." Typically, evidence of legal residence will also serve as proof of continuous residence. Article 21 of Directive 2004/38/EC specifies that continuity of residence may be demonstrated through any form of proof accepted by the host Member State. However, the Court in the *Dias* case highlighted that holding a valid residence document does not make the residence legal, including for the purposes of acquiring the right of permanent residence. In any case, once long-term residence status is granted, the Directive allows a maximum of six months for issuing a permanent residence card to TCN family members, starting from the date the application is submitted, as outlined in Article 20(2). Lastly, it should be noted that once an EU citizen acquires the right of permanent residence, the conditions in Article 7(1)(a) to (c) no longer apply to either the EU citizen or their family members, including the non-EU primary carer of a mobile EU minor.

Once permanent residence status is obtained, Article 23 of Directive 2004/38/EC ensures that family members of EU citizens, regardless of their nationality, are entitled to work or engage in self-employment in the host Member State. This right applies to both immediate family members, as defined in Article 2(2) of the Directive, and extended family members, as outlined in Article 3(2). The Court clarified in the *Reyes* case that dependent family members of EU nationals who may retain their right to residence after they have ceased to be dependants are also entitled to work in the host Member State¹⁴⁸. In this context it is important to note that, the entitlement to work does not depend on holding a valid visa, residence card, or permanent residence card, nor does it require proof of having applied for a family member residence card. These documents do not create rights but simply confirm the entitlements conferred directly by EU law. Furthermore, Article 24(1) of the Directive mandates that EU citizens residing in a host Member State are entitled to equal treatment with the nationals of that Member State within the scope of the Treaties. This equal treatment extends to their non-EU family members who have acquired a right of residence or permanent residence under the Directive. Especially for workers and their TCN family members, obtaining permanent residence enhances protection against expulsion without affecting their equal treatment rights. In contrast, for those residing based on sufficient resources or studies, securing permanent residence has more profound implications. An EU citizen who relies solely on sufficient resources must ensure these resources are not derived from social benefits to maintain their residence rights under the directive. Until permanent residence is secured, such individuals cannot access social benefits. However, once they achieve a total of ten years of residence, including five years of permanent status, their protection against expulsion is significantly reinforced¹⁴⁹.

¹⁴⁸ *Reyes* case, para 31-32.

¹⁴⁹ *Supra* note 37, p. 5.

A.2 Retention of the residence status in cases of death, departure of the EU citizen, divorce, annulment, or termination of a registered partnership

Having thoroughly examined the different categories of residence rights, it is now essential to address Articles 12 and 13 of Directive 2004/38/EC. These Articles specifically grant the right to TCN family members who have already acquired long-term residence status to retain this status even in circumstances such as the death of the EU citizen, their departure from the host Member State, or in cases of divorce, annulment of marriage, or termination of a registered partnership. Especially for children in education and the parent with custody, the Court held in the *Ibrahim* case¹⁵⁰ that no conditions regarding sufficient resources or comprehensive sickness insurance are required for them to retain their right of residence in the host Member State until the children have completed their studies¹⁵¹. Before acquiring permanent residence, however, both EU and non-EU family members must adhere to certain conditions. Particularly, they must comply with the requirements specified in Article 7(1) of the Directive, which includes conditions related to employment, self-sufficiency, or study. In this context, non-EU citizens enrolled solely in educational institutions cannot retain residence rights based on study alone.

Article 12 addresses cases where an EU citizen is no longer present to grant a derived right, either due to their death or departure from the host Member State. On the other hand, Article 13 applies to cases where the family relationship, such as marriage or a registered partnership, between the EU citizen and the family member ends. It specifically addresses registered partnerships in this context. Both of these Articles ensure that family members retain their residence rights on a personal basis, irrespective of their derivation from the EU citizen's status. However, specific conditions apply depending on the event leading to the loss of the derived right of residence. For instance, under Article 12(2) the death of a Union citizen does not automatically result in the loss of residence rights for their non-EU family members, provided these family members have lived in the host Member State for at least one year prior to the Union citizen's passing. However, until they acquire permanent residence, these individuals must meet specific conditions to retain their right of residence. They must either be employed or self-employed, or demonstrate that they have sufficient resources to avoid becoming a financial burden on the host Member State's social system and possess comprehensive health insurance. Alternatively, they may remain as family members of someone who fulfills these requirements basis. Moreover, under Article 13(2)(a), a non-EU spouse who has been married for at least three years, including one year in the host Member State, may retain their right of residence if the EU citizen remains in the host Member State until the divorce proceedings begin. In this context, the CJEU explained in the *Belgian State* case that initiating divorce proceedings almost 3 years after the EU spouse has left the host Member State does not appear to represent a reasonable period.¹⁵² Another condition in a situation where non-

¹⁵⁰ Case C-310/08, *London Borough of Harrow v Nimco Hassan Ibrahim and SecrIbidetary of State for the Home Department* [2010], ECLI: EU:C:2010:80.

¹⁵¹ *Ibid*, paras 56 & 57.

¹⁵² See C-930/19, *X v État belge* [2021] ECLI:EU:C:2021:657, paras 43 & 45.

EU citizen has been a victim of domestic violence by their EU spouse, is to retain their residence rights under Article 13(2)(c), provided the divorce proceedings are initiated within a reasonable time after the EU citizen's departure from the host Member State. In any case, if the family members have already obtained a permanent right of residence before or at the moment of the event (such as the EU citizen's death, departure, or divorce), no additional conditions are imposed.¹⁵³ It is obvious that Articles 12 and 13 focus on safeguarding the family life and dignity of family members by allowing TCNs to retain their right of residence in certain situations once they have acquired long-term residence status within EU.

A.3 Interim Conclusion

In conclusion, the residence rights of TCN family members of EU citizens are structured to reflect both their derivative status and the various stages of integration within a host Member State. Under the Free Movement Directive, TCN family members initially enjoy short-term residence rights with minimal conditions. For longer stays, they must meet specific criteria related to the EU citizen's employment status, financial stability, or educational engagement. Permanent residence status, attainable after five years of continuous legal residence, provides enhanced stability and protection, freeing TCNs from initial residence conditions and ensuring their rights to work and engage in self-employment. Moreover, the Directive's provisions safeguard further TCN family members in cases of significant life changes, such as the death of the EU citizen, divorce, or termination of a partnership. Overall, balancing the facilitation of free movement with the need to safeguard the welfare systems of host states these rights ensure that TCN family members can achieve long-term stability and security, while also providing mechanisms to protect their rights in varying circumstances.

CHAPTER B: Restrictions on residence rights for TCN family members in the EU: Directive 2004/38 Clarifications

While the right of entry and residence within the EU is fundamental for EU citizens and their TCN family members, it is not absolute and comes with certain restrictions. These limitations are crucial for addressing specific concerns that arise in the context of public policy, public security, and public health, as well as reasons beyond these, including the prevention of fraud and abuse, such as the abuse of residence rights and marriages of convenience. Additionally, geopolitical changes, such as Brexit, which led to automatic restrictions on the right of residence for UK nationals and their TCN family members, have introduced further constraints affecting the residence rights of individuals. In such cases, national authorities retain the power to deny residence on these grounds, even when it results in the forced departure of an EU citizen from the Union¹⁵⁴. Importantly, the

¹⁵³ *Supra* note 122, p. 42.

¹⁵⁴ *K.A. and Others* (note 81), paras 91-93.

CJEU has clarified that the protection of these rights is not absolute. For instance, in *Subdelegación del Gobierno*, the Court ruled that the derived right of residence under Article 20 TFEU is conditional¹⁵⁵. This means that, similar to the rights conferred under Article 21 TFEU and Directive 2004/38, these rights can be restricted in certain circumstances. The so-called "substance of rights" test does not offer full protection, allowing Member States to impose limitations based on legitimate concerns such as public safety, security, or other interests¹⁵⁶. This chapter will explore these restrictions in detail, examining how they balance the principle of free movement with the need to uphold public interests and legal integrity.

B.1. Limitations based on grounds of public policy, public security, and public health

Under Article 27 of the Free Movement Directive¹⁵⁷, Member States may limit the freedom of movement and residence of EU citizens and their TCN family members on specific grounds, including public policy, public security and public health. These restrictions are laid out in Chapter VI of Directive 2004/38/EC, which applies to any actions taken on these grounds that affect the ability of individuals covered by the Directive to freely enter or reside in another Member State. The Directive ensures that these individuals have the same rights to movement and residence as nationals of the host Member State. However, in the event that public policy or security concerns arise, the Member States retain a degree of discretion in restricting these rights, still their decisions must be thoroughly justified and subject to the strict criteria established by EU law and case law from the CJEU.

To begin with, public policy and public security are distinct but closely related concepts within EU law. Public policy generally pertains to maintaining social order, addressing serious offenses that disrupt the functioning of society, rather than minor infractions¹⁵⁸. Public security, meanwhile, encompasses internal and external threats to the safety and integrity of a Member State, such as threats to national defense or essential services¹⁵⁹. Under these principles, EU citizens may only face expulsion for behavior that is punishable under the host state's laws or addressed by other legitimate measures. This is described in Article 28 of the Directive, where we read that *the host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security*¹⁶⁰. Importantly, non-compliance with registration requirements, such as failing to fulfill administrative formalities, alone does not

¹⁵⁵ *Subdelegación (note 101), para 43.*

¹⁵⁶ *Supra* note 10, p. 9.

¹⁵⁷ Directive 2004/38/EC, Art. 7.

¹⁵⁸ Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR I-11979, ECLI:EU:C:2010:708 paras 43-47.

¹⁵⁹ See Case C-273/97 *Sirdar* [1999] ECR I-7403, para 17; Case C-285/98 *Kreil* [2000] ECR I-69, para 17; Case C-423/98 *Albore* [2000] ECR I-5965, para 18; and Case C-186/01 *Dory* [2003] ECR I-2479, para 3.

¹⁶⁰ Directive 2004/38/EC Art. 28&2.

constitute a sufficient threat to public policy or security to justify expulsion. The Court emphasized in the *Jipa* case that restrictive measures can only be taken when an individual's personal conduct presents cumulatively a genuine, present, and serious threat to one of the fundamental interests of society¹⁶¹ and this is a high threshold.

For example, a person cannot be expelled simply for having committed a crime in the past unless that conduct poses an ongoing risk to the public¹⁶². Additionally, past criminal convictions, while they can be taken into account, cannot be the sole basis for restricting an individual's right to reside or move freely within the EU unless they demonstrate that the person remains a threat. The CJEU has consistently held that a potential threat must be real and present, not hypothetical or based on assumptions. This was the case in *Orfanopoulos and Oliveri* where the Court highlighted that in the event of criminal offences having occurred, a mere possibility of reoffending is not sufficient; the threat must be demonstrably current. For example, the CJEU has clarified that the existence of multiple convictions is not enough to constitute a sufficiently serious threat unless it shows an ongoing pattern of behavior. Similarly, failing to comply with registration requirements or minor civil infractions like tax liabilities do not, in themselves, pose a serious threat to public policy or security. Such infractions do not justify expulsion or refusal of entry, as they do not directly endanger fundamental societal interests. The Member States are to base their decisions on concrete evidence, and no Member State can have general preventive measures on its own. The limitation must be concerned with the personal conduct of the person in question and with the actual probability of his reoffending in the future as the Court highlighted in the *K and H* case¹⁶³. Accordingly, even though Member States still have discretion in defining what is contrary to public policy or a threat to public security, such a decision must be based on the specific conduct of the person concerned and must not be an arbitrary or too general measure.

In any case, once Member States decide to limit the right of residence or free movement, they have to assess the proportionality of those measures. This means that the principle of proportionality makes sure the action taken by a Member State is appropriate, necessary, and not excessive in relation to the objective pursued¹⁶⁴. In other words, as considered within Article 28 of the Directive, the national authorities, in regard to restricting movement for grounds of public policy or public security, need to consider personal circumstances. The duration of residence of the person concerned in the host Member State, his family situation and the seriousness of the interference with his private life which an expulsion order would create are factors to be considered alongside

¹⁶¹ Case C-33/07 *Ministerul Administrației și Internelor - Direcția Generală de Pașapoarte București v Gheorghe Jipa* [2008], ECLI:EU:C:2008:396, paras 25-26; See also, C-503/03, *Commission v Spain*, ECLI:EU:C:2006:74, para 62.

¹⁶² Joined cases C-482/01 and C-493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECR I-5257, ECLI:EU:C:2004:262, paras 82 and 100.

¹⁶³ Joined Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veiligheid en Justitie and H.F. v Belgische Staat* [2018] OJ C231/4, para 56.

¹⁶⁴ *Ibid*, para 61.

others¹⁶⁵. The authorities must balance the gravity of the ground of expulsion against the interest of the individual in staying in the host state. For instance, if the person has spent most of his life in the host Member State, speaks the language fluently, and has close family or economic links to that state, such factors would be against expulsion. EU law corroborates further the requirement of compliance with fundamental rights, especially regarding the right to private and family life under Article 7 of the CFR and Article 8 of the ECHR¹⁶⁶. This would also include considering any children's rights, the age of a person, a person's health, and hardship that may be caused to the family. In practice, this means that Member States cannot impose blanket restrictions but must tailor their actions to the specific circumstances of each case.

Member States also have the power to limit the free movement and residence rights of EU citizens and their TCN family members on public health grounds. According to Article 29 of Directive 2004/38/EC, such restrictions can only be applied in relation to specific diseases. These include diseases with epidemic potential recognized by the WHO and other serious infectious or parasitic diseases that are subject to protective measures within the host Member State¹⁶⁷. For instance, the coronavirus pandemic was a notable example of a public health emergency justifying restrictions. However, the Directive makes it clear that EU citizens and their TCN family members who have lived in a Member State for more than three months cannot be expelled solely for public health reasons. Likewise, individuals who have been resident for less than three months may be subjected to such medical tests only in cases where there are serious indications that they have been infected with any of the diseases referred to in Article 29. It is also important to note that these medical tests should be non-discriminatory, free of charge, and must meet the principle of proportionality. Any expulsion or refusal of re-entry must thus only be a measure of last resort and then only in so far as strictly necessary to the requirements of public health¹⁶⁸. The measures taken, as provided for in Article 29(2) and (3), with respect to persons already resident in the host Member State, should be distinguished from broader public health measures taken at national level. During the COVID-19 pandemic, for example, various public health measures affected the free movement of EU citizens, including requirements for medical testing, quarantine upon arrival, and the submission of travel documentation like passenger locator forms. These restrictions, however, must be limited to diseases mentioned in Article 29(1) and should always comply with EU law's core principles, particularly proportionality and non-discrimination. In this context, Member States are required to provide clear and timely information about any public health measures they implement. Finally, when determining whether these measures are necessary, Member States must explore whether less intrusive alternatives could achieve the same public health objective. The nature of the threat will inevitably influence the types of measures that can be justified, but all

¹⁶⁵ See in particular, Case C-331/16 and 366/16, *K. & H.F.*, ECLI:EU:C:2018:296, para 67; C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, para 50.

¹⁶⁶ Case C-331/16 and 366/16, *K. & H.F.*, ECLI:EU:C:2018:296, para 63 and Case C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, para 52 and case law cited.

¹⁶⁷ Directive 2004/38/EC Art. 29&1.

¹⁶⁸ Regulation (EU) 2021/953, for example, is limited both in scope and in time to the COVID-19 pandemic.

actions must be limited in scope and time to ensure they do not unduly interfere with the right to free movement¹⁶⁹.

B.2 Restrictions on the right of residence based on grounds beyond public policy, security, and health

According to Article 15 of the Free Movement Directive¹⁷⁰, expulsion decisions may be imposed on TCN family members based on grounds that do not pertain to threats against public policy, public security, or public health. This provision allows host Member States to expel EU citizens or their family members who previously enjoyed a right of residence—either for up to three months under Article 6 or for longer periods under Article 7—but who no longer meet the necessary criteria for residency¹⁷¹. For instance, a TCN family member may lose their right of residence if the EU citizen with whom they were connected, departs from the host Member State. Similarly, an individual who ceases to be a family member of an EU citizen may find themselves without the grounds to retain residency under the Directive. Additionally, economically inactive EU citizens who become an unreasonable burden on the social assistance system of the host Member State can also face expulsion. In such cases, the safeguards outlined in Articles 30 and 31 of the Directive apply by analogy when expulsion decisions are being made. It is important to note though that these decisions cannot include a definite entry ban into the territory of the host Member State, as established by the Court in the *Chenkooliah* case¹⁷². The CJEU further clarified in *Staatssecretaris van Justitie en Veiligheid*¹⁷³, that compliance with an expulsion decision under Article 15(1) cannot be assumed merely because the individual has physically left the Member State. It requires that the EU citizen has genuinely and effectively terminated their residency, as stipulated in Article 7. Only once an individual has truly ended their residence can they once again invoke their right to reside under Article 6 within the same host Member State; this new residence cannot be considered a continuation of the previous stay.

Determining whether an EU citizen has genuinely terminated their residency involves a comprehensive assessment of various factors. The length of their absence is critical; a longer duration away typically suggests that the individual has indeed severed their ties with the host Member State, while short absences may indicate that residency remains intact. Additionally, evidence such as a request for removal from local registers, termination of leases, or deregistration from public services can demonstrate a break in connections to the Member State. Furthermore, the characteristics of the individual's situation abroad will also be scrutinized to ascertain whether they have shifted their personal, occupational, or familial interests to another country during their absence. If the expulsion decision is not complied with, the Member State does not have to issue

¹⁶⁹ Commission Guidelines 2023 (supra note 122), p. 65-67.

¹⁷⁰ Directive 2004/38/EC Art. 15.

¹⁷¹ Case C-94/18 *Nalini Chenkooliah v Minister for Justice and Equality* [2019], ECLI:EU:C:2019:693, para 73.

¹⁷² *Ibid*, para 74.

¹⁷³ Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* [2022], ECLI:EU:C:2022:913.

a new decision and may enforce the initial one to compel departure¹⁷⁴. However, a change in circumstances—such as gaining employment—could reinstate the individual’s right to reside under Article 7, rendering the prior expulsion decision ineffective. Lastly, it is essential to note that an expulsion decision taken under Article 15(1) does not obstruct the right of entry under Article 5 when the EU citizen travels to the Member State temporarily for purposes other than residence¹⁷⁵. Therefore, as long as their presence in the host Member State is justified under this provision, the expulsion cannot be enforced against them¹⁷⁶. In any case, expulsion decisions must be fully reasoned and list all the specific factual and legal grounds on which they are taken so that the person concerned may take effective steps to ensure his or her defence¹⁷⁷ and national courts may review the case in accordance with the right to an effective remedy, which is a fundamental right under Article 47 of the CFR.

B.3 Abuse and fraud in residency rights

Article 35 of Directive 2004/38 plays a pivotal role in enabling Member States to combat abuse of rights and fraud within the framework of EU residency law. This provision grants states the authority to refuse, cancel, or withdraw the rights conferred by the directive when there is evidence of misconduct, particularly in the case of marriages of convenience¹⁷⁸. Under the Guidelines on the Free Movement Directive by the European Commission, fraud and abuse of rights are well differentiated. Fraud involves deceiving the authorities either through false representations or through fraudulent documentation. A good example would be a person's use of a forged marriage certificate to obtain residency rights; this is considered fraud because there is an actual intentional misrepresentation of facts. While fraudulent behaviour, for example, that consisting in filing false documentation or even in impersonating one's identity, might result in losing residency rights they may have been entitled to as a consequence of that fraud, abuse of rights, in turn, refers to behaviour that formally meets the conditions specified by EU law but is engaged in solely to exploit the benefits that those rules create. The European Commission has defined abuse of rights as artificial behavior, adopted strictly to obtain rights under EU law, without regard for the underlying objectives of those rules¹⁷⁹. A well-known example of this is the *Kol* case, where the CJEU ruled that a worker does not meet the conditions for residency when their employment in the host Member State was based on fraudulent behavior¹⁸⁰. Similarly, an individual who falsely claims to be entering a Member State for tourism but intends to engage in work or other activities falls outside the scope of protection provided by EU law¹⁸¹.

¹⁷⁴ *Staatssecretaris* case, para 90-93.

¹⁷⁵ *Staatssecretaris* case, para 102-103.

¹⁷⁶ Commission’s Guidelines 2023, p. 67-68.

¹⁷⁷ Case 36-75 *Roland Rutili v Ministre de l’intérieur* [1975], ECLI:EU:C:1975:137, paras 37-39.

¹⁷⁸ Directive 2004/38/EC Art. 35.

¹⁷⁹ European Commission’s Guidelines 2023 (supra note 43), p. 71.

¹⁸⁰ Case C-285/95, *Suat Kol v/Land Berlin* [1997], EU:C:1997:280, para 29.

¹⁸¹ Case C-63/99, *The Queen v./ Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk* [2001], EU:C:2001:488, para 75.

The CJEU has provided significant insight into what constitutes fraud and abuse. In the *Emsland-Stärke* case, the Court explained that identifying abuse requires two elements: objective circumstances indicating the behavior in question, and a subjective element—intention to gain an advantage through artificially creating the conditions to meet legal requirements¹⁸². This interpretation is echoed in the *Centros* case, where the court emphasized that national courts must assess each case individually, based on objective elements, to determine whether fraudulent or abusive behavior has occurred¹⁸³. The court also highlighted the importance of considering the purpose behind the EU provisions at play when evaluating the nature of the conduct in question¹⁸⁴. A quintessential example of abuse of rights is the marriage of convenience. Such unions are typically entered into with the sole purpose of exploiting the free movement and residency rights conferred by EU law, thus undermining the integrity of these protections. They are actually characterized by a lack of genuine emotional or familial connection, with the primary aim being to allow a non-EU national to obtain residency rights within an EU Member State who would otherwise not have such a right¹⁸⁵. Importantly, the quality or nature of the relationship is immaterial when applying Article 35. What matters is the intent behind the marriage. According to the European Commission, marriages of convenience do not need to fulfill traditional marital criteria as their sole purpose is to grant immigration advantages. Other examples of abusive relationships include registered partnerships of convenience, fictitious adoptions, and fraudulent paternity claims, such as when an EU citizen falsely declares themselves the father of a non-EU child to enable the child and their mother to gain residency rights¹⁸⁶.

In all these cases Member States should be able to address the possibilities of misuse of the right of entry and residence by a TCN within EU. While the Free Movement Directive permits them to adopt measures to prevent fraud and abuse, emphasis should be placed on the necessity of individual case assessments, ensuring that decisions regarding residency rights are not based on generalized suspicions or trends¹⁸⁷. Each case must be evaluated on its own merits, with authorities required to make fair and proportionate decisions. Investigations into suspected marriages of convenience or other abuses must not infringe on the rights of non-EU family members. For instance, ongoing investigations cannot justify the suspension of work rights, passport seizures, or delays in issuing residence cards, as such actions may lead to undue hardship for individuals caught

¹⁸² Case C-110/99, *Emsland-Stärke GmbH v./ Hauptzollamt Hamburg-Jonas*, [2000], EU:C:2000: 695, paras 52-53.

¹⁸³ Case C-212/97, *Centros Ltd v./Erhvervsog Selskabsstyrelsen*, [1999], EU:C:1999:126 para 25.

¹⁸⁴ Gheorghe Bonciu, 'Fraud on the Law Regarding the Right to Free Movement and Residence in the Territory of the Member States for Citizens of the Union and Their Family Members Reflected in the Jurisdiction of the CJEU' (2023) 59 *Management Strategies Journal* 112-120, <http://www.strategiimanageriale.ro/papers/230116.pdf> accessed 22 September 2024.

¹⁸⁵ See Directive 2004/38/EC recital 28.

¹⁸⁶ Betty de Hart, 'The Europeanization of Love. The Marriage of Convenience in European Migration Law' (2017) 19 *European Journal of Migration and Law* 281–306, p. 284.

¹⁸⁷ *McCarthy* case (note 98), paras 52-58.

up in scrutiny due to others' action¹⁸⁸s. Also measures against individuals must be non-discriminatory, effective, and proportionate to the misconduct. Thus, the existing procedural safeguards under the directive aim to ensure fairness and prevent undue restriction of individual rights. For example, if a marriage is determined to be one of convenience, consequences may include withdrawal or non-renewal of residence permits. However, such decisions must align with the directive's overall objectives, which seek to balance free movement and residence rights with the prevention of their exploitation. The European Commission plays a critical role in guiding Member States on interpreting and implementing Article 35, clarifying that a marriage cannot be classified as one of convenience solely for granting immigration advantages. Instead, it must be evident that the union was formed with the specific intent to exploit the directive's provisions. Moreover, the Commission extends this interpretation to other artificial unions, ensuring Member States have adequate tools to address fraud and abuse. Authorities must balance the discretion to refuse, cancel, or withdraw residency rights in cases of misconduct with the need for individual assessments to ensure fairness¹⁸⁹. This balance is key to preserving the integrity of the directive's rights while preventing their exploitation.

B.4 The specific situation of Brexit: Ex-EU citizens' and TCNs family members' rights

After examining the limitations on the right of entry and residence for TCN family members of EU citizens under Directive 2004/38/EC, it is now appropriate to discuss an unprecedented situation that also limits these rights well known as Brexit. The withdrawal of the UK from the EU greatly disrupted the lives of approximately 5 million EU citizens who were reside in the UK and some 1 million British nationals living in the Member States of the EU¹⁹⁰. In respect of UK citizens, Brexit entailed the loss of EU citizenship and all those rights which flowed therefrom under EU law¹⁹¹. At this point, it is important to consider the effects of this situation on the derivative rights of TCN family members of EU citizens, as these individuals may face new challenges in securing their right of residence following the loss of EU citizenship by their UK family members.

In the aftermath of Brexit, the UK introduced the EUSS: a scheme protecting EU citizens and members of their family resident in the UK by the end of the transition period, that is to say December 31, 2020¹⁹². To benefit from this protection, applicants had to prove that the family relationship existed during that period. Applicants found to be eligible under this scheme retained

¹⁸⁸ European Commission's Guidelines 2023 (supra note 43), p. 72.

¹⁸⁹ Supra note 183, p. 6.

¹⁹⁰ See https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-withdrawal-agreement_en

¹⁹¹ Ιωάννης Γ.-Στ. Κούρτης, «Ευρωπαϊκή Ιθαγένεια και Brexit: Το καθεστώς των υπηκόων του Ηνωμένου Βασιλείου» (2024) 17(1) De Jure Journal 20, p. 22

¹⁹² EU Settlement Scheme: information for status holders and applicants (UK Government, Updated 2 August 2024) <https://www.gov.uk/government/publications/eu-settlement-scheme-communications-information-for-applicants/eu-settlement-scheme-at-a-glance-information-for-applicants-accessible-version> accessed 24 September 2024.

the right to stay in the UK. However, TCN family members who wish to join their relatives after the transition period are now subject to much stricter immigration controls, including visa requirements¹⁹³. This represents a significant change from the pre-Brexit system, where TCN family members could join EU citizens without facing such hurdles. Furthermore, concerning EU Member States, Brexit has also altered the situation for TCN family members of UK nationals who were previously EU citizens. Under the Withdrawal Agreement¹⁹⁴, British nationals who were already residing in an EU country before the end of the transition period can continue to do so, along with their TCN family members. However, UK nationals who move to an EU country post-Brexit are now treated as third-country nationals, meaning they are subject to national immigration laws, which tend to be stricter. This change has eliminated the streamlined processes that previously applied under EU law for TCN family members of British citizens.

Specifically, under Article 10 of the Withdrawal Agreement, protection is granted to the residence and employment rights of family members of both UK nationals in the EU and EU citizens in the UK. In this context, family members must demonstrate that they were residing in the host state in accordance with EU law. Both "direct" family members, as defined by Article 2(2) of the Free Movement Directive, and "extended" family members, such as partners in durable relationships under Article 3(2) of the same directive, are protected. Moreover, children born or legally adopted after the transition period are also granted a right of residence. However, there is no longer any guarantee for UK nationals to return to the UK with their non-UK family members. This right, established through case law, previously enabled EU citizens to invoke EU law against their own country when they returned after exercising their free movement rights under Articles 45, or 21 of the TFEU¹⁹⁵. Since Brexit, the UK has the authority to enforce its own immigration rules for British citizens' family members coming from the EU, which may complicate family reunification. The UK government, however, did permit British nationals returning from the EU to bring their family members, provided the relationship existed before Brexit, until March 29, 2022, under national law¹⁹⁶. It is evident that the loss of EU citizenship undeniably imposes new restrictions on the rights of entry and residence for TCN family members of former EU citizens. While protections may exist for those already residing in the UK or EU before the end of the transition period, anyone seeking to move after Brexit faces more stringent immigration rules. The automatic rights once

¹⁹³ Apply to the EU Settlement Scheme (settled and pre-settled status) (gov.uk, 2023) <https://www.gov.uk/settled-status-eu-citizens-families> accessed 24 September 2024.

¹⁹⁴ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384I/01 [http://data.europa.eu/eli/treaty/withd_2019\(3\)/oj](http://data.europa.eu/eli/treaty/withd_2019(3)/oj) accessed 24 September 2024.

¹⁹⁵ Gillian More, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020) 26, p. 459.

¹⁹⁶ Guidance, *Living in Europe: citizens' rights if you moved before 1 January 2021*, Foreign & Commonwealth Office and Foreign, Commonwealth & Development Office (30 January 2020, last updated 30 June 2022) <https://www.gov.uk/guidance/living-in-europe> accessed 24 September 2024.

enjoyed have been replaced by a regulated system, restricting the freedoms that were previously guaranteed under EU law.

B.5 Interim Conclusion

In conclusion, while the right of entry and residence for TCN family members of EU citizens is enshrined in EU law and rooted in the principles of free movement, it is not without limitations. Directive 2004/38/EC outlines several restrictions aimed at balancing the protection of these rights with the need to safeguard public security, public policy, and public health. Thus, Member States can refuse or revoke residence rights if a TCN family member poses a genuine threat, but such decisions must comply with the principles of proportionality, non-discrimination, and individualized assessment. Beyond these security-related grounds, the right of residence may also be lost when TCN family members no longer meet legal conditions, such as when the EU citizen leaves the host country or there are changes in the family member's circumstances. Additionally, to prevent abuse and fraud, such as marriages of convenience, the EU allows Member States to investigate and take action to protect the integrity of residency laws. Moreover, Brexit complicated things even further by taking away EU citizenship from UK nationals, which drastically affected the rights of their TCN family members. It follows from this that, although the EU strongly affirms its position of maintaining the free movement rights of EU citizens and their family members, these are not absolute rights; rather, they may be subject to certain procedural limitations and derogations with a view to ensuring public policy, security, and the proper management of migration within the Union. Such fields of sensitivity also include those referring to the protection of individual liberties, the sovereignty, and security of the Member States, even more so in light of the continuous changes taking place within the EU framework.

Conclusion

The right of entry and residence in an EU Member State is a basic entitlement for EU citizens and extends to their family members, including non-EU nationals. While these rights stem directly from the status of the EU citizen, they play a crucial role in safeguarding family life and maintaining the unity of families when an EU citizen exercises their free movement rights within the Union. This legal framework was based on Directive 2004/38/EC, which sets out a structured approach for how TCN family members may join EU citizens in various Member States. Along with Article 21 TFEU, the Directive ensures that TCN family members do not get left behind when an EU citizen moves between Member States. However, for these protections to apply, there must be a cross-border element—meaning that the EU citizen must have moved to a Member State other than their own. This limitation created gaps in protection for EU citizens who remain in their home countries but want the same rights for their families. The landmark ruling in the *Zambrano* case addressed this issue by introducing the principle that an EU citizen should not be forced to leave their state of nationality to maintain their family life. Known as the “genuine enjoyment of the substance of rights” test, the ruling ensured that even in the absence of cross-border movement, an EU citizen's core rights must be protected, particularly regarding their family members. This marked a significant evolution in EU law, recognizing the need to protect the rights stemming from EU citizenship, regardless of whether the freedom of movement has been used.

Regardless of the specific legal provision protecting them, residence rights for TCN family members differ based on the length of their stay in the host Member State. These rights fall into three main categories: short-term residence for up to three months, residence for more than three months, and permanent residence for those who have lived continuously in the Member State for five years. Although these rights are strongly rooted in EU law, they are subject to certain limitations. Member States retain discretion in regulating these rights, particularly when they involve matters of public policy, security, or health. Under Directive 2004/38/EC, Member States have the authority to refuse or revoke residence rights of TCN family members if their presence poses a genuine threat to society. While these restrictions are essential for protecting national interests, decisions must be proportional and based on individual assessments, not on blanket policies. Moreover, TCN family members may also face the loss of their residence rights in specific cases such as divorce, death of the EU citizen, or the departure of the primary EU citizen from the host Member State. However, EU law provides mechanisms to protect those TCNs who have built strong ties within the Member State, allowing them to retain their residence rights in certain situations, especially when expulsion would lead to significant hardship. Furthermore, the abuse of residency rights, including marriages of convenience and fraudulent applications, is another significant issue addressed by the EU. Thus, these measures must be carefully regulated to ensure that genuine families are not unjustly penalized or denied their rights. Procedural safeguards are essential in preventing overreach and ensuring that Member States' investigations into potential abuses do not infringe upon the rights of legitimate family members. Finally, Brexit has introduced

a unique and unprecedented challenge to the free movement rights of TCN family members of former EU citizens. This situation highlighted the fragility of free movement rights and underscores the need for a more robust legal framework that can better withstand political changes and ensure that individuals are not left in legal limbo due to external factors.

While the bold steps the EU has taken regarding protecting the rights of its citizens and their TCNs family members are to be acknowledged, several issues continue to niggle. Foremost among them, it is a question of how much the EU can intervene in the national legal systems of its Member States, particularly regarding areas where immigration and national security sensitivities are vital. This will imply a balance between defending the principles of the EU, like free movement and family unity, but also having respect for the sovereignty of the Member States. Furthermore, TCN family members, in cases where they have built their lives in the EU, should be granted protection, even when they no longer depend on the EU citizen. Currently, the legal framework places great emphasis on the relation of TCN with the EU citizen, making him vulnerable in case that relationship breaks. The current gap needs more comprehensive protection to ensure that TCN family members who are integrated into the fabric of EU society can continue without fear of expulsion to live and work in the EU. Ultimately, while significant progress has been made in protecting the rights of EU citizens and as a result the rights of their family members, more efforts are needed to ensure family unity rather than focusing solely on individual protection. When this unity ceases to exist, enhanced protection for TCN family members would offer them greater security in their residence within the EU, particularly in the event of any changes in their relationship with the EU citizen. This approach would contribute to a more integrated European Union.

Bibliography

Books

D Chalmers, G Davies & G Monti, *European Union Law*, II ed. (Cambridge 2010).

David De Groot and Jacques Gerard, *Free Movement of EU Citizens and Their Family Members: An Overview* (European Parliamentary Research Service, PE 762.303, May 2024).

Gillian More, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020) 26.

Articles

Adrian Berry, 'The EU after Zambrano: Adrian Berry analyses recent judgment on EU rights of residence' (2011) 59 *Socialist Lawyer* 34-36.

Betty de Hart, 'The Europeanization of Love. The Marriage of Convenience in European Migration Law' (2017) 19 *European Journal of Migration and Law* 281–306.

C Taroni, 'Rights of Residence of TCN Family Members within a Union Citizen's Home State: Comment on Cases C-456/12 O and B and C-457/12 S and G, Judgment of the Court (Grand Chamber)' (EUtopia Law, 3 April 2014).

D Chalmers, G Davies & G Monti, *European Union Law*, II ed. (Cambridge 2010).

E Spaventa, 'Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G' (2015) 52 *Common Market Law Review* 753–778.

Elaine Fahey, 'Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock' (2008) *Case C-127/08, Metock & Others v Minister for Justice, Equality & Law Reform*, Judgment of the European Court of Justice of 25 July 2008, nyr.

Georgios Milios, 'Defining “Family Members” of EU Citizens and the Circumstances under Which They Can Rely on EU Law' (2020) 39 *Yearbook of European Law* 293.

Hester Kroeze, 'The Substance of Rights: New Pieces of the Ruiz Zambrano Puzzle' (2019) 44 *European Law Review*.

Koen Lenaerts, 'The Concept of EU Citizenship in the Case Law of the European Court of Justice' (2013) 13 *ERA Forum* 569.

Lenka Kříčková, 'Three Years with Coman: How Much Has Changed?' (2022) 16(2) *ICL Journal* 263.

Martijn van den Brink, 'Is It Time to Abolish the Substance of EU Citizenship Rights Test?' (2021) 23 *European Journal of Migration and Law* 13.

Olivier & Herman Reestman, 'European Citizens' Third Country Family Members & Community Law', (2007) 3 *EuConst* 463 at 469.

Peter Van Elsuwege, 'European Union Citizenship and the Purely Internal Rule Revisited: Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department' [2011].

Silvia Bartolini, "Another Piece of the Puzzle Surrounding the Application of Article 20 TFEU" (2020) *EU Law Live*.

Tryfonidou A, 'The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The Coman Ruling' (2019) 44(5) *European Law Review* 663-679.

Case Law

Case 36-75 *Roland Rutili v Ministre de l'intérieur* [1975], ECLI:EU:C:1975:137.

Case C-285/95, *Suat Kol v./Land Berlin* [1997], EU:C:1997:280.

Case C-212/97, *Centros Ltd v./Erhvervsog Selskabsstyrelsen*, [1999], EU:C:1999:126.

Case C-273/97 *Sirdar* [1999]. ECR I-7403.

Case C-285/98 *Kreil* [2000]. ECR I-69.

Case C-423/98 *Albore* [2000]. ECR I-5965.

Case C-110/99, *Emsland-Stärke GmbH v/ Hauptzollamt Hamburg-Jonas*, [2000], EU:C:2000:695.

Case C-63/99, *The Queen v/ Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk* [2001], EU:C:2001:488.

Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002], ECLI:EU:C:2002:493.

Case C-459/99 *MRAX* [2002], ECR I-6591.

Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department* [2002], ECLI:EU:C:2002:434.

Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003], ECLI:EU:C:2003:491.

Case C-186/01 *Dory* [2003] ECR I-2479.

Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECLI:EU:C:2004:639.

Cases C-482/01 and C-493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECR I-5257, ECLI:EU:C:2004:262.

Case C-157/03 *Commission v Spain* [2005], ECR I-2911.

Case C-441/02 *Commission v Germany* [2006], ECR I-3449.

Case C-503/03, *Commission of the European Communities v Kingdom of Spain* [2006], ECLI:EU:C:2006:74.

Case C-1/05 *Yunying Jia v Migrationsverket* [2007], ECR I-00001, ECLI:EU:C:2007:1.

Case C-291/05 *Eind* [2007], ECR I-0000.

Case C-33/07 *Ministerul Administrației și Internelor - Direcția Generală de Pașapoarte București v Gheorghe Jipa* [2008], ECLI:EU:C:2008:396.

Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008], ECLI:EU: C:2008:449.

Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010], ECLI:EU:C:2010:104.

Case C-310/08, *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010], ECLI: EU:C:2010:80.

Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR I-11979, ECLI:EU:C:2010:708.

Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177, ECLI:EU:C:2011:124.

Case C-325/09 *Dias* [2011], ECLI:EU:C:2011:498.

Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011], ECLI:EU:C:2011:734.

Case C-378/12 *Onuekwere* [2014], ECLI:EU:C:2014:13.

Case C-423/12 *Flora May Reyes v Migrationsverket* [2014], ECLI:EU:C:2014:16.

Case C-456/12, *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014], ECLI:EU:C:2014:135.

Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G* [2014], ECLI:EU:C:2014:136.

Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014], ECLI:EU:C:2014:2358.

Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* [2015], ECLI:EU:C:2015:597.

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

Case C-304/14 *Secretary of State for the Home Department v CS* [2016], EU:C:2016:674.

Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017], ECLI:EU:C:2017:354.

Case C-82/16 *K.A. and Others v Belgische Staat* [2018], ECLI:EU:C:2018:308.

Cases C-331/16 and 366/16, *K. v Staatssecretaris van Veiligheid en Justitie & H.F v Belgische Staat* [2018], ECLI:EU:C:2018:296.

Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018], ECLI:EU:C:2018:385.

Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger* [2018], ECLI:EU:C:2018:570.

Case C-246/17 *Ibrahima Diallo v État belge* [2018], ECLI:EU:C:2018:499.

Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* [2019], ECLI:EU:C:2019:189.

Case C-94/18 *Nalini Chenchooliah v Minister for Justice and Equality* [2019], ECLI:EU:C:2019:693, para 73.

Case C-129/18 *Entry Clearance Officer, UK Visa Section, in the presence of Coram Children's Legal Centre (CCLC) and AIRE Centre* [2019], ECLI:EU:C:2019:248.

Case C-836/18 *Subdelegación del Gobierno* [2020], EU:C:2020:119.

Case C-32/19 *AT v Pensionsversicherungsanstalt* [2020] ECLI:EU:C:2020:25.

Case C-710/19 *G. M. A. v État belge* [2020], ECLI:EU:C:2020:1037.

Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo”* [2021], ECLI:EU:C:2021:1008.

Case C-930/19, *X v État belge* [2021], ECLI:EU:C:2021:657.

Case C-432/20 *ZK* [2022], ECLI:EU:C:2022:39.

Case C-624/20, *E.K. v Staatssecretaris van Justitie en Veiligheid* [2022], ECLI:EU:C:2022:639.

Case C-22/21 *Minister for Justice and Equality (Ressortissant de pays tiers cousin d'un citoyen de l'Union)* [2022], ECLI:EU:C:2022:683.

Treaties

Treaty on the Functioning of the European Union (TFEU), Arts. 20, 21.

Charter of Fundamental Rights

Charter of Fundamental Rights of the European Union (CFR), Arts. 7, 45.

EU Directives and Regulations

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77, Arts. 2, 3, 5, 7, 10, 14, 15, 16, 22, 23, 28, 29, 35.

Regulation (EU) 2021/953 on the EU Digital COVID Certificate [2021] OJ L211/1.

Press Releases

CJEU, PRESS RELEASE No 85/15, Luxembourg, 16 July 2015.

CJEU, PRESS RELEASE No 48/17, Luxembourg, 10 May 2017.

CJEU, PRESS RELEASE No 142/22, Luxembourg, 7 September 2022.

Greek Articles

Ιωάννης Γ.-Στ. Κούρτης, «Ευρωπαϊκή Ιθαγένεια και Brexit: Το καθεστώς των υπηκόων του Ηνωμένου Βασιλείου» (2024) 17(1) *De Jure Journal* 20.

Websites

Taroni, C., 'Rights of Residence of TCN Family Members within a Union Citizen's Home State: Comment on Cases C-456/12 O and B and C-457/12 S and G, Judgment of the Court (Grand Chamber)' (EUtopia Law, 3 April 2014) <https://www.ein.org.uk/blog/rights-residence-tcn-family-members-within-union-citizens-home-state-comment-cases-c-45612-o-an>.

EU Settlement Scheme: information for status holders and applicants (UK Government, Updated 2 August 2024) <https://www.gov.uk/government/publications/eu-settlement-scheme-communications-information-for-applicants/eu-settlement-scheme-at-a-glance-information-for-applicants-accessible-version>.

Apply to the EU Settlement Scheme (settled and pre-settled status) (gov.uk, 2023) <https://www.gov.uk/settled-status-eu-citizens-families>.

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384I/01 [http://data.europa.eu/eli/treaty/withd_2019\(3\)/oj](http://data.europa.eu/eli/treaty/withd_2019(3)/oj).

Guidance, Living in Europe: citizens' rights if you moved before 1 January 2021, Foreign & Commonwealth Office and Foreign, Commonwealth & Development Office (30 January 2020, last updated 30 June 2022) <https://www.gov.uk/guidance/living-in-europe>.

Gheorghe Bonciu, 'Fraud on the Law Regarding the Right to Free Movement and Residence in the Territory of the Member States for Citizens of the Union and Their Family Members Reflected in the Jurisdiction of the CJEU' (2023) 59 *Management Strategies Journal* 112-120 <http://www.strategiimanageriale.ro/papers/230116.pdf>.

Reports

Court of Justice of the European Union, 'Judgment in Cases C-456/12 and C-457/12 O., B., S. and G. v Minister voor Immigratie, Integratie en Asiel' (Press Release No 32/14, 12 March 2014).

European Commission, 'Guidance on the Right of Free Movement of EU Citizens and Their Families' (Commission Notice C/2023/1392, 22 December 2023).

European Commission, 'Guidance on the Right of Free Movement of EU Citizens and Their Families (Text with EEA relevance)' (Communication) [2023] OJ C 1392/03, 22 December 2023.

Commission of the European Communities, 'Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC' COM (2009) 313 final, 2 July 2009 (Commission Guidelines of 2009).

David De Groot and Jacques Gerard, *Free Movement of EU Citizens and Their Family Members: An Overview* (European Parliamentary Research Service, PE 762.303, May 2024).