THE MOVEMENT AND RESIDENCE RIGHTS OF THIRD COUNTRY NATIONAL FAMILY MEMBERS OF EU CITIZENS: A HISTORICAL AND JURISPRUDENTIAL APPROACH

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Abstract

Granting family residence rights to third country national EU family members is a controversial issue that has been the object of a lively debate, especially in recent years. The debate has been particularly focused on the role played by the Court of Justice of the European Union in deciding cases involving EU citizens and their third country national family members. The Court has been criticized for inconsistent judgments and providing a lack of legal certainty. The object of this thesis is to analyse the intricate jurisprudential scenario of family reunifications between EU citizens and third country nationals. In order to do so I will place the Court's case law in its broader historical context. Through my analysis, I will show how the phenomenon of family reunification between EU citizens and third country nationals is the fruit of a development that, starting from the legislation of the first post World War II era reached its climax in the more recent judgments of the CJEU. Using a historical prospective, I will outline that the original meaning of the first family reunification legislative provisions, their more recent CJEU interpretation and the new application of the concept of EU citizenship find their ground on specific trends that have characterized the process of European integration for years. I will look in particular at the development of the Common Market project, focused on eliminating obstacles that would hinder the right of free movement of workers and at the strengthening of the rights deriving from the EU citizenship status. I will also show how since the oil economic crises these two currents begun to clash with the stricter immigration policies adopted by some Member States. I will argue that the approach of the Court can be better appreciated when placed at the interplay of this clash.

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Introduction

The European Union (from now on also EU)[1], over the years, has developed a complex legislation concerning residence family rights of third country national EU family members. [2] For the purpose of simplicity it is possible to subdivide the group of families affected by this legislation into three main categories. The first category includes those third country nationals already residing within the territory of one of the Member States wishing to live with a third country national family member. In accordance to the power granted by the Treaty at Art. 79(2)(a)(b) TFEU[3] in the area of immigration, the EU released Directive 2003/86/EC on the right to family reunification, that sets minimum standard conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member

[1] For purpose of simplicity, in this thesis the terms European Union, EU or Union will be used also when referring to the European Economic Community (EEC).

[2] The necessity of protecting families was understood far back in the past, since the *ius commune* era. On this point see Masha Antokolskaia, "The "better law" approach and the harmonization of family law", in *Perspective for the Unification and Harmonization of Family Law in Europe*, ed. Katharina B. Woelki, (Oxford: Hart Publishing, 2003), 169-170. After the Second World War, protection was granted to families at international level. State family law is subject to both private international law conventions and public international law. Under the first group we can list the Hague Convention on Child Abduction (25th of October 1980, entered into force on the 1st of December 1983), the Hague Convention on Inter-country Adoption (29th of May 1993, entered into force 1st of May 1995), the Convention on the Law Applicable to Maintenance Obligations towards Children (24th of October 1956, entered into force 1st of January 1962) and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (23rd November 2007, entered into force on 1st January 2013). These treaties are binding on state parties and in many states they become enforceable through implementing legislation. As far as public constitutional law is concerned, the major pieces of legislation affecting family law are the Universal Declaration of Human Rights (art. 16, 10th of December 1948), the European Convention on Human Rights and Fundamental Freedoms (ECHR, art. 8, art. 14 and Protocol 1 art. 1, 4th of November 1950, entered into force 3rd of September 1953), International Covenant on Civil and Political Rights (ICCPR, art. 7, 16th of December 1966, entered into force 23rd of March 1976), the International Covenant on Economic, Social and Cultural Rights (ICESCR, art. 10, 16th of December 1966, entered into force 3rd of January 1976). However, the first treaties that, at international level, recognized the right to family reunification were Convention on the Elimination of Discrimination Against Women (signed 18th of December 1979, entered into force 3rd of September 1981), the Convention on the Rights of the Child (adopted on the 20th of November 1989, entered into force 2nd of September 1990) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (approved on the 18th of December 1990, entered into force 1st of July 2003). Nevertheless, even when these provisions started to be protected internationally, the treaties and conventions that contained them did not envisage a clear system of enforcement. For example the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families established, at Art. 72, a Committee for the Rights of Migrant Workers. However, this body functions as a body of political pressure and is not able to enforce sanctions.

[3] Several Directives have been adopted by taking this article as a legal ground (or the previous 63(3)(4) TEC): Directive 2003/86/EC on the right of family reunification; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents; Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings; Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research; Directive 2009/50/EC on the conditions of entry and residence of highly qualified workers.

States.[4] This Directive has consequentially shaped the national legislation that has to be applied to this category of family members. The second category covers EU workers or citizens residing in another Member State wishing to live with a third country national family member. Also in this case the right of entry and residence of the third country national is granted in accordance to EU law, although this time owing to Directive 2004/38/EC on the right of free movement of EU citizens and their family members. Finally, the third category concerns those nationals residing in their EU Member State of origin wishing to live with a third country national family member. The legislation applying to this category is still national. In other words, it is up to the state to decide the conditions and the modality of admission of these specific third country nationals. However, in accordance to the most recent jurisprudence of the Court of Justice of the European Union (from now on CJEU or Court), third country national family members of EU non moving citizens should be allowed to reside in the national Member State of their EU sponsor if the denial of this right would force the latter to leave the territory of the European Union. In these cases family reunification rights are granted not via national rules but by EU law.

The topic of this thesis focuses on the issue of family residence rights granted to third country nationals within the EU and, in particular, on the two last categories of potential applicants listed above. Leaving aside the numerical importance of this phenomenon[5], it is worth focusing on this specific issue because it has been the object of a lively and still ongoing debate. Indeed, over the years, Member States[6] have often

[4] Council Directive 2003/86/EC [2003] 0J L 251/12. For an account of this Directive see Kees Groenendijk, "Family Reunification as a Right under Community law", *European Journal of Migration and Law* 8, no 2 (2006). (Apart from freedom of movement legislation and Directive 2003/86/EC, family reunification provisions can be found in several Association Agreements with third countries. In addition, there are also several special EU law regimes of family reunion with regard to special categories of third country nationals such as Refugees and Blue Card Directive holders. The special rules for refugees are set out in Chapter V of the general Family Reunion Directive. The special rules for Blue Card Directive holders are instead contained in the Council Directive 2009/50/EC [2009] OJ L 155/17. For a detailed explanation of these exceptions see Steve Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011), 473-478.

[5] Family reunification between third country nationals and EU citizens, being them either moving or static, is not an irrelevant phenomenon. In 2011 the total numbers of permits released by the 27 Member States to third country nationals willing to reunify with EU citizens was 239,533. In 2012 the provisional number, with Belgium's, Latvia's, Poland's and Romania's data still not available, amounted already to 210,024 (Data collected from Eurostat, 2013). The total immigration of third country nationals in 2011 to the twenty-one EU Member States whose date are available amounted to 1.350.100 (see data at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Immigration,_EU-27,_2009-2011.png&filetimestamp=20130325145256). Residence permits granted to third country national EU family members contributed 18% of all third country national immigration to these twenty-one EU Member States.

[6] It is worth pointing out that just some Member States raised issues concerning third country national family members. From the cases that will be analysed we can note that the ones involved in the kind of disputes more often are Germany, the Netherlands, the UK, Belgium and Ireland to which one should add

tried to deny residence rights to third country national EU family members.[7] The Court's answer to these challenges has not been consistent but rather swinging between liberal and austere positions.[8] The object of this thesis is to analyse the intricate jurisprudential scenario of family residence rights of third country national EU citizen family members. In order to fulfill this aim I will endorse a historical approach. Through my analysis, I will show how the phenomenon of family reunification between EU citizens and third country nationals is the fruit of a development that, starting from the legislation of the first post World War II, era reached its climax in the more recent judgments of the CJEU. Using the historical prospective, I will show that the original meaning of the first family reunification legislative provisions, their more recent CJEU

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also Denmark, Greece, Austria and Poland that are often listed among the intervening states in the post *Zambrano* cases.

[7] For example, with regard to cases concerning free movement, in *Metock* (Case 127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241) several governments, challenged by the issue of whether a third country national family member should be allowed to enter the territory of the host Member State of his Union relative without complying with the national immigration rules of the latter, held that "[...] prohibiting a host Member State from requiring prior lawful residence in another Member State would undermine the ability of the Member States to control immigration at their external frontiers" (see para. 71). On other grounds of reasoning, in relation to cases involving static EU citizens instead, in the very debated *Zambrano* (Case 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-1177) several Member States argued that the situation at hand fell within their competences because, since the EU citizens never left the territory of Belgium, the circumstances did "not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law" (see para. 37). In particular, it seems that the debate concerning marriage frauds across the Member States of the European Union has triggered the stricter immigration measures that have been adopted by some national legislators and, therefore, their stricter approach towards third country national immigration (Since 2008 the Italian citizenship is not granted automatically to a third country national spouse of an Italian citizen anymore but only after two years of permanent residence in Italy. In the UK the right to apply for permanent residence by the third country national spouse of an English citizen has been recently raised from two to five years. For a more detailed account on sham marriages in the UK see Helena Wray, "An Ideal Husband: Marriages of Convenience, Moral Gate-keeping and Immigration to the UK", *European Journal of Migration and Law* 8, no. 3 (2006).

[8] Alina Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach", *European Law Journal* 15, n. 5 (2009), 634. It was argued that the Court "must either endeavour to wave its case law logically together or, if there are good reasons to push the law in a different direction, articulate its reasoning as clearly and explicitly as possible."(see Niamh N. Shuibhne, "Case Law: (Some) Of The Kids Are All right", *Common Market Law Review* 49, n.1 (2012), 379). As far as family reunification between EU static citizens and third country nationals is concerned, it was also argued that the post *Zambrano* cases are good examples of how the Court conjured rights, and limits to them, out of nowhere (see Alan Dashwood, "Judical Activism and Conferred Powers – Is the CJEU Falling into Bad Habits?", paper presented at 10th IEL (Institute of European Law) Annual Lecture, Birmingham University, 27th June 2012). On the academic debate addressed by the Court see also in particular Silvia Acierno, "The Carpenter judgment: fundamental rights and the limits of the Community legal order", *European Law Review* 28, n.3 (2003), 407; Eleanor Spaventa, "From Gebhard to Carpenter: Towards a (Non-) Economic European Constitution", *Common Market Law Review* 41, n. 3 (2004), 767; Alina Tryfonidou, "Jia or "Carpenter II": the edge of reason", *European Law Review* 32, n. 6 (2007), 917 (in this case comment the author underlined how the Court did not succeed in making explicit whether it was willing to depart from the previous *Akrich* case and to endorse a new family reunification approach); Jeremy B. Bierbach, "European citizens' third-country family members and Community law", *European Constitutional Law Review* 4, n. 2 (2008), 356-357 (in this case comment the author underlines how the CJEU's reasoning was far from providing legal certainty); Nigel G. Foster, *Foster on EU law* (Oxford: Oxford University Press, 2011), 353.

interpretation and the new application of the concept of EU citizenship find their grounds on different but concrete historical trends that influenced the approach of the Court.

It is common knowledge that, since its origins, the main aim of the European Union has been the creation of Common Market. The Treaty of Rome, in establishing the EU, recognized that certain matters had necessarily to be free from any regulation that would restrict their movement among the Member States. The aim of developing the right of free movement of workers was immediately endorsed by the Court. The CJEU, through its restless activity, immediately from the early sixties started to interpret broadly the provisions on free movement of workers and to apply the market access model to free movement of labour cases in order to eliminate all the obstacles that could hinder Member States' workers to take advantage of such a crucial right.[9] Furthermore, in 1992 the concept of European citizenship (from now on also EU citizenship) was finally introduced in the Maastricht Treaty. The Court interpreted this new concept not only as a way to extend free movement rights to non economically active people but also as a source of self-standing rights occurring without the presence of a real cross border element.

However the action of the EU and of the Court, mainly focused on eliminating obstacles that would hinder the right of free movement and on strengthening the rights deriving from the EU citizenship status, soon begun to clash with the stricter immigration policies adopted by the Member States. Indeed, since at least forty years immigration has become a particularly serious issue in Europe and often it has been subject to a vehement national political debate. Since the oil crisis of the seventies, passing through the fall of the Berlin Wall, followed by the 9/11 terrorist attacks and the more recent Arab spring, many European states have begun to fear waves of legal and illegal third country nationals and to act in order to keep them out their borders as much as possible.[10] For these reasons the signing of the Schengen treaty as well as the introduction of the concept of EU citizenship and the enhancement of free movement of people have had a deep impact on the perception of immigration, to the extent that the greater internationalism of Europeans has simultaneously triggered strong Eurocentrism, fear of third country nationals and higher levels of xenophobia.[11]

[9] On this point see Chapter 2.
[10] Among all see the UN High Commissioner for Refugees, interview of Antonio Guterres, March 20, 2012, accessed October 10, 2013, http://www.epc.eu/events_rep_details.php?cat_id=6&pub_id=1430.
[11] David Cesarani, and Mary Fulbrook, *Citizenship, Nationality and Migration in Europe* (London: Taylor & Francis, 2002), 3.

The solutions offered by the Court will be analysed considering these trends as a background. In particular, Chapter 1 will show that family reunification provisions were introduced within the free movement legislation for the purpose of matching the post war lack of manpower of Northern European States with the Italian surplus of labour through the establishment of the right of free movement of people.[12] By looking at the Bilateral Treaties era and the development of the Common Market I will show how family reunification was introduced as an incentive to push Italian workers to move towards the northern European Member States in order to fill their lack of manpower. Finally, I will also underline how the openness toward Italians can be placed in the broader context of an initial general relaxed approach toward foreigners and, with the advent of the European Union, third country nationals. In Chapter 2 I will underline how, after the oil crisis of the mid seventies, the backdrop drastically changed. The sudden drop in economic activity pushed some states to endorse protectionist measures, which included putting a stop to immigration. The "other" started to be stigmatized as a potential threat[13] for the economy and the society by the media and within the political arena[14] and this became part of the common mentality. Nevertheless, these years were also characterized by the liberalization of the rights of EU workers and citizens. On one side, the EU continued to pursue the strengthening of the right of free movement of workers. This right became soon a right to be claimed also by student and pensioners (90/364 EEC[15], 90/365 EEC[16], 90/366 EEC[17]) and, finally, by all EU citizens despite them being engaged in work, owing to Directive 2004/38/EC.[18] Also the Court begun to interpret free movement cases in the light of the market access approach, according to which national measures can be turned down if they create obstacles to the smooth functioning of free movement. On the other side, EU politicians and academics started to discuss the opportunity of introducing the idea of EU citizenship, which was finally encompassed within the Maastricht Treaty. Far from being just an empty shell, as many

[12] Among all see Ferruccio Pastore, and Giuseppe Sciortino, *Tutori Lontani: il Ruolo degli Stati d'Origine nel Processo di Integrazione degli Immigrati*, 2001, Ricerca svolta su incarico della Commissione delle politiche di integrazione degli immigrati presso Centro Studi di Politica Internazionale (Cespi), <www.cespi.it/PASTORE/tutori-lontani.PDF>, 10-11.
[13] Klaus J. Bade, *Migration in European History*, (Oxford: Blackwell Publishing, 2003), 280.
[14] *Ibid*.
[15] Council Directive 90/364/EEC [1990] OJ L 180/26; concerning a general right of residence.
[16] Council Directive 90/365/EEC [1990] OJ L180/28; concerning a right of residence for pensioners.
[17] Council Directive 90/366/EEC [1990] OJ L 180/26; concerning a right of residence for students; after annulment by the CJEU (in Case C-295/90 *European Parliament v. Council* [1992] ECR I-4193) replaced by Directive 93/96/EEC, OJ 1993, L 317/59. For a summary of the case see Siofra O'Leary, "Case note on Case C-295/90 European Parliament v. Council, Judgment of 7th of July 1992", *Common Market Law Review* 30, n. 3 (1993).
[18] Council Directive 2004/38/EC [2004] OJ L 158/77.

scholars initially argued, the treaty articles on citizenship started to be often utilized by the Court as a source of self stemming rights, including also family rights, in cases in which the connection between the circumstances at stake and EU law was not so clear since the EU citizen did not exercise his/her right of movement. In Chapter 3 I will show how applications on family reunification cases between EU citizens and third country nationals begun to be filed when the immigration concerns, as opposed to the enhancement of free movement and EU citizenship, became stronger. In this chapter I will focus on the analysis of the first case law over the issue of family reunification between EU moving citizens and third country nationals. Taking into account the trends described in the previous chapter, I will show how these cases found their roots at the interface between free movement of workers and citizens and Member States' concerns over immigration and how these two currents ended up shaping the reasoning of the Court. I will point out that the reasoning of the Court, far from being the result of simplistic choices, can be considered as bringing solutions of compromise between the protection of the Member States' sovereignty over immigration and EU interests over the enhancement of free movement. Likewise, in Chapter 4 I will show how the Court's reasoning in cases involving EU static citizens was also built around the immigration concerns of some Member States, this time however at the interplay with the development of the EU citizenship status as a source of self-standing rights. I will highlight that also this stream of case law has been shaped by the Court's attempt take account of Member States' concerns over immigration as well as the development of the concept of EU citizenship through the application of the *Zambrano* test. In Chapter 5 I will bring together all the themes explored in the previous chapters and I will point out that the Court's attempt of taking into account the various stances at stake has managed to grant, under certain conditions, an unrestricted right to family reunification for families composed by EU citizens and third country nationals. In order to show the peculiars of the family reunification protection endorsed by the CJEU I will compare its approach with that of the Court of Human Rights' (from now on ECtHR or Court of Strasbourg). I will show that while the latter bases its reasoning on the principle of proportionality, which implies a balancing exercise between the competing interests of the family and of the Member States the CJEU, once assessed that the situation falls within the competence of EU law, can grant nearly unrestricted family residence rights to third country national family members. Finally Chapter 6 will be dedicated to the conclusions.

Chapter 1: Family Reunification at the time of Bilateral Agreements and Common Market

1. Introduction

The first EU law provision granting family residence rights to family members of EU workers can be found in Council Regulation 15/1961/EEC[1] on free movement of workers. This was the first regulation of a three steps phase that culminated with Regulation 1612/1968/EEC and the full liberalization of manpower.[2] Art. 10(1) of the latter regulation provided that the spouse, the descendants who are under the age of 21 years or dependants and the dependant relatives in the ascending line of the worker and his spouse have the right, irrespective of their nationality, "to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State".

It has been argued that, originally, these provisions were not only introduced for humanitarian concerns[3] but also for economic reasons concerning the Common Market.[4] As the goal of the EU was in fact the creation of a market in which factors of production (goods, services, capital and labour) could move where the requirements of

[1] Council Regulation 15/1961/EEC [1961] OJ L 1073/6. This measure was also accompanied by the Directive of the 13th December 1961 on the administration practices concerning settlement, employment and residence.

[2] The second step of this three steps phase started with the introduction of Council Regulation 38/1964/EEC ([1964] OJ L 965/64). The third and last one started in 1968 with Council Regulation 1612/1968/EEC (OJ Sp. Ed. 1968, L 257/2). The subdivision in different phases was meant to introduce gradually the concept of freedom of movement of workers in order not to negatively affect the domestic markets. For instance, in the first two phases, the priority to take up job offers was given to national workers (if the competent authorities did not propose the name of a national worker within three weeks time , only then could the offer be taken up by the worker of another Member State). This limitation was eliminated with Council Regulation 1612/68/EEC. Council Regulation 1612/68/EEC has been repealed in 2011 by Council Regulation 492/2011/EU [2011] OJ L 141/1.

[3] A sign that the EU did not intend to create a general legislative protection for family reunifications consists in the fact that these rights were considered residual. Indeed, family members who had the nationality of a Member State and were economically active could rely directly on the free movement provisions in order to have access to the host Member State. On this point see John Handoll, *Free Movement of Persons in the EU*, (New York:Wiley, 1995), 249.

[4] Gavin Barret, "Family Matters: European Community Law and Third Country National Family Members", *Common Market Law Review* 40, no. 2 (2003), 375-376.The first to explicate this idea was A.G. Darmon in the *Demirel* case (Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 1573). He pointed out that "family reunification for example is treated by community law as a necessary element in giving effect to the freedom of movement of workers and does not become a right until the freedom which it presupposed has taken effect". The idea of third country national family members residence rights being secondary to the primary right of free movement was shared also by academics. See for example Barret, *op. cit.*, and Elspeth Guild, *The legal elements of European Identity, EU Citizenship and Migration Law*, (The Hague: Kluwer Law International, 2004), 98.

supply and demand dictated,[5] therefore residence rights of family members were built as an instrument to avoid hindrances to the free movement of the European worker.

In this chapter, I will look at the origins of the phenomenon of family reunification at EU level within the context of free movement. I will start this historical overview by looking at family residence rights from the time of Bilateral Agreements between Italy and northern European countries and I will show how they were conceived as an instrument capable of creating an incentive for workers to migrate towards the receiving state. I will then highlight that, since the Common Market project can be considered connected to the first Bilateral Agreements (given the same historical circumstances in which they were drafted and the Italian participation in both projects), it seems that family reunification provisions inserted in the first secondary free movement legislation were also drafted as a way to create incentives for unemployed Italians to move to the northern European Member States. Finally, I will note that the openness of family reunification provisions towards third country national family members can be placed in the broader context of a general liberal and relaxed approach toward foreigners characterising those years.

The message conveyed in this chapter is that it is fundamental to clarify the origins of the first provisions on family reunification and to point out, in the next chapter, the change of some Member States towards immigration since the oil crisis.

This chapter is subdivided in five parts. After this brief introduction part 2 will be dedicated explaining how the Common Market concept of free movement of persons, having developed during the same historical background that characterized the drafting of the first Bilateral Agreements, can be considered to be born in order to fulfill the same aim, which was the enhancing of the movement of the Italian unemployed workers toward the northern European states. In part 3 I will begin to focus on the analysis of family residence rights as endorsed in the Bilateral Agreements concluded between Italy and Belgium, France, Germany and Luxembourg. At the end of this analysis I will show how residence family rights seemed to have been guaranteed not as a fundamental right but as an extra incentive for the Italians to move to the receiving state. In part 4, in the light of the previous considerations, I will underline how the first EU residence family rights were likely drafted in order to promote the Italian movement towards the other Member States and how this can be placed on the backdrop of a

[5] Barret, *supra* note 4, 375-376.

broader friendly attitude toward immigration in the first years of the post World War II period. Finally part 5 will be dedicated to the conclusions.

2. Movement rights of workers and the role of Italy: from Bilateral Agreements to the Treaty of Rome and the Common Market Project.

The years from 1945 to the late sixties were characterized by an increased inflow of migrants from and to different European states and from outside Europe.[6] The rise in the number of migrants coming to Europe, historically, has been triggered by two main factors: on one side, the surprising economic growth in the old continent, on the other, the European shortage of workers and the process of decolonization.[7] With regards to the economic growth, nothing in the history of Europe resembles the experience of the postwar years. Although absolute poverty was still affecting people even in the richest countries of the old continent, the standards of life of all social classes increased uninterruptedly and rapidly for more than two decades.[8] As far as the lack of labour forces is concerned instead, data show that immediately after the war the number of displaced people was around 20 million.[9]

The post war economic expansion triggered a time of intense capital formation but, despite this growth, many workers were still missing in their home countries. This circumstance made the Federal Republic of Germany (from now on Germany) and many other states of continental Europe realize that their demand for labour could not be satisfied just by their nationals.[10] This realization engendered a significant rise in migration[11] from the southern part of Europe,[12] especially from Spain, Portugal, Greece

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[6] Klaus F. Zimmerman, "Tackling the European Migration Problem", *The Journal of Economic Perspectives* 9, no. 2 (1995), 46-47.

[7] Klaus F. Zimmerman, *European Migration What Do We Know*, (Oxford: Oxford University Press, 2005), 5. The author distinguishes between four phases of European Migration: a) period of postwar adjustments and decolonization from 1945 to 1960, b) labor migration from 1960 to 1973, c) restrained migration from 1973 till the end of the eighties, d) dissolution of socialism and afterwards from the nineties till nowadays.

[8] Alan S. Milward, *The European Rescue of the Nation State*, (London: Routledge, 1992), 21. The author explains the uniqueness of this period underlining the role of the state as the crucial and most important factor. The successful institutional management of the economy of that time, in his view, was one of the main explanatory factors of the new European economic expansion.

[9] K. F. Zimmerman, *supra* note 6, 46. On this point see also Klaus J. Bade, *Migration in European History*, (Oxford: Blackwell Publishing, 2003), 215.

[10] Randall Hansen, "Migration to Europe since 1945: its History and its Lessons", *The Political Quarterly* 74, no. s1 (2003), 25.

[11] Leslie P. Moch, "Foreign Workers in Western Europe: The "Cheaper Hands" in Historical Perspective", in *European Integration in Social and Historical Perspective: 1850 to the Present*, ed. Jytte Klausen et al. (New York: Rowman & Littlefield, 1997), 111.

[12] The demand of manpower was, nevertheless, also referred to extra-European states. The demand for labour was so high that many national labour offices searched for workers outside European sources, in countries such as Algeria, Tunisia, Morocco, Yugoslavia, Turkey and former colonies.

and Italy. It is on the role of Italy that this chapter is focused. This is because Italy was the only southern country involved both in negotiating Bilateral Agreements and in the drafting of the Common Market and, therefore, it is the link through which it is possible to discover potential connections between the two projects.

From the end of the Second World War, Italy's vast population and lack of capital enhanced a widespread political consensus on the necessity of developing new efficient migration policies. With an official level of unemployment at 2,000,000 people[13] the Italian government considered emigration of national workers a vital necessity.[14] The migratory outflow had to be rapid and as vast as possible. The government's own diplomatic initiatives had also to be focused on the pursuit of this goal. Hence, the promotion of emigration became the primary purpose of Italy's foreign policy.[15]

The exigency of several states to recruit worker and the correspondent need of Italy to find employment for its nationals made everyone realize the necessity of agreeing over an intelligent interstate policy that had to be capable of allowing workers to move from one part of Europe to another in order to take up job positions.[16] This common purpose opened up the golden era of Bilateral Treaties. As Schmitter highlights, these treaties were the trigger and guidance of Europe after the Second World War.[17] From 1946 onwards Italy signed Bilateral Agreements with all the European countries that experienced some shortage of manpower and, consequentially, needed an inflow of migrant labour such as, Belgium, France, Germany, Luxembourg, the Netherlands, the UK etc. These agreements organized the co-operation between different state's employment services with the aim to promote the recruitment of specific types of workers. An overall ceiling was usually set to limit the number of immigrant workers that could be admitted every year. The decision of recruitment was

[13] To this critical scenario one has to add nearly one million people, just from the north of Italy, that were previously employed in the war industry and, after the war ended, were left without a job. See Cesare Besana, "Accordi Internazionali ed Emigrazione della Manodopera Italiana tra Ricostruzione e Sviluppo", in *Il lavoro come fattore produttivo e come risorsa nella storia economica italiana: atti del Convegno di studi, Roma, 24 novembre 2000*, ed. Sergio Zaninelli et al. (Milano: Vita e pensiero, 2002), 4.

[14] Federico Romero, "Migration as an issue in European interdependence and integration: the case of Italy", in *The Frontier of National Sovereignty: History and Theory, 1945-1992*, ed. Alan S. Milward et al. (London: Routledge, 1993), 37.

[15] *Ibid.*

[16] Ferruccio Pastore, and Giuseppe Sciortino, *Tutori Lontani: il Ruolo degli Stati d'Origine nel Processo di Integrazione degli Immigrati*, Ricerca svolta su incarico della Commissione delle politiche di integrazione degli immigrati, (2001) available at <www.cespi.it/PASTORE/tutori-lontani.PDF>, 10-11.

[17] Barbara S. Heisler, "Sending Countries and the Politics of Emigration and Destination", *International Migration Review* 19, no. 3 (1985), 474.

left to the expressed demand of the receiving state. Depending on the country, sometimes the concrete process of recruitment was either managed directly by a government agency or left to the employer.[18]

However, these treaties did not meet the expectations and the necessities of the Italian government. Despite the still increasing demand for Italian labour, Italy found difficulties and resistances of some European states during political and diplomatic negotiations aiming to approve these agreements.[19] The Italian government became therefore increasingly persuaded that national barriers to the circulation of manpower had to be brought down. The only way to circumvent the problem of national barriers was to internationalize the issue of Italian unemployment and deal with it at a multilateral level. The issue of full employment had to transcend the national state borders and be placed in the broader backdrop of the economic cooperation within Western Europe.[20]

Initially Italy, under pressure from the United States, proposed to the OEEC[21] Member States a complete liberalization on the circulation of manpower. This would have allowed a more efficient utilization of the available work forces through the total opening European borders within ten years. This solution, however, found the criticism of some states. In particular France, Belgium and the UK were very much concerned about losing their sovereignty on labour and immigration policies and the proposal ended up in nothing being done.[22]

In the early fifties the French Prime Minister Robert Schuman, tired of the hesitations of the European intellectual environment,[23] proposed that the market for coal

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[18] Romero, *supra* note 14, 40.

[19] For example the German government was, for some years, quite reluctant to sign a bilateral migration agreement with Italy. On this point see Joannes D. Steinert, "L'accordo di emigrazione italo-tedesco e il reclutamento di manodopera italiana negli anni cinquanta" in, *L'emigrazione tra Italia e Germania*, ed. Jens Petersen, (Bari: Piero Lacaita Editore, 1993), 142-160.

[20] Romero *supra* note 14, 40.

[21] OEEC stands for Organization for European Economic Co-operation. It was founded in 1948 with the aim of continuing a joint economic recovery program within Europe after the end of the Second World War. Originally the OEEC had 18 participants. In September 1961 the OEEC was superseded by the Organization for Economic Co-operation and Development (OECD), a worldwide body. In 1961, the OECD consisted of the European founder countries of the OEEC plus the United States and Canada. The list of member countries has expanded over the years, with 34 countries today.

[22] Luciano Tosi, "La tutela internazionale dell'immigrazione", in *Storia dell'immigrazione italiana, vol. 2, arrivi*, ed. Piero Bevilacqua et al. (Roma: Donzelli Editore, 2001), 453-456.

[23] See Derek W. Urwin, *The Community of Europe, A History of European Integration since 1945*, (New York: Longman, 1995), 1-3. The author underlines how, between the 19th and 20th century, many politicians and intellectuals began to appreciate the remarkable potentialities of a European Economic Unity, either in the form of a customs union or of a free trade area. The most famous example was probably the Zollverein custom union. It was a coalition of German states, established in 1818 and created in order to equalize customs and tariffs among their territories. After nearly fifty years since its creation it ended officially in 1866 with the outbreak of the Austro Prussian war and was substituted by

and steel, of which Europe was witnessing a shortage, had to be controlled by a new supranational authority, which became on the 18th of April 1951 the European Coal and Steel Community (from now on ECSC).[24] During the negotiations, the Italian delegates took the opportunity to argue that, in order to achieve a complete integrated market of coal and steel, freedom of circulation for workers had to be encompassed within the treaty provisions. However, France and Germany made it clear that free circulation could be contemplated just for workers with proven qualifications. The strict Franco-German formulation was finally accepted in the ECSC Treaty.[25] Art. 69 committed Member States to lift every employment restriction based on nationality, just for a restricted category of workers, by stating that "Member States bind themselves to renounce any restriction based on nationality against the employment in the coal and steel industry of workers of proven qualifications for such industries who possess the nationality of one of the Member States; this commitment shall be subject to the limitations imposed by the fundamental needs of health and public order".

The Franco-German approach to the issue of freedom of movement left the Italian diplomats, aiming for a wider interpretation of the ECSC Treaty,[26]unsatisfied. Due to this limited progress, Bilateral Agreements still seemed the only way to achieve more advantages. In 1955 Italy signed a migration Bilateral Agreement with Germany. With the signing of the German-Italian Treaty all the industrial regions of Western Europe were completely engaged in bilateral migratory schemes with Italy as a counterpart.[27]

Perhaps the awareness of the fact that Europe was now thoroughly covered by this intricate network of migratory schemes helped the northern European states to surrender to the fact that the problem of working migration could be better faced at communal level. The issue of freedom of movement took an explicit and fuller shape

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another regional organization, that kept the same name. Despite its relative local success, on a broader European level it can be considered a failure. The reason is because this organization had just German states as members and therefore, by the rest of Europe, it was still considered a protectionist initiative. Initiatives of this kind stopped at the beginning of the 20th century, due to the world wars. During this period states adopted a protectionist approach by raising their tariff barriers and restrictions upon imports.

[24] Treaty Establishing the European Coal and Steel Community, expired 23 July 2002.

[25] Romero, *supra* note 14, 43.

[26] *Ibid*. Italy argued that freedom of circulation had to entail the full harmonization of all the factors and procedures regulating access to the labour market of the six Member States. However, this attempt did not find the approval of the other Member States. France and Luxembourg conceived the free movement of workers within Europe as an aim that had to be achieved when the problem of unemployment in Europe had been completely solved. On the other side Belgium and The Netherlands did not agree to a mutual recognition of qualifications and to harmonization of social legislation. Finally Germany agreed on a common European approach to unemployment but foresaw its solution in a future coordination of economic policies and not in the move towards free movement of labour.

[27] *Ibid.*

with the negotiations for the Common Market, which began in 1955 in Messina.[28] In that occasion the Benelux countries suggested that the target to achieve was the creation of a new comprehensive economic community. Surprisingly, they suggested that this new economic community had not to encompass limited economic areas of integration[29] but had to pursue the aim of achieving a complete Common Market of goods, capital and labour. Germany as well joined the Benelux countries and Italy in asking for a gradual introduction of the free circulation of workers. At the end of the conference the freedom of movement of workers was incorporated among the aims to pursue for the creation of a Common Market in order to launch "a fresh advance towards the building of Europe".[30]

These aims took the concrete form of an embryonic Common Market proposal, owing to the restless work of the Belgian Prime Minister of the time, Henry Spaak. His first *ad interim* report issued in 1956, known as the Spaak Report,[31] referred to unemployment not as a hindrance but rather as a resource for European growth. According to it, unemployment could be better tackled by common action.[32] To this end, Chapter III, Title III was completely dedicated to free movement of labour and particular attention was also given to the avoidance of discrimination between nationals and non-nationals when taking up job positions.[33]

The Spaak report was examined in detail during the drafting for the preparation of the EEC Treaties. Italy insisted again that the liberalization of the free movement of goods, capital and services had to be accompanied by the right of workers to move freely within the Community. States ended up codifying freedom of movement of workers as a right to take up an employment offer in another Member State, freely move and reside in the territory of the Member State and right of not being expelled

[28] *Ibid*., 52. On this point see also Urwin, *supra* note 23, 74.
[29] Jean Monnet was the one who strongly suggested for further sector integration in the field of transport and energy. See Urwin (n 22) 62-67.
[30] Messina declaration, 3rd June 1955.
[31] *Comite Intergouvernemental cree par la Conference de Messine, Rapport des Chefs de delagationaux Ministres des Affaires Etrangeres*, Bruxelles 21 Avril 1956.
[32] See Spaak Report, 91: "La perspective de la liberation des mouvements de main-d'oeuvre incitera des Etats a participer aux efforts qui s'imposent en vue du developpement economique et de la creation d' emplois neces- saires pour eliminer Ie grave probleme europeen du chomage structurel qui existe dans certaines regions; et la resorption de ce chomage eliminera la principale difficulte a laquelle se heurterait la libre circulation de la main-oueuvre, pour le moment meme ou elle pourra se trouver finalement etablie, c'est-a-dire au plus tard a la fin de la periode de transition".
[33] *Ibid.*: "La Commission europeenne est chargee de proposer aux Etats membres, des qu' elle pourra, des mesures appropriees pour eliminer progressivement routes les reglementations discriminatoires legales ou administratives, y compris les pratiques administratives par lesquelles les ressortissants des Etats membres, les personnes juridiques y induses, sont soumis a un traitement moins favorable que les nationaux de l'un de ces Etats pour l' acces a une profession independante ou pour l'exercice de cette profession."

from the Member State in case of temporary unemployment.[34] Moreover, in order to comply with the French request, the idea of progressive quotas was abandoned and substituted with a transition that would be based on the gradual decrease of the procedures and qualifying periods that regulated the eligibility of foreigners for available jobs under the national permit system.[35]

These indications were finally crystallized in the EEC Treaty.[36] Workers were subdivided into salaried, service providers and self-employed[37] and their right to freely move within the territory of the Union was encompassed in the part of the Treaty dedicated to the Foundations of the Community.[38] With regards to salaried workers Art. 48(2) stated that free movement "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". Likewise, with regard to the freedom of establishment, Art. 53 stated that Member States "shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty". Finally, Art. 59 on service providers prohibited "restrictions on freedom to provide services within the Community". The compromise on the abolition of quotas and on the gradual reduction of administrative restrictions, agreed by Italy and the other Member States, can be noticed in the words of the Treaty. The EEC Treaty stated in fact that "for the purpose of establishing a Common Market the activities of the Community shall include […] c) the abolition as between Member States, of obstacles to freedom of movement for persons, services and capital" and that "as soon as this Treaty enters into force, the Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48, in particular: […] b) by systematically and progressively abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreement concluded between Member States, the

[34] Tosi, *supra* note 22, 454-455
[35] Romero, *supra* note 14, 43
[36] Treaty Establishing the European Economic Community, 25 March 1957. On the same day the Treaty Establishing the European Atomic Energy Community (Euratom or EAEC Treaty) was also signed.
[37] EEC Treaty provisions from Art. 48 to Art. 66.
[38] See Art. 3 EEC Treaty. This article lists the fundamental policies of the Community. Its paragraph C includes among these policies "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital".

maintenance of which would form an obstacle to liberalization of the movement of workers". These programmatic provisions, in time, took a more detailed shape through the following secondary legislation. The secondary legislation concerning free movement of workers, adopted soon after the entry into force of the EEC Treaty and culminated in Council Regulation 1612/68/EEC, worked on a long "step by step" process in order to abolish the limits that could be perceived as a strain on the right of workers to move freely within the Union.[39]

In this part, it has been seen how Italy was particularly involved in the negotiations and signing of Bilateral Agreements straight after the conclusion of the Second World War, mainly because of its surplus of manpower and lack of primary resources. Subsequently, on the occasion of the negotiations and ratification of the Treaty of Rome, Italy was again in the front line for the achievement of the Common Market project and, more specifically, for the development of the right of free movement of workers. The crucial role played by Italy both in the drafting of Bilateral Agreements and in the pursuing of the right of free movement of workers during the negotiations of the Treaty of Rome, together with the fact that both these moments were characterized by the same historical condition of lack of manpower in northern Europe and severe unemployment in Italy, suggest that the birth free movement finds its roots in the post World War II background as well as the first Bilateral Agreements concluded between some northern European states and Italy. Therefore we can conclude that, apparently, these two phenomena share common origins.

3. Bilateral Agreements and family members' residence rights

After having pictured the historical background from the Bilateral Agreements to the Common Market I will now focus on the family reunification approach adopted by the Bilateral Agreements concluded between northern European states and Italy. This section is divided in five subparts. In the first four parts I will describe the family reunification approach adopted by the Bilateral Agreements concluded by some states with Italy. In the last part I will show that the open approach towards family

[39] Secondary legislation soon followed the EEC Treaty provisions on freedom of movement. In the first phase, Council Regulation 15/1960/EEC tempered the normal priority given to national workers when taking up a job position with a temporal limitation. Art. 1 provided that, once passed three weeks from the registration of a vacancy without a national worker having responded to it, the position had to be granted to a worker of another Member State at equal conditions. This provision was completely abolished in the second phase by Council Regulation 38/1964/EEC, although even with this second regulation priority was still given to national workers. A complete abolition of any restriction occurred with Council Regulation 1612/68/EEC.

reunification adopted by the Bilateral Agreements was likely adopted in order to create an incentive to the Italian movement of workers towards northern Europe.

Before starting this analysis a clarification of the method is necessary. Given the fundamental role of Italy both in the drafting of Bilateral Agreements and in the pursuit of the Common Market this analysis is going to focus just on the Bilateral Agreements concluded by Italy, in particular with Belgium, France, Germany and Luxembourg. The Netherlands, despite being one of the six founding fathers of Europe, will be excluded from this analysis because it had a later history of Bilateral Agreements with southern European states, Italy included.[40]

3.1. Belgium

From the 18th century the economy of thirty municipalities in the Borinage, a region of southern Belgium, was founded on coal mining. After the Second World War this region was a valuable resource, in the worldwide coal shortage, for the rebuilding of Europe. There was no more striking example anywhere in Europe of the post war concern for employment than the re-establishment and maintenance of the production of coal in the mines of southern Belgium. In fact during the world coal shortage of 1945, when the only coal available on world markets was allocations from the United States, it appeared logical to avoid any sort of reduction of the size of Belgian industries.[41]

The necessity of re-establishing the coal industry made mining a protected occupation during the war and even after. For example, the lowest skilled group of mining workers was granted good salaries and good pension schemes.[42] Moreover, the necessity of finding workers in order to revitalize the coal industry convinced the Belgian government to approve a "statute" for coal miners. This statute provided

[40] The Netherlands was the last northern European state to start concluding Bilateral Agreements with southern European and northern African states. The Dutch Government concluded bilateral recruitment agreements with Italy, Spain, Portugal, Turkey, Greece, Morocco, Yugoslavia and Tunisia between 1960 and 1970. On this point see Stephen Castles, "The Guest-Worker in Western Europe - An Obituary", *International Migration Review* 20, no. 4 (1986), 765. The reason could be rooted in the fact that, unlike the other northern European states, the Netherlands had a very accelerated economic growth to the extent that, by the early fifties, the Dutch industry had largely recovered from the second World War and the unemployment reached a very low level (see Sara K. van Walsum, *The Family and the Nation: Dutch family Migration Policies in the Context of Changing Family Norms*, (Cambridge: Cambridge Scholar Publishing, 2008), 26-27). Perhaps this fact slowed down, at least at the beginning, the request of foreign labourers. Moreover, the less immediate need of foreign workers seems to have triggered also a different approach towards family reunification compared to the other European states. Taking again Italy as a case study during the sixties, when the Netherlands started recruiting bigger numbers of Italian unschooled labourers, those had to be unmarried (see van Walsum, *supra*, 120).

[41] Milward, *supra* note 8, 51.

[42] For all the economic advantages applied to the miners see Albert Martens, *Les Immigres: Flux et reflux d'une main-d'oevre d'appoit, La politique belge de l'immigration de 1945 a 1970*, (Louvain: Presses Universitaries de Louvain, 1976), 64.

exceptional advantages to them such as right to retire before thirty years of work, supplementary holidays and free coal up until 4.200 Kg per year.[43]

Despite such advantages, Belgian citizens still showed no great desire to work underground.[44] Moreover, many citizens were still displaced because of the war and Belgium did not have a strong reserve of manpower.[45] In order to fill these gaps, initially Belgium retained 64, 000 German prisoners in its mines. However, when prisoners where released in 1947, the crucial question was about who could replace them. Given its structural lack of workers, Belgium looked for men in a country in which it was sure to find them: Italy.[46]

The first Bilateral Agreement between Belgium and Italy was signed on the 20th of June 1946.[47] Belgium agreed to supply to Italy five tons of coal per month for each given Italian worker. Italy, on its side, agreed to provide Belgium with 2,000 workers per week.[48] After 1947 immigrants made up about three-quarters of the total underground labour force, and of them about three-quarters were Italians.[49]

Apart from this exchange between men and primary resources, the agreement encompassed also some other provisions on the rights of Italian workers. The agreement stated that the Belgian government had to provide Italian workers with appropriate housing, food, job conditions and a salary that had to be equal to the one paid to Belgian miners.[50] Despite the attempt to give Italian migrants enhanced protection on certain issues, the legislation remained silent on family residence rights. However, like France, Belgium perceived itself as a country of immigration, needing families to settle both for economic and demographic reasons.[51] To this aim, the famous French demographer

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[43] *Ibid*.
[44] Milward, *supra* note 8, 51.
[45] Bade, *supra* note 9, 204. Even five years after the world war ended, Europe's total population was 531 million, about six million less than in 1940.
[46] Milward, *supra* note 8, 51.
[47] The text of this agreement was modified on the 23rd June 1947. The Italian text of the Bilateral Agreement between Italy and Belgium can be found in Atti Parlamentari dell'Assemblea Costituente, Doc. No. 42, 22nd of October 1947.
[48] Section 11 of the Protocol of the Agreement. On this point see Antonio Canovi, "L'Immagine degli Italiani in Belgio: Appunti Geostorici", n.5 (2011), Dossier: Italia altre. Immagini e Comunita' Italiane all'Estero, available at www.diacronie.it, 2.
[49] For detailed data see Besana, *supra* note 13, 26. According to their data Italian migrants working in Belgian mines were 26.000 in 1946 and doubled already in 1948, reaching the number of 46.000.
[50] See Art. 3 Bilateral Agreement Belgium-Italy 20th June 1946. Despite this provision in reality the working and living conditions of Italian miners were quite precarious. On this point see Flavia Cumoli, "Dai campi al sottosuolo. Reclutamento e strategie di adattamento al lavoro dei minatori italiani in Belgio", in Storicamente, n.5 (2009), accessed May 2011, available at <http://storicamente.org/07_dossier/emigrazione-italiana-in-belgio.htm>.
[51] Arturo John, "Family Reunification For Migrants and Refugees: a Forgotten Human Right?", *A comparative analysis of family reunification under domestic law and jurisprudence, international and*

Alfred Sauvy, in his report,[52] underlined how Belgium had to adopt, in order to improve production and solve its demographic problems, a policy of integration and assimilation of the families of the migrant workers. As Belgium had a strong interest for Italian workers to stay in order to develop the coal industry, the authorities made efforts, through campaigns[53] such as its brochures "Vivre et travailler en Belgique" to encourage prospective immigrants to bring their families along, as this would have allowed them to lead a normal life, overcome any difficulties in settling in[54] and, therefore, to establish themselves finally in Belgium. According to the chronicles of the time, in many public squares in Italy it was possible to find posters declaring the advantages granted by Belgium to foreign miners, among which there was also the possibility to reunify soon with their families.[55] One of these advantages granted by the Belgian government, for instance, was the covering of the 50% of the travel expenses of the family.[56] From 1946 to 1957, 140, 469 Italian workers, followed by 46, 364 family members reached Belgium.[57]

3.2. France

France has a long tradition of immigration. Since the second half of the nineteenth century thousands of foreigners had been recruited or granted admission in the hope of compensating for the country's insufficient labor supply and low birth rate.[58] The real problem of immigration arose in France in 1945, in conjunction with the

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regional instruments, ECHR caselaw and the EU, (2003), accessed May 2011, available at <http://www.fd.uc.pt/hrc/working_papers/arturojohn.pdf>, 6.

[52] Alfred Sauvy, *Le rapport Sauvy sur le probleme de l'economie et de la population en Wallonie*, Liege, 1962, Conseil Economique Wallon.

[53] Campaigns to recruit Italian workers were organized by the Belgian trade unions. For a deeper account see Francesco Micelli, "L'emigrazione dal Friuli Venezia Giulia in Belgio", accessed June 2011, available at http://www.ammer-fvg.org/ita/paesi/index_tree_d.asp?CCat_ID=BE&CCatS_ID=&Cont_ID=262.

[54] John, *supra* note 51, 6.

[55] This was the original content of the poster: "Approfittate degli spaciali vantaggi che il Belgio accorda ai suoi minatori. Il viaggio dall'Italia all'estero e' completamente gratuito per i lavoratori italiani firmatari di un contratto annuale di lavoro per miniere. Il viaggio dall'Italia al Belgio dura in ferrovia solo 18 ore. Compiute le semplici formalita' d'uso la vostra famiglia potra' raggiungervi in Belgio". See "Dimensioni e caratteristiche del fenomeno occupazionale della popolazione immigrata in provincia di Latina", research report, accessed May 2011, available at http://www.progettostima.it/public/articoli/29/Files/Rapporto%20finale%2009%2006%202010.pdf, 28.

[56] Western Europe's Migrant Workers, report 28, 1974, 21.

[57] Micelli, *supra* note 53, 10. The fact that family reunification was just stimulated through political campaigns and not through the legislation leaves uncertainties on which family members could effectively join the Italian workers and what were effectively the rights granted to them once in the host Member State.

[58] Gilles Verbunt, "France", in *European Immigration Policy: A Comparative Study*, ed. Tomas Hammar, (Cambridge: Cambridge University Press, 1985), 127. For a detailed account on this issue see Yves Lequin, *Histoire des etrangers et de l'immigration en France*, (Paris: Larousse, 1992), 313 *et seq*.

issues of demography and manpower. To understand their importance as postwar concerns, one must appreciate the situation that existed at the end of World War II. As result of World War II, France lost a big part of its population.[59] On the top of this issue, France was also experiencing a severe decline of birth rate. It was again Alfred Sauvy, the eminent demographer that would advise Belgium some years later, who suggested that in order to overcome the postwar economic stagnation a program of permanent, large-scale immigration was a top priority.[60]

On the 2nd of November 1945, with an *ordonnance*, the National Immigration Office (ONI) was created.[61] This institution was given the monopoly over the recruitment of foreign labor into France. Although ONI was meant to become the most highly organized system of recruitment for migrants coming to France from every foreign state the reality was far from this assumption[62]and, for this reason, after some years after its creation the ONI was left responsible only for migrants coming from Europe.[63] When the Commisariat General Du Plan[64] set France the objective of increasing production 25% above that in 1929 by 1950[65], the ONI, with the support of the time Ministry of Labour Ambroise Croizat, concentrated all its efforts on Italy. All of a sudden Italy became the cornerstone of the new French migration policy. Geographic and cultural proximity, the presence of former Italian migrants and the absence of political obstacles made Italy the perfect candidate to supply the French with much needed labour.[66]

The Bilateral Agreement between France and Italy was ratified on the 21st of March 1947.[67] According to this agreement, France had to grant the recruitment of 200,

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[59] Apparently 1, 500, 000 military and civilians died during the First World War. In the second conflict figures are around 2, 100, 000.

[60] On this point see Alfred Sauvy, "Evaluation des besoins de l'immigration francaise", Population (French Edition) 1, no. 1 (1946).

[61] For more details about ONI see Castles, *supra* note 40, 763, and Georges Tapinos, *L'immigration etrangere en France 1946-1973, Travaux et Documents*, Cahier n. 71, (Paris: Presses Universitaires De France, 1975), 22-23.

[62] See Castles, *supra* note 40, 763-764. The author underlines how, from 1948 to 1968, the proportion of migrants coming as "clandestine" increased from 26% to 82%. According to his view, this increment was triggered by the developing competition for labour within Western Europe as labour demands from Switzerland, Belgium and the Netherlands started to increase.

[63] *Ibid.,* 764.

[64] It was created in 1946 and lasted until 2006. Its main purpose was to plan the economy of France, mainly through five years plans.

[65] Tapinos, *supra* note 61, 16.

[66] *Ibid.,*19.

[67] The text of the bilateral treaty between Italy and France can be found at Atti parlamentari dell'Assemblea Costituente, Doc. No. 45, 20th November 1947. Soon after, other bilateral agreements were signed with other countries which were experiencing excess of manpower, such as Spain in 1956, Morocco in 1963, Portugal in 1964, former Yugoslavia in 1965, Tunisia and Turkey in 1964 (and came into force in 1969). On this point see Henry de Lary, "Bilateral Labour Agreements Concluded by

000 Italian workers per year.[68] Prior to leaving, workers had to be subjected to medical check-ups by the Italian Health Authorities.[69] Italian workers could not choose the job position they were going to cover, or the place in which they would have liked to be assigned.[70] In contrast with the agreement with Belgium, in the French Bilateral Agreement one cannot find provisions binding the French government to provide Italian workers with an appropriate housing. Despite the faults of the system, a special regime was applied to Italian workers who had families. In this Treaty in fact it was possible to find provisions that explicitly referred to the possibility of transferring family members to France,[71] instead of simply granting workers the right of sending allowances to their relatives back to Italy.[72] In particular, Art. 14 stated that a special agreement had to determine the conditions under which families of Italian workers could travel to France. The French government, on its side, had to facilitate the arrival of these families to the territory of France by taking up some of their trip expenses. Again, as for Belgium, the Treaty did not give any specific definition of family members. From 1947 to 1949 the total number of families recorded by the O.N.I. included approximately 58,000 people, 48% of which were Italian.[73]

3.3. Germany

Until 1885 Germany was mainly an emigration country.[74] The peak of emigration was reached between 1881 and 1885 when 857,000 migrants left Germany.[75]

France", in Federal Office of Immigration, Integration, and Emigration, *Migration for Employment: Bilateral Agreements at a Crossroads*, (Paris: OECD Publishing, 2004), 43. Each of these agreements specified the number of workers to be admitted each year, the conditions of work guaranteed and the requirements for entry. Every nationality group had its own set of legal rights and duties and its own limits on numbers. On this point see Gary P. Freeman, *Immigrant Labor and Racial Conflict in Industrial Societies: The French and British Experience 1945-1975*, (Princeton NJ: Princeton University Press, 1979), 68-74.

[68] Art. 1 : "En vue d'assurer pendant l'annee 1947 le recrutement en Italie et la mise au travail en France de 200.000travailleurs destines a l'industrie et l'agricolture et desireux de se rendre en France, les deux Gouvernements predront les mesures necessaries, chacun en ce qui le concerne, pour que le depart en France de ces immigrants et leur mise au travail eient lie a la cadence de 17.000 personnes par mois, en moyenne". The recruitment had to happen with monthly quotas of 17, 000 workers each. To this end the Office National d'Immigration Francaise opened an Italian branch in Milan. Welcoming centers were also placed close to the borders between the two states.

[69] Artt. 3, 4, 5.

[70] Art. 7.

[71] Art. 18.

[72] With regards to the faculty to send allowances back in Italy see Artt. 12, 13, 14.

[73] Tapinos, *supra* note 61, 31.

[74] Hartmut Esser, and Hermann Korte, "Federal Republic of Germany", in *European Immigration Policy: A Comparative Study*, ed. Tomas Hammar, (Cambridge: Cambridge University Press, 1985), 165. Germans emigrated mainly to the United States and, to a lesser extent, to Canada, Australia and South America.

[75] *Ibid.,*166.

After the economic expansion began, the number of emigrants dropped rapidly and, as a consequence, during the late nineteenth century overseas German migration was massively replaced by internal migration from rural to industrialized parts of the country.

After the Second World War, Germany slowly started to turn into an immigration country. During this period Germany began to face massive immigration flows. The first people that entered the country were either refugees from Eastern Europe or expelled persons from the former German territories.[76] These voluntary migrants practically covered the vacant places that, during the war, were occupied by war prisoners[77] and ended up functioning as a large labour reserve. Nevertheless, the almost immediate efforts begun by the allies after the cessation of the hostilities to reconstruct the industrial capacity of Germany, together with the currency reform of 1948, triggered such a deep and fast economic recovery that all the labour surpluses were soon absorbed.[78]

West German employers started actively importing foreign labour from 1948. Despite the delay compared to other European countries, the outcome was probably the most organized state recruitment apparatus anywhere in Europe, known as guestworkers system.[79] Initially, the Federal Labour Office of Germany set up recruitment offices all around the Mediterranean countries. German employers in need of foreign labour had to apply to the Labour Office that, after receiving the payment of a fee, had the task of recruiting suitable workers. Workers had to pass a test that allowed the Labour Office to evaluate their occupational skills. Moreover, workers were subjected to medical tests and screening police records. If all the prerequisites were fulfilled, they were all accompanied in groups to Germany, where employers had to provide them a proper accommodation.[80]

The first Bilateral Recruitment Agreement was concluded with Italy in 1955.[81] Already in 1953 Italy expressed its will to sign a Bilateral Agreement with Germany. However, it was only in April 1954 that the negotiations started and, after a period of

[76] See Thomas Liebig, "Recruitment of Foreign Labour in Germany and Switzerland", in Federal Office of Immigration, Integration, and Emigration, *Migration for Employment: Bilateral Agreements at a Crossroads*, (Paris: OECD Publishing, 2004), 158.
[77] Esser and Korte, *supra* note 74, 167-169.
[78] Ray C. Rist, *Guestworkers in Germany: The Prospects for Pluralism*, (New York: Praeger Publishers, 1978), 61.
[79] Castles, *supra* note 40, 768.
[80] *Ibid*.
[81] The text of the Treaty can be found in Diritto Internazionale, Vol. XVII, 1963, 280. Further recruitment agreements were concluded later on with Spain (1960), Greece (1960), Turkey (1961), Portugal (1964) and Yugoslavia (1968). See Hammar (n 56) 170.

stalemate,[82] the agreement was signed. The decision to sign this agreement was dictated by economic and historical circumstances. In the early fifties Germany, in order to develop its economy, pushed for a strong liberalization of international trade. At that time Germany traded intensely with Italy, one of its major coal importers.[83] At the same time the Italian economy, as previously mentioned, was characterized by a strong unemployment rate. When the latter pressured Germany to hire seasonal Italian workers, threatening to adopt a more restrictive importation policy in case of a negative answer, Germany accepted the Italian conditions. This decision was moved surely out of fear of losing its biggest importer of coal[84] and, presumably, also because Germany desperately needed new labour forces to keep the pace of its continuously growing economy.[85]

According to the agreement, Germany had to indicate the number of workers and the kind of jobs that needed to be recruited.[86] Practically, the Federal Labour Office, acting jointly with the Italian Labour Ministry, was responsible for the recruitment. From Nuremberg all job requests from German employers had to be sent to the local offices of the Italian Labour Ministry, which was in charge of viewing and choosing the workers.[87] Once the worker was accepted, he was granted a bilingual job contract[88] and an authorization to work, which was the prerequisite to have the work permit released once in Germany.[89] The German government covered also the visa and trip expenses for the Italian workers.[90] They were also granted same work and housing conditions as German workers.[91]

Looking at the content of the agreement it is also clear how the presence of Italian workers on German territory was meant to be limited in time.[92] In fact, probably because of the nation's self perception of not being a country of immigration, German

[82] Grazia Prontera, "L'emigrazione italiana verso la Repubblica Federale Tedesca. L'accordo bilaterale del 1955, la ricezione sulla stampa, il ruolo dei centri di emigrazione di Milano e Verona", in *Storicamente*, no. 4 (2008), accessed June 2011, available at <http://www.storicamente.org/07_dossier/migrazioni-prontera.htm>.
[83] *Ibid*.
[84] *Ibid*.
[85] *Ibid*. In September 1955 the unemployment of German workers nearly disappeared. German unemployment reached in fact 2,7% by September 1955.
[86] Art. 4(2).
[87] Art. 5(1)
[88] Art. 9(1).
[89] Art. 9(3) and Art. 11.
[90] Art. 16.
[91] Steinert, *supra* note 19, 142-160.
[92] Paolo Borruso, "Note sull'emigrazione clandestina italiana 1876-1976", *Emigrazione e Storia d'Italia*, ed. Matteo Sanfilippo, (Cosenza: Luigi Pellegrini Editore, 2003), 265. Art. 4 (2) of the Treaty shows how Germany looked at the Italian permanence within its territory as temporary. As a matter of fact it states that the job offers had to indicate clearly how long the job would have lasted.

Bilateral Agreements[93] were characterized by the creation of a rotation system which intended to replace frequently the previous generation of temporary guestworkers with a new one.[94] Despite the German temporary job policy towards migrants the agreement, surprisingly, made reference to family rights adopting quite an open position on family reunification. Art. 15 stated that all the Italian workers that wished to be accompanied by their families, had to prove to be living in a proper housing. Workers, when issues on public safety or public order were not occurring, were given residence permits for their families in the shortest possible time. Moreover, requests for residence permits of relatives not belonging to the core family unit were also accepted.[95] In fact, the same article states explicitly that the competent offices had to examine "benevolently" the admission requests also of other family members.[96] Finally, although the Bilateral Agreement between Italy and Germany did not specify it in any provision, the policy of Germany was that also the family member (generally the woman) who was allowed to enter with the foreign worker was entitled to take up a job position.[97]

3.4. Luxembourg

The first migration flows to Luxembourg can be tracked back to the last quarter of the nineteenth century. That period was characterized by the industrialization of the country and the beginning of mining activities. The fast development of the mining and steel industry created the need to import a huge amount of manpower since the need for labour could not be supplied entirely by the native population. Both low and high skilled workers were required.[98]

The first wave of immigrants to be employed in the steel and coal industry was,

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[93] See John, supra note 51, 5.

[94] There were several reasons why the importation of temporary foreign workers seemed to be the right solution. Among all, importing temporarily foreign labour was considered less risky, considering the still uncertain economic recovery of Germany. See Heinz Werner, "From the German "Guestworker" Programmes of the Sixties to the Current "Green Card" Initiative for IT Specialists", no. 43. Institut für Arbeitsmarkt-und Berufsforschung der Bundesanstalt für Arbeit (IAB), (2001), 7.

[95] See Art. 15. These provision was applied also to workers that were meant to remain in Germany for a period not more than 9 months.

[96] *Ibid*.

[97] The job market was in such need of recruitment that also the family member was encouraged to apply for jobs. See Monica Mattes, "Gender and Migration in Germany: the case of female labour migration from the 1950s to the 1970s", (2009), accessed June 2011, available at http://migrationeducation.de/fileadmin/uploads/MattesGenderMigration_01.pdf, 4. The author underlines how, during the 60s, the German recruitment agencies promised Italians to receive a preferential treatment if they decided to move with or to be joined by their wives. On migration of women after the Second World War see also E. Kofman, "Female "Birds of Passage" a Decade later: Gender and Immigration in the European Union", *International Migration Review* 33, no. 2 (1999), 274.

[98] Marie Valentova, and Guayarmina Berzoza, "Attitudes towards immigrants in Luxembourg: do contacts matter?", CEPS/INSTEAD working paper, (2010), accessed June 2011, available at <http://www.ceps.lu/pdf/3/art1547.pdf>, 3.

once again, Italian.[99] The first Italian wave of migration to Luxembourg was between the last decade of the nineteen century and the beginning of the First World War. Italian workers used to move to Luxembourg mainly from the northern and central regions of Italy. This first migration flow was characterized by the extreme temporariness of the presence of Italian labourers within Luxembourg. Workers in fact stayed for limited periods and generally returned back to Italy in winter.[100] Temporariness, with some exceptions in the period before the First World War, continued to characterize the presence of Italian migrants in Luxembourg up until the post World War II period.[101] After the end of World War II Luxembourg was on its knees. One third of the country was destroyed. Infrastructures and railways had to be totally rebuilt. Agriculture stopped together with the steel and coal industry.[102] Luxembourg realized that, in order to face its economic problems, migration had to be enhanced. In 1948, the first Bilateral Agreement between Luxembourg and Italy was signed. Luxembourg needed Italians to work in the mines to rebuild the country.[103] On the other side Italy, once again, needed to reduce its national unemployment rate. The last Bilateral Agreement concluded between Luxembourg and Italy before the creation of the European Communities was signed on the 16th of January 1957.[104] All the requests of hiring Italian employees had to be sent first to the Office National du Travail in Luxembourg and, from there, sent to the Italian Embassy that had the task to transmit them to the competent Italian office.[105] The Italian Labour Offices had to make sure that all the workers fulfilled all the health, sanitary and professional conditions required.[106] The Government of Luxembourg had to make sure that Italian workers were granted the same work conditions that applied to national workers[107] and that they were given proper housing and food in compliance with their eating habits.[108]

Like Germany, Luxembourg also had a preference for temporary immigration. In fact the Italy-Luxembourg Bilateral Agreement envisaged two kinds of contracts for

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[99] *Ibid.*
[100] Maria Luisa Caldognetto, "Per una storia dell'emigrazione dal Montefeltro al Lussemburgo: temi, problemi, prospettive", in Studi Montefeltrani, 32/2010, Pesaro, Societa' di Studi Storici per il Montefeltro, accessed June 2011, available at <http://www.cdmh.lu/resources/pdf/_base_documents/9983156792.pdf>, 506.
[101] *Ibid.*
[102] Jean-Marie Kreins, *Histoire du Luxembourg: des origines à nos jours*, (Paris: Presses Universitaires de France, 1996),104.
[103] Caldognetto, *supra* note 100, 510.
[104] Text of the Treaty can be found in Diritto Internazionale, Vol. XIII, 1959, 347.
[105] Art. 2.
[106] Art. 3.
[107] Art. 8.
[108] Art. 7.

Italian migrant workers: contract A and contract B. Contract A was the contract concerning workers hired for a limited period of time. Contract B instead was utilized for workers engaged in a permanent position. From the text of the Bilateral Agreement it is evident that preference was given to temporary workers. In fact Art. 3 stated that all the Italian workers coming to Luxembourg after the 31st of December 1956 would have been given a contract of type A whereas contract of type B could be only issued in accordance to the quotas agreed by the two contracting states.[109] In this context family reunification could surely be granted in cases in which the worker was hired with a contract classified as B, when he could prove he/she could fulfill the requirement of a proper housing. Nevertheless, despite the tendency of Luxembourg to prefer temporariness over permanence, in cases in which an Italian worker was issued with a type A contract he/she could still obtain the right to family reunification in case he/she was authorized by the Luxembourg Ministry of Justice. Finally, according to the Bilateral Treaty, the concept of family encompassed the spouse and children until eighteen years old or of any age if they were unable to work. The Luxembourg government also had to facilitate the reunion of other dependent family members who did not belong to the core family unit.[110]

3.5. What is the role of family reunification provisions in Bilateral Agreements?

Some scholars have tried to analyse the advantages and the disadvantages triggered by Bilateral Agreements on migratory waves. Among all, the very interesting article by Martin and Miller showed that, if on one side it is true that without the manpower supplied by guestworker programs the post war economy recovery could not probably have been possible, on the other side this short term benefit was diluted by long term economic problems such as dependence on foreigners for the growth, delays in the receiving countries on rationalization of industries and restructuring of the labour force, deteriorating working conditions of national low-skilled workers, social service expenses and governmental infrastructure expenditure and increasing social problems towards foreigners such as discrimination and xenophobia.[111] To this dark side of Bilateral Agreements system one should also add the often precarious working and living conditions that the guestworkers had to face. As far as the Belgian experience is

[109] Art. 2
[110] Art. 3 final notes.
[111] Philip L. Martin, Mark J. Miller, "Guestworkers: Lessons from Western Europe", *Industrial and Labor Relations Review* 33, no. 3 (1980), 327-328.

concerned for example, chronicles of the time spoke about "men worn out by silicosis, widows of miners, young people crippled from injuries suffered at work and families still housed in barracks".[112] Similar experiences were witnessed also in France and Germany.[113]

Despite the prospective of facing these precarious conditions, the signing of Bilateral Agreements increased the flux of Italian workers towards the above mentioned northern European States. As far as Belgium is concerned from 1947, in the same year in which the Bilateral Agreement between the latter and Italy was signed, the Italian population started to grow and from 84,134 of 1947 it reached the peak of 200, 086 in less than fifteen years.[114] Likewise, in France the wave of Italian immigrants began in 1946, once again in the same year in which the Bilateral Agreement between the two countries was signed, and from 1950 till 1956 the 77% of all the permanent immigrant workers were Italians.[115] Finally also in Germany and Luxembourg the wave of Italian migrants increased dramatically since the years in which the Bilateral Agreements were signed. As a matter of fact in Germany, between 1955 and 1956, the Italian migrants moved from none to 15, 600 people. In Luxembourg after the signing of the Bilateral Agreement with Italy Italian migrants increased immediately to more than 2,000 people, reaching the peak of 8, 100 working permits released to Italian workers in a year.[116]

In the light of this data it seems evident how the prospect of finding a job, as opposed to being unemployed in an Italian country village, was stronger than the thought of all the difficulties that they had to face. In this backdrop, was the possibility of family reunification an incentive for the decision of the Italian workers to move abroad? In the previous paragraphs I showed how, although in different ways, in the Bilateral Agreements concluded between Italy and other northern European states special concerns towards family reunification were already conceived. When there were not written provisions, like in the Bilateral Agreement signed between Belgium and Italy, it was anyway commonly known that bringing family members was not prohibited but actually promoted by the Belgian government. Professor Boyd of the

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[112] Canovi, *supra* note 48, 4.

[113] While in France many migrant workers ended up living in bidonvilles, Germany had special workers' camps. "Long barrack-like quarters clean and characterless. Three men to a small, twelve foot by six foot room, for which they each pay 30DM a week". For a deeper account see Western Europe's migrant workers, *supra* note 56, 19.

[114] Joan Leman, *From Challenging Culture to Challenged Culture: The Sicilian Cultural Code and The Socio-Cultural Praxis of Sicilian Immigrants in Belgium*, (Leuven: Leuven University Press, 1987), 74.

[115] James R. McDonald, "Labour Immigration in France, 1946-1965", *Annals of the Association of the American Geographers* 59, no. 1 (1969), data at 119.

[116] The data on Germany and Luxembourg can be found on the report of the Commission for Social Affairs, 5th of October 1960, Doc. No. 67, 4.

University of Ottawa made a point on the role of family networks in migration movements.[117] In her work the author underlined the fact that families are migratory units.[118] This means that a family may either migrate together or, as it happens in the majority of times, individuals may be sent out with the expectation that other members of the family will be in the future allowed to be sent for. Consequently, the increment of the scale of migration in certain regions is connected to the abolition of limitations to family reunifications, which can be perceived as a deterrent from moving into another state.[119]

The states involved in the drafting of Bilateral Treaties with Italy seem to have understood and made use of this basic rationale of migration policies.[120] One could recall that Germany and Luxembourg in particular, despite generally aiming for a policy that pursued limited and temporary presence of foreign workers, nevertheless accorded generous family reunification provisions to Italian workers. Since it was neither Luxembourg nor Germany's intention to create a long term Italian workers' colony within their territory, it is reasonable to think that family reunification was probably granted in order to stimulate the Italians to move to work there[121]. In addition Belgium,

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[117] Monica Boyd, "Family and Personal Networks in International Migration: Recent Development and New Agendas", *International Migration Review* 23, no. 3 (1989), 638. In this paper the author suggests that the role of chain migration in providing information is the key factor that allows the evolution of linkages between sending and receiving countries.

[118] *Ibid.*, 643.

[119] *Ibid*., 646. Professor Boyd also highlighted how, most of the times, "friendly" family reunification norms are motivated by state opportunistic reasons. The state in fact, being in need of manpower, intentionally removes the psychological deterrent of the worker of not being able to enjoy the company of his relatives in the new state. Therefore the choice of the migrant cannot ultimately be considered totally free, as it is highly conditioned and dependent on the regulations and the objectives that are set by the states. See also Rinus Penninx, "International Migration in Western Europe Since 1973: Developments, Mechanism and Controls", *International Migration Review* 20, no. 4 (1986), 961. In this article the author distinguishes different policy instruments to stimulate migration: recruitment and admission of workers, stimulating voluntary return based on premia, admission of dependants (family reunification) and prolongation of legal residence for workers and dependants. On how countries can use family reunification according to their purposes see W.A. Dumon, "Family Migration and Family Reunion", *International Migration* 14, no. 1-2 (1976), 61. According to the author, receiving countries can take quite different stands towards family reunification, swinging from rather strict to rather liberal family reunification policies in accordance to their necessities. This differentiation of policies is due to several factors. For instance, countries defining themselves as countries of immigration tend to have a favorable attitude towards families accompanying the migrant worker whereas states not defining themselves as countries of immigration generally set more strict conditions. Moreover, countries defining migration of labour force as multifunctional, such as fulfilling demographical next to economic roles, develop higher standards of family migration and family reunification than countries that do not. Finally the author underlines that some external factors may influence to a certain extent the adoption of family reunification policies within Bilateral Agreements. For example, differentiations can be made according to the nationality of immigrants coming from the sending country in cases in which the latter already had a privileged relationship with the receiving country.

[120] Boyd, *supra* note 117, 644.

[121] See Castles, *supra* note 40, 769. One could be surprised to find provisions on family reunification rights in this bilateral treaty, especially if one considers the fact that, at that time, Germany was promoting temporary working policies. As a matter of fact Germany generally embarked a policy against

despite not inserting any family reunification provision in the Bilateral Treaty with Italy, was very keen to advertise in every Italian *piazza* the right of workers to bring their families with them. The fact that no provisions on family reunification were officially included within the text of the agreement seems to indicate that there was no intention to preserve the right of the family to be united but more the idea to create an incentive for the Italian workers to migrate.[122] Finally, one might think also about France whose main concern, as seen, clearly consisted in sorting out its demographic problems and lack of manpower. In this light, it seems that the generous family reunification provisions contained in the Bilateral Agreement with Italy were likely inserted in order to increase the population and create an incentive for the Italian workers to decide to move there.[123]

In the light of this reading one can reasonably appreciate the influence of family reunification in the choice to migrate for many Italians and how, since the origins of Bilateral Agreements, family residence rights seem not to have been conceived as human rights but as simple incentives in order to encourage –or to avoid obstacles for- the Italian workers to move.

4. Rationale behind EEC family reunification provisions and approach towards third country nationals.

In the previous part of this chapter it was suggested that residence rights to family members seem to have been guaranteed in order to stimulate the decision of the Italian workers to move towards northern European states. The necessity of enhancing the decisions of the Italian workers to move abroad as much as possible was the result of the high Italian unemployment rate and the lack of manpower of northern European states, both consequences of World War II. Nearly ten years from the signing of the first Bilateral Agreements with Belgium, the social and economic conditions of Italy and of northern Europe were not drastically different. As a matter of fact, at the time of the

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family rights of migrant workers and this attitude was not changed even in the German Alien Law 1965, that made no reference to family reunification whatsoever (on this point see John, supra note 49, 6). This apparent contradiction can be explained in the light of the historical background. Germany needed to hire as many Italian workers as possible to keep pace with its growing economy. Among the various incentives that were granted to Italian workers to convince them to move to Germany, family reunification might have been considered one of them. This approach allowed Germany, on one side, to maintain strong trade connections with Italy and, on the other, to fill the lack of national labour in the economic productivity. As a result to this policy, by the end of July 1960 the number of workers in the Federal Republic of Germany amounted 280.000, of which 45% were Italians. On this point see Hartmut Esser, and Hermann Korte, *supra* note 76, 170.

[122] See part 3.1.

[123] See part 3.2.

signature of the Treaty of Rome, the unemployment rate of Italy was still quite high while the other northern founding father states still suffered of a high shortage of manpower. As the Parliamentary Committee for the Social Affairs reported in 1960: "Italy is the only country that still has at his disposal sufficient reserve of labor force not only to avoid the danger of internal penury but also enough to satisfy the demand of other states."[124] In this similar historical background, considering in particular the protagonist role played by Italy both in the Bilateral Treaty Era and in the negotiation and drafting of the Common Market project, seems reasonable to suggest that the family members residence rights provisions contained in the EU free movement legislation, like the provisions contained in the Bilateral Treaties that have been analysed, have strong historical roots in the post World War II backdrop and in the necessity of pushing Italian workers to migrate towards states characterized by a lack of manpower.

The idea that family reunification provisions were inserted in order to create an incentive or, in the language to which we are more used to, remove all the obstacles, for the workers to move is evident in particular from the way in which they were drafted. Indeed, the more open the provisions are, the less the obstacles for the sponsor to move abroad will be. The openness of these provisions can be easily noted in their approach towards EU sponsor's relatives. In Council Regulation 15/1961/EEC[125], at Art. 11(1), it is stated that the spouse and descendants, under the age of twenty-one years old, could rejoin their EU national worker relative who was regularly employed in another Member State. Art. 11(2) stated also that every host Member State had to "facilitate" the entrance of "other" family members who do not belong to the core family household but, nevertheless, were totally or partially dependent on the worker and lived under the same roof in the Member State of origin. The same provision could be found in Council Regulation 38/1964/EEC at Art. 17 and in Council Regulation 1612/1968/EEC at Art. 10(1) which, in addition, added a new category of family members who were entitled to

[124] Commission for Social Affairs, *supra* note 116, 5.

[125] As mentioned in the introduction, the first provisions on family residence rights can be found in this regulation. Family provisions were encompassed in Title II, named "Workers' Family".
It is important to note that, for the purpose of this thesis, I will particularly focus
on the ancillary relationship between EU worker/citizen right of free movement and family members' right to reside in the host Member State. To this extent the following analysis is particularly focused on the secondary law provisions that, throughout the years, granted the right of residence to family members of the EU sponsor who decided to exercise his/her right to move. However, it is worth noting that the free movement legislation encompassed other provisions that are more related to the status of family members once they are admitted to the host Member State and to the conditions in which such admittance is allowed. For a clear explanation norms and of all the relevant cases see Steve Peers, "Family Reunion and Community Law", in *Europe's Area of Freedom Security and Justice,* ed. Neil Walker, (Oxford: Oxford University Press, 2004).

join the EEC relative. Indeed, Art. 10(1) provided that the spouse, the descendants who are under the age of 21 years or dependants and the dependant relatives in the ascending line of the worker and his spouse had the right "to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State".[126]

Another interesting aspect that suggests the capacity of family reunification provisions to create incentives (or remove obstacles) for the workers to move is the openness of these provisions to third country national family members. It was initially Regulation 38/1964/EEC that, at Art. 17, specified that the spouse, dependants under

[126] With regard to facilitation of other family members to reunify with the EU sponsor, Art. 10(2) Council Regulation 1612/1968/EEC mirrored exactly Art. 11(2) Regulation 15/1961/EEC. This first legislation on freedom of movement was also completed by Directive 1968/360/EEC ([1968] OJ Sp. Ed. L 257/13), which laid down provisions on formal entry requirements for European workers and their family members, and by Regulation 1251/1970/EEC ([1970] OJ Sp. Ed. L 142/24), concerning the right to remain in the host Member State when the worker ceased to work there. The first directive did not add anything more to family reunification provisions but simply listed the requirements that the European worker and his family members had to fulfill in order to be admitted into the host Member State (Directive 1968/360/EEC, at Art. 2, stated that " Member States shall grant nationals referred to Art. 1 (nationals of a Member State), the right to leave their territory in order to take up activities as employed persons and to pursue such activities as employed person and to pursue such activities in the territory of another Member State such right shall be exercised only on a production of a valid identity card or passport. Member of the family shall enjoy the same right as national on whom they are dependent". Art. 3(2) stated that "no entry visa or equivalent document may be demanded save from the fact that members of the family are not of a Member State. Member States will accord any facilitation to the third country national family member to obtain the visa"). The second regulation did not add any new provision to the core rules on family reunification as well but simply specified the meaning of the right of residence of the EU family member in the host Member State more in detail (Regulation 1251/1970/EEC, in Art. 3(1)(2) established that "Members of a worker's family referred to in Art. 1 of this regulation who are residing with him in the territory of a Member State shall be entitled to remain there permanently if the worker has acquired the right to remain in the territory of that state in accordance with Art. 2, and to do so even after his death. If however the worker dies during his working life and before having acquired the right to remain in the territory of the state concerned, members of his family shall be entitled to remain there permanently on a condition that:-the worker on the date of decease, has resided continuously in the territory of that Member State for at least two years; - his death resulted for an accident at work or an occupational decease or; -the surviving spouse is a national of the state of residence or lost the nationality of that state by marriage to that worker"). The Treaty of Rome, when referring to free movement of workers, did not just simply mean salaried workers but also to self employed workers and service providers. It was not necessary to wait too long to see the legislative scenario completed by the parallel secondary legislation on the right of establishment and the right to provide services. Directive 1973/148/EEC (OJ 1973, L 172/14) on the abolition of restriction on movement and residence within the community for nationals of Member States with regards to establishment and provision of services, was directed to people who wish to establish themselves in another Member State in order to pursue activities as self employed persons or who wish to provide services. This Directive did not modify the provisions on family member residence rights contained in the older free movement of salaried workers legislation nor introduced new provisions, except from widening the category of the sponsors from people that were taking up a salaried position abroad to people that wished to establish themselves in another Member State as self employed or service providers. Similarly to what was stated by the secondary regulation concerning salaried workers, the host Member State had also to facilitate the admission of family members that did not belong to the previous group but that, nevertheless, were dependants of the national or of the spouse and that in the country of origin lived under the same roof (Art. 1(2). Also Directive 1975/34/EEC ([1975] OJ L 14/10) on the right of nationals of a Member State to remain in the territory of another Member State after having pursued there an activity of self employed capacity, resulted to be the equivalent of Regulation 1251/1970/EEC and did not encompass any different provisions on family reunification.

twenty-one years old and ascendants or descendants who were dependants either on the European worker or his spouse were admitted to the host Member State regardless their nationality. This was later on confirmed in Regulation 1612/1968/EEC that, at Art. 10, emphasized the equality between nationals and third country nationals by stating that "irrespective of their nationality", the spouse and their descendants had the right to install with the European worker in the Member State. Finally, also Art. 11 of the same regulation stated that the spouse of the European worker, children under twenty one years old or children who were dependant on the worker had "the right to take up an activity as an employed person throughout the territory of that same state, even if they are not nationals of any Member State".

On this point, it is worth adding that the openness of family reunification provisions towards third country nationals seems to be a hint of the broader European attitude toward immigration in the immediate years following the World War II. Initially, at the time of Bilateral Agreements, everybody not belonging to the national state was considered a foreigner by that very same state. This fact, as seen, did not prevent several northern European states from concluding migration agreements with some other states, including states from southern Europe whose workers (before they became part of the European Union) were considered foreigners like anyone else. With the adoption of the Treaty of Rome and of the secondary legislation on freedom of movement, the founding states adopted an extensive set of principles, rules and norms aiming to provide labour mobility in order to implement a robust intra migration regime. The creation of a free movement space within these countries, initially, did not change the liberal approach towards those countries that were not part of the EU at the time, and that after the signing of the Treaty of Rome can be correctly referred to as third countries.[127] Evidence of this is the fact that some of the EU founding father states also continued to sign Bilateral Agreements with states that did not belong to the Common Market at the time (and some who still do not) due to labour shortages.[128]

[127] The creation of a free movement space started to change the conception of foreigner: foreigners were not anymore those who came from any other state apart from the state of origins but those who came from outside the European Union. However, it was just with the entry into force of the Schengen Agreements in 1986 that officially controls at the internal borders were replaced by controls at the external borders. For a deeper account of the issue of European borders see Kees Groenendjik, Elspeth Guild, and Paul Minderhoud, *In Search of Europe's Borders*, (Leiden: Martinus Nijhoff, 2002).

[128] Since the labour shortage at the time of the creation of the European Communities was still high, the same European Member States kept on signing individually migratory Bilateral Agreements with countries that were not part of the Union. The first Bilateral Agreements concluded in the early fifties mainly with Italy were soon followed by a yet larger number of agreements with third countries in the sixties. For example Belgium, after the signing of the Treaty of Rome, signed in 1964 a bilateral treaty with Morocco and with Turkey, in 1969 with Tunisia and in 1970 in Algeria and Yugoslavia (On this

In conclusion, in this part it has been shown that the provisions on family reunification inserted in the secondary legislation on free movement were characterized by the aim of enhancing free movement of workers and, like the previous Bilateral Agreements, found their roots in the post World War II needs of matching the Northern Europe shortage of labour with the Italian surplus of labour. The way in which these provisions were drafted demonstrates how efforts to encourage movement of Italian workers were achieved in a concrete fashion. On a final consideration I pointed out that the willingness to extend family reunification provisions also to third country national family members can be placed in the broader context of a general relaxed approach toward foreigners characterising those years.

5. Conclusions

In this chapter I have provided the background underpinning the introduction of the first provisions on family reunification. I have shown how it seems that in the Bilateral Agreements signed by Italy and other European states family reunification

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point see Marco Martiniello, "The new migratory Europe: towards a proactive immigration policy", in *Immigration and the Transformation of Europe,* eds. Craig A. Parsons, Timothy M. Smeeding, (Cambridge: Cambridge University Press, 2006), 311. France also, in 1963 signed an agreement with Morocco, in 1964 with Portugal (which was not already part of the Union), in 1965 with Yugoslavia and in 1968 with Algeria (On this point see de Lary, *supra* note 67, 43). Finally also Germany itself, which started recruiting people quite late in comparison to the other Member States, concluded agreements with Spain and Greece in 1960 (like Portugal, they were not already part of the Union), in 1961 with Turkey, with Morocco in 1963, with Portugal in 1964, with Tunisia in 1965 and finally with Yugoslavia in 1968 (on this point see Werner, *supra* note 94, 10). It is interesting to note that openness towards third country nationals can be found in several aspects of these agreements. One aspect was the openness of family reunification processes for third country nationals. For example, in the Bilateral Agreements between Belgium and Morocco and Belgium and Turkey Art. 13 and Art.11 respectively granted the right of family reunification to the Moroccans and Turkish workers at the condition of being able to find appropriate housing. The Belgian government was even meant to help those migrants to find an appropriate house for workers and their families. The same thing occurred in relation to Germany and Turkey. By 1974, there were one million of Turkish people in West Germany: 60% workers, 20% children and 20% non- working spouses and other dependants (see Ozlem L. Sari, "Migration and Development; the Case of Turkish Migration in Germany", accessed 1 October 2013, available at <http://www.spaef.com/file.php?id=681>). Another aspect is the length of the working permits issued. As far as France was concerned, at the time of the bilateral agreements it was possible to get three years work permit after just one year of employment (see de Lary, *supra* note 67, 44). For the sake of completeness, in order to show the original more liberal attitude of Europe toward immigration, it is worth pointing out that the European post World War II period was also characterized by huge immigration waves coming from ex colonies. In particular, Algerians in France, West Indians in Great Britain and Indonesians in the Netherlands came in large numbers over the fifties whereas Surinamese in the Netherlands and Pakistani and Indians in the United Kingdom reached their peak in sixties and seventies. Within the vast literature on this issue see in particular Leo Lucassen, David Feldman, and Jochen Oltmer, *Paths of Integration: Migrants in Western Europe (1880-2004)*, (Amsterdam: Amsterdam University Press, 2006); Ulbe Bosma, Jan Lucassen, and Gert Oostindie, *Postcolonial Migrants and Identity Politics: Europe, Russia, Japan and the United States in Comparison*, vol. 18, (New York: Berghahan Books, 2012); Klaus Bade, *Migration in European History*, (Oxford: Blackwell Publishing, 2002); Anthony M. Messina, *The Logics and the Politics of Post-WWII Migration to Western Europe*, (Cambridge: Cambridge University Press, 2007).

introduced in order to encourage Italian workers to move towards the receiving states. Likewise, the first EU provisions on family reunification seem to fulfill the same aim. Finally, I underlined how the first years of the post World War II immigration context were characterized by openness towards migrants and third country nationals more generally.

In the next chapter I will proceed to present further relevant historical developments of Europe from the mid seventies until now. I will point out that after the oil crisis the approach towards immigration changed drastically. Member States moved from a favorable approach toward third country national immigration to a strict one and rapidly begun to seal their borders. Simultaneously, the EU continued to develop liberal policies for its members. On one side, the Union continued enhancing free movement by extending this right from pure workers also to EU citizens, despite them not being involved in a working activity. On the other side, the EU started to contemplate the opportunity of introducing the concept of EU citizenship to the extent that from some embryonic proposals already in 1992 the idea of EU citizenship was introduced in the Treaty of Maastricht. Far from being simply an empty concept, soon the Court started to interpret it as a source of self-stemming rights. Underlying the historical changes occurred from World War II till today, it is crucial to understand the challenges faced lately by the Court when dealing with the issue of granting family residence rights to third country national EU family members.

Chapter 2: From the oil crisis till today

1. Introduction

In the previous chapter I looked at the origins of the provisions granting residence rights to family members of EU citizens in free movement legislation. I suggested that family residence rights were drafted as ancillary rights to the right of free movement because of the need to create incentives for Italian workers to move towards the other Member States, which were experiencing a lack of manpower.

In this chapter I will continue the analysis of the historical background from the seventies till our days. I will show that, from the middle of the seventies, a significant change occurred in terms of the way migrants were perceived in Europe. At the time of the oil crisis available job positions were drastically reduced, and European States began to strengthen their borders and to look at immigrants as potential enemies. European States started to endorse a defensive attitude toward foreigners, which first concretely took the shape of stricter national immigration legislation, both on legal and illegal immigrants and then, for those states that were already part of the European Union, of stricter EU measures on border controls against the citizens of non Member States: the third country nationals. This was the beginning of a tougher immigration approach that, although for different circumstances from the initial recession of the seventies, has lasted over the years and characterized many immigration measures adopted by the EU. Nevertheless, despite a change of need and in attitude toward third country nationals, the EU continued to endorse a generous approach toward its own workers and citizens. On one side, the European Union continued to enhance the right of free movement of workers by extending it also to people that were not engaged in a working activity such as students, pensioners and, finally, to the entire category of EU citizens. On the other side, since the seventies, scholars started to hint to the introduction of the idea of EU citizenship that, after long negotiations, entered into force with the Maastricht Treaty. Over time, this new concept triggered the vibrant activity of the CJEU, which started to interpret it as a source of self-stemming rights, including residence family rights of third country nationals.

In this chapter, through the explanation of the historical events in the way they occurred, it is my intention to show how the concerns towards third country nationals grew in parallel to the development of the right of free movement and of the concept of EU citizenship. This clarification will be particularly useful when, in the next two

chapters, I will show how the decisions of the Court on the issue of family reunification between EU citizens and third country nationals can be better understood if read at the interplay between, on one side, concerns over third country nationals and, on the other side, protection of the right of free movement or of the self stemming right of residence deriving from the concept of EU citizenship itself.

This chapter is divided in five parts. After this brief introduction part 2 will focus on the approach of the Member States on third country nationals and on the process of strengthening of borders initiated after the oil crisis. Part 3 will be dedicated to the development of free movement and its extension also to EU citizens. Part 4 will focus instead on the concept of EU citizenship conceived as a source of self-stemming rights. Finally part 5 will offer some conclusions.

2. Strengthening of borders against third country nationals.

As mentioned in the previous chapter, the economic expansion of Western Europe throughout the fifties was remarkable. This led to an enormous increase of migration.[1] Such migration was seen as short-term migration, capable of satisfying the state's immediate labour needs without long-term consequences.[2] However in the seventies things started to change. It was in 1973-1974 when the first oil crisis struck the economies of the world and Europe. This crisis particularly affected the labour market. Almost overnight oil had become scarce and very expensive.[3] Naturally, companies and states started to reduce their costs with capital and jobs transferred to parts of the world where it was cheaper to invest. This particularly affected the once

[1] For the sake of completeness it is worth pointing out that, although in the previous chapter only labour immigration coming from the southern part of Europe was mainly mentioned, the European post World War II period was characterized by huge immigration waves coming from ex colonies. In particular, Algerians in France, West Indians in Great Britain and Indonesians in the Netherlands came in large numbers over the fifties whereas Surinamese in the Netherlands and Pakistani and Indians in the United Kingdom reached their peak in sixties and seventies. Within the vast literature on this issue see in particular Leo Lucassen, David Feldman, and Jochen Oltmer, *Paths of Integration: Migrants in Western Europe (1880-2004)*, (Amsterdam: Amsterdam University Press, 2006); Ulbe Bosma, Jan Lucassen, and Gert Oostindie, *Postcolonial Migrants and Identity Politics: Europe, Russia, Japan and the United States in Comparison*, vol. 18, (New York: Berghahan Books, 2012); Klaus Bade, *Migration in European History*, (Oxford: Blackwell Publishing, 2002); Anthony M. Messina, *The Logics and the Politics of Post-WWII Migration to Western Europe*, (Cambridge: Cambridge University Press, 2007).

[2] John Handoll, *Free movement of persons in the EU*, (New York: Wiley, 1995), 351.

[3] The price of a barrel of oil which had remained 2 dollars or less for 15 years up to the end of 1971 and had only risen gradually for the remaining two years, quadrupled within the span of three months. The UK monthly average crude oil bill, which was £78mn in 1973 rose to £308mn in the second quarter of 1974 representing nearly one-quarter of the monthly import bill compared with less than one-tenth a year previously. For an economic explanation of the crisis see Alan Peacock, *The oil crisis and the professional economist*, for Sir Ellis Hunter memorial lectures, lecture delivered at the University of York on 11 December 1974, (York: University of York publication, 1975), 2.

prosperous coal and heavy industries that, due to the new investment policies and increased costs, started to face a situation of almost unstoppable job losses.[4]

Due to the changes in the labour market, since migration was already conceived as a "tap" to turn on and off according to the labour market's needs,[5] the receiving countries started to push migrants to return their states of origin[6] and started to limit the number of legal migrant workers who were granted access into the territory of the state. The tight controls on migration were accompanied by structural state actions to make sure only national workers supplied the demand for labour.[7]

Despite these restrictions, immigration did not end. On one side, with regard to legal immigration, although a stop was put on economic immigration, foreigners that established themselves in the host country pursued other ways to gain residence. For example, around the seventies European national state legislation started to adopt measures to guarantee family reunification at national level. Consequentially, it was more difficult for states to stop the old guestworkers to rejoin with their families in the guest state.[8] Likewise, the imposed limitations on economic migration could not restrict the right of asylum.[9] On the other side, with regard to illegal immigration, European governments were not immediately able to enforce effective measures on illegal foreigners and, consequentially, these years became characterized by increasing

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[4] Marco Martiniello, "The new migratory Europe: towards a proactive immigration policy", in *Immigration and Transformation of Europe,* edited by Craig A. Parsons and Timothy M. Smeeding, (Cambridge: Cambridge University Press, 2006), 302-303.

[5] See Randall Hansen, "Migration to Europe since 1945: its History its Lessons", *The Political Quarterly* 74, no. s1 (2003), 31.

[6] Martiniello, *supra* note 4, 303. France and Germany raised their ban to entry to non EU workers respectively in 1974 and 1973. In 1974 the Netherlands ceased its recruitment programs. See in particular Stephen Castles, "The Guest-Worker in Western Europe – an Obituary", *International Migration Review* 20, no. 4 (1986), 761. On January 1973, the Immigration Act 1971 came into force in order to "stop large scale permanent migration", in particular from the Commonwealth. See John Solomos, "Racism and Anti-Racism in Great Britain: Historical Trends and Contemporary Issues", in *Racism and Anti-Racism in World Perspective,* ed. Benjamin P. Bowser, (Thousand Oaks: Sage Publications, 1995), 169.

[7] Handoll, *supra* note 2, 351.

[8] Andrew Geddes, *Immigration and European Integration: Towards a Fortress Europe?*, (Manchester: Manchester University Press, 2000), 20-21. The author describes the situation of the seventies in this way: "Migrant workers and their families began to build new lives for themselves in Europe: they bought houses, their children attended school, opened businesses and similar. In short, migrants and their descendants became part of the social and cultural fabric of modern and western Europe." On this point see also Bade, *supra* note 1, 232: "Special social benefits, such as childhood benefits in West Germany, led to increased immigration of children and adolescents to join parents. Consequently, from 1973 to 1975, more than 31% of all the new immigration was attributed to family reunification which in other countries developed in one of the largest immigration movement".

[9] Martiniello, *supra* note 4, 304. See also Wenceslas De Lobkowicz, "Intergovernmental Cooperation in the Field of Migration – From the Single European Act to Maastricht", in *The Third Pillar of the European Union, Cooperation in the fields of justice and home affairs,* eds. Joerg Monar, Roger Morgan, Proceedings of an International Conference organized by the College of Europe, Bruges, the Institut für Europäische Politik, Bonn, and the European University Institute, Florence, Conférences de Bruges - Bruges Conferences - Volume 5, Bruxelles, (1994), 105.

irregular employment situations.[10] Moreover, states were not even able to control the entry of asylum seekers with the consequence that the right of asylum was increasingly abused.[11]

The economic emergency[12] and the realization of the incapacity of not being able to tackle the immigration problem triggered the stigmatization of the figure of the immigrant. The fear of the "other" took the form of populist alarmism, dramatization and demonization of immigrants also at the level of media and political discourse.[13] Within the broader European Union context immigrants meant, for the Member States, nationals of countries that were not part of the Union or, in other words, third country nationals.[14] Aware that immigration was a common issue and that it was difficult to tackle the problem alone, the European Member States slowly started to look to each other. If after the end of the Second World War and even after the creation of the EU national migratory policies regarding third country nationals were still very much "nationally oriented",[15] the years following the oil crisis witnessed the development of a supranational level of discussion about migration. The discussion, initially, was simply focused on illegal crimes somehow connected to illegal immigration. In 1975, on the occasion of the Rome Council, the heads of each Member State decided to proceed together with regard to terrorism, equipment, public order, training, drugs, serious crime and, later on, internal security implications,[16] by setting up a special working group called Trevi.[17]

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[10] Bade, *supra* note 1, 250. The author underlines how one of the main consequences of illegal immigration and irregular employment was the expansion of *bidonvilles* at the outskirts of major cities in the sixties and seventies. In 1970, there were around 25, 000 residing in *bidonvilles* Marseilles and Paris.

[11] De Lobkowicz, *supra* note 9, 105.

[12] Klaus F. Zimmerman, "Tackling the European Migration Problem", *The Journal of Economic Perspectives* 9, no. 2 (1995), 45. The author clearly states that the Fortress Europe policy finds its roots in the 1973 economic recession (at 45).

[13] Bade, *supra* note 1, 280. See also Catherine Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law,* (Cambridge: Cambridge University Press, 2008). In this book the author underlines how globalization had an impact on the concept of migration to the extent that if at the outset of the twentieth century migration was in the process of becoming legalized, with the development of a globalized world, the illegalization of migration became the new trend.

[14] The creation of a free movement space started to change the conception of foreigner: foreigners were not anymore those who came from any other state apart from the state of origins but those who came from outside the European Union. For a deeper account of the issue of European borders see Kees Groenendjik, Elspeth Guild, and Paul Minderhoud, *In Search of Europe's Borders*, (Leiden: Martinus Nijhoff, 2002). It has been argued that these days we cannot find anymore a clear line between third country national and citizens in the EU. This is due to practices of semiinclusion, expression of security relationship between individuals, community and states. On this point see in particular Elspeth Guild, *Security and Migration in the 21st Century*, (Cambridge: Polity Press, 2009), 190.

[15] Martiniello, *supra* note 4, 312-313.

[16] Geddess, supra note 8, 74-75. On the structure and development of Trevi see also Valsamis Mitsilegas, Jorg Monar, Wyn Rees, *The European Union and Internal Security: Guardian of the People?*, (Basingstoke: Palgrave Mcmillan, 2006), 23-27. Initially Trevi consisted of only two working groups,

However, during the eighties a new and stronger wave of discriminatory and xenophobic phenomena began to predominate. Differently from the seventies when there was still hope that immigration was just a temporary phenomenon, in this period European states finally realized the fact the ethnic minorities settled.[18] The formation of racially mixed societies "prompted many locals, encouraged by political agitation and support by the media, to set in motion processes of negative integration and defensive crowding together at the expense of strangers".[19]In the light of these concerns, Member States decided for the first time to act together both on illegal and legal immigration.

With regard to illegal immigration, in 1986,[20] all the EU Member States of the time decided to create an Ad Hoc Group on Immigration. The Group practically had to monitor "the improvement of checks at the external frontier community, the value of internal checks, the role of coordination and possible harmonization of Member States visa policies in improving controls, the role and effectiveness of controls at internal frontiers in the fight against terrorism, drug, crime and illegal migration, exchange of information about the operation of spot-check systems, close cooperation to avoid the abuse of passports, measures to achieve a common policy in order to eliminate asylum abuse in consultation with the Council of Europe and UN High Commission of Refugees and examination of ways in which Community travel could be improved without adding to the terrorist threat, illegal immigration, drug trafficking and other crime."[21]

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comprising of senior officials from national ministries, senior police officers and intelligence personnel. The first group was called TREVI I and dealt with international terrorism. The second group was called TREVI II and dealt with general public order issues and the organization and training of police forces. On June 1985 the Trevi ministers of Justice and Home Affairs decided to establish a third working group, TREVI III, on drugs and organized crime. Trevi III focused on the methods of fighting all forms of international and organized crime, with particular emphasis on drugs and arm trafficking and links to international terrorism. The creation of Trevi III was a major step towards wider police cooperation between EC Member states. Its existence and work prepared the ground for the establishment of Europol in 1990.

[17] Trevi, whose name was taken from the famous fountain of Rome, operated within the European Policy Cooperation stream of action. It ceased to exist in 1992, when the Maastricht Treaty integrated it into the Justice and Home Affairs Pillar.

[18] In Germany the matter at hand was the shift from work stays to immigration situations; in Britain instead it was about the emergence of ethnic minority populations from colonial and post-colonial immigration; in France both trends occurred at the same time.

[19] Bade, *supra* note 1, 279.

[20] The Ad Hoc Group on Immigration was the fruit of the London meeting of 1986. It was an intergovernmental structure of a particular type because besides the twelve Member States, also the Community institutions belonged to it. For a more detailed description see De Lobkowicz, *supra* note 9, 107-108.

[21] Elspeth Guild, and Jan Niessen*, The developing immigration and asylum policies of the European Union : adopted conventions, resolutions, recommendations, decisions and conclusions*, (The Hague: Kluwer Law International, 1996), 32.

In relation to legal immigration, on the 14th of June 1985, the first Schengen Agreement was signed by France, Germany and the three Benelux countries.[22] Its ultimate goal was to dismantle the internal European border controls in order to make internal borders open at any point without checks on the person being carried out. However, if on one side these provisions were particularly favorable to EU workers or citizens wanting to cross the internal borders, on the other these provisions were imbued by a strong security rationale, of which third country nationals were the main targets. For example, the Convention clarified that the right to freedom of movement within the Schengen area was granted just to some specific and limited categories of third country nationals such as those who held a uniform Schengen visa, those who were residents of third countries and not subject to a visa requirement and those who were holding valid resident permits issued by one of the contracting parties.[23] If they did not meet these requirements or if they were considered a threat for the public order they had to be refused entry unless a state considers necessary to derogate on humanitarian grounds.[24] The Schengen Convention also introduced the principle of removal of third country nationals not fulfilling the conditions for a short stay applicable within the Schengen territory[25]and, finally, it created the Schengen Information System (SIS), which included data related to aliens who were reported for having been refused entry.[26]

The Member States' concerns over immigration reignited once again at the end of the eighties.[27] In 1989 Europe was struck by the fall of the Communist states. This fact gave rise to new and specific fears of mass immigration from Eastern Europe and the former Soviet Union.[28] Statistics mooted at the beginning of the nineties pictured a situation of nearly twenty million refugees fleeing from war and more than a hundred

[22] The Schengen Agreement was originally signed by 6 member states in 1985. This agreement however was not crowned with immediate success. Schengen countries had to struggle for five years before they were able to agree on the Convention Implementing the Schengen Agreement (CISA) which was only signed on the 19th of June 1990. The Schengen Agreement was largely programmatic. CISA was instead drawn up for the practical functioning of Schengen.
[23] Art. 19-24 of the Schengen Convention. Georgia Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, (Leiden: Martinus Nijhoff Publishers, 2006), 113.
[24] Art. 5(2).
[25] Art. 23 of the Schengen Convention. See Papagianni, *supra* note 23, 117.
[26] From Art. 92 onwards of the Schengen Convention. The SIS became fully operational since 1995. The system is composed of a central database, located in Strasbourg, to which all the other national SIS databases are linked. According to Art. 96 of the Schengen Convention, the decision of SIS for issuing an alert against a third country national had to find its grounds on either a threat of public policy or national security. In 2006 works started to begin for the creation of the second generation of Schengen Information System (SIS II). This new system has been operational since April 2013.
[27] On the politicization of immigration in this period see Anastassia Tsoukala, "Looking at migrants as enemies", in *Controlling frontiers: free movement into and within Europe,* eds. Didier Bigo, and Elspeth Guild, (Aldershot: Ashgate Publishing, 2005).
[28] Handoll, *supra* note 2, 352.

million poor legal migrants trying to escape extreme poverty.[29] These new fears for the future, once again, called for a renewed control of the borders, which implied also a more rigorous asylum policy to avoid giving refugee status to purely economic migrants, in order to prevent illegal entry of people coming from Eastern Europe.[30] Having realized that an overall migration strategy was lacking, with the introduction of Maastricht Treaty,[31] Member States started collaborating in a "formal intergovermentalism"[32]. With the advent of Maastricht, the Member States introduced for the first time migration within the treaty's text as a European independent subject. Maastricht did not just provide the legal grounds to develop the legislation connected to illegal immigration such as border control and unauthorized migration[33] but also in the area of legal migration.[34]Indeed the measures adopted in this area, despite being rather limited and not legally binding, had a strong restrictive character.[35] For example the Resolution adopted on family reunification of third country nationals used a restrictive definition of family.[36] Moreover, one year later, the resolutions regarding the admission of employed and self-employed workers set again a heavy series of limitations granting extremely limited leeway for admission.[37]

[29] Mitsilegas, *supra* note 16, 25-26.
[30] Handoll, *supra* note 2, 352.
[31] On the negotiations and drafting of the Maastricht Treaty see Guild, and Niessen, *supra* note 21.
[32] See Steve Peers, "EU Justice and Home Affairs Law(non-civil)", in *The Evolution of EU law*, eds. Paul Craig, and Grainne de Burca, (Oxford: Oxford University Press, 2011), 270: "Formal, because cooperation between Member States on immigration was brought within the umbrella of the Treaty, intergovernmentalism, because the *modus operandi* of Member States based on unanimity".
[33] Mitzigelas, *supra* note 16, 32.
[34] Papagianni, *supra* note 23, 127.
[35] *Ibid.*
[36] Resolution on the harmonization of national policies on family reunification, Ad Hoc Group on Immigration, Copenhagen, 1 June 1993, SN 2828/1/93 REV 1 WG I 1497. According to Art. 2 access was granted to: the resident's spouse, the children, other than the adopted children, of the resident and his or her spouse, the children adopted by both the resident and his or her spouse while they were resident together in the third country. Text reproduced in Guild and Niessen, *supra* note 21, 251-273. See also Papagianni, *supra* note 23, 128.
[37] Council Resolution of 20 June 1994 on limitation on admission of third country nationals to the territory of the Member States for employment, OJ C 274/3, 19.9.1996 and Council Resolution of 30 November 1994 relating to the limitations on the admission of third country nationals to the territory of the Member States for the purpose of pursuing activities of self employed persons, OJ C 274/7, 19.9.1996. For instance, the Resolution of the 20 June 1994 stated at C(i) "Member States will consider requests for admission […] only where vacancies in a Member State cannot be filled by national and Community manpower or by non –Community manpower lawfully resident on a permanent basis in that Member State[…]. Such an offer is named to a named worker or a named employee […]. An employer offers named workers vacancies only where the competent authority consider, if appropriate, that the grounds adduced by the employer, including the nature of the qualifications required, are justified in view of a temporary manpower shortage on the national or Community labour market […]". On this point see again Papagianni, *supra* note 23, 128.

The last decade was characterized by the gradual communitarization of the areas of immigration and asylum starting from the Amsterdam Treaty.[38] Four days after the collapse of the Twin Towers in 2001 the European Commission in a communication to the European Parliament stressed the necessity of fighting terrorism by tackling irregular immigration and stated that "criminal activities, which are regularly connected with irregular migration flows, are a major concern in all Member State". [39] Hence, terrorism started to be perceived as a threat that had surely to be combated through tackling illegal immigration.[40] With regards to illegal immigration the Member States, within the Council, worked hard for the creation of Frontex, an EU agency created to help the Member States to manage external borders, and VIS, a database containing information for all the Visa applicants.[41] The concern towards new immigrants touched also field of asylum, on which the directives adopted (minimum standards for asylum seekers,[42] procedure for granting and withdrawing a refugee status,[43] for the qualification of the status of refugee[44] and for temporary protection to refugees in a crisis situation[45]) were strongly criticized for their low standards of protection.[46] The suspicion towards third country nationals did not leave legal migration untouched. The first period after Amsterdam was characterized by legislation that set relatively low standards of protection for third country nationals such as the Family Reunification

[38] For an explanation of how Maastricht developed into the Amsterdam Treaty see Geddes, *supra* note 8, 113 *et seq*.
[39] European Commission, On a Common Policy on Illegal Immigration, Communication from the Commission and the European Parliament, COM(2001)672 final, Brussels, 15.11.2001, 10. Soon after, at the Seville European Council, Member States called for an urgent action by the whole international community. See European Council 2002, Conclusions of the Presidency, Seville 21–22 June, 35.
[40] Gemma Pinyol-Jimenez, "The migration security nexus in short: instruments and actions in the European Union", *Amsterdam Law Forum* 4, no. 1 (2012), 41.
[41] Papagianni, *supra* note 23, 281. The European Agency for the management of operational cooperation at the external borders of the Member States of the European Union, better known as Frontex, started to operate in October 2005. It was established in Warsaw. Frontex's mission was to help EU Member States implement EU rules on external border controls and to coordinate operational cooperation between Member States in the field of external border management. While it remains the task of each Member State to control its own borders, the Agency has the function to ensure that they all do so with the same high standard of efficiency. The European Union Visa Information System is a database containing information, including biometrics, on visa applications by third country nationals requiring a visa to enter the Schengen group. The system was established in June 2004 by the Council decision 2004/512/EC. VIS is organized on a regional basis, starting on 11 October 2011 with north African countries. These systems have been considered to promote coercive sanctions such as the refusal to travel, refusal of visa and asylum applications, the refusal of admission to a country at external borders, detention and extradition. For a deeper comment see Ben Hayes, "From the Schengen Information System to SIS II and the Visa Information (VIS): the proposals explained", (2004), accessed March 2013, available at http://www.statewatch.org/news/2005/may/analysis-sisII.pdf.
[42] Directive 2003/9/EEC [2003] OJ L31/18.
[43] Directive 2005/85/EEC [2005] OJ L 326/13.
[44] Directive 2004/83/EEC [2004] OJ L 304/12.
[45] Directive 2001/55/EEC [2001] OJ L 212/12.
[46] Peers, *supra* note 32, 284.

Directive, that was the subject of a challenge by the European Parliament because its standards fell under the minimum level of human rights protection, and the Long Term Resident Directive, which omitted refugees and persons with subsidiary protection from its scope.[47]

Finally, the more recent years have also been characterized by the debate over immigration. As far as illegal immigration is concerned new stringent measures against third country national unlawful immigration were applied such as Directive 2008/115/EC[48] on common standards and procedures in Member States for returning illegally staying third-country nationals, Directive 2009/52/EC[49] on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals and Directive 2011/36/EU[50] on preventing and combating the trafficking of human beings. Moreover, also on the side of legal migration, the approach towards third country nationals has been very cautious. With regard to Directive 2009/50/EC[51] on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, the initial ambitious aim of the Commission to replace the national admissions schemes has been left unsatisfied by a weak directive in which Member States still enforce significant barriers to intra-mobility.[52] Finally, with regard to Directive 2011/98/EU[53] on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State it was pointed out that the very low harmonizing effect still leaves the procedure related to immigration very much on the national level and to the discretion of the Member States.[54]

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[47] *Ibid.*, 289. See in particular footnote 140.
[48] Directive 2008/115/EEC [2008] OJ L 348/98.
[49] Directive 2009/52/EEC [2009] OJ L 168/24.
[50] Directive 2011/36/EEC [2011] OJ L 101/1.
[51] Directive 2009/50/EEC [2009] OJ L 155/17.
[52] For a literature on this Directive see Steve Peers, "EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives", *European Journal of Migration and Law* 11, no. 4 (2009); Elspeth Guild, "EU Policy on Labour Migration: A First look at the Commission's Blue Card Initiative", CEPS Policy Brief 145/2007, accessed September 2013, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334076>; Lucie Cerna, "The EU Blue Card: preferences, policies and negotiations between Member States", *Migration Studies* 1, (2013), available at http://migration.oxfordjournals.org/content/early/2013/07/26/migration.mnt010.full; Elisabeth Collett, "The Proposed European Blue Card System: Arming for the Global War on Talent?", Migration Policy Institute 7/1/2008, accessed September 2011, available at <http://www.migrationinformation.org/feature/display.cfm?ID=667>.
[53] Directive 2011/98/EU [2011] OJ L 343/1.
[54] On this point see Yves Pascouau, and Sheena McLoughlin, "EU Single Permit Directive: a small step forward in EU migration policy", European Policy Centre Policy Brief, 24/1/2012, accessed September 2013, available at <http://www.epc.eu/pub_details.php?cat_id=3&pub_id=1398>.

In light of this historical excursus it is apparent how Member States, particularly since the advent of the oil crisis, have been continually focused on protecting their borders from threat of third country nationals.[55] Moreover, the process of border strengthening did not just involve illegal migration or asylum issues but touched also the field of legal migration.

3. Enhancing free movement of people (EU nationals)

3.1. Promoting mobility by extending free movement also to non-workers

The development of the process of strengthening the EU borders was accompanied, in parallel, by the continuous pursuit of the right free movement of people.[56] The two trends are inextricably linked as "freer movement for EU citizens has brought with it tighter controls on movement by non-EU citizens […]."[57]

As seen in the previous chapter free movement was born having workers, originally in particular Italian workers, in mind. The implementing regulations for the right of free movement, for example, provided for the right to take up a job activity as an employed person.[58] For some years, since the creation of the Union till the eighties, the exercise of an "effective and genuine activity" remained the fundamental prerequisite for accessing the benefits linked to the status of a migrant worker.[59] However, soon after the introduction of the first legislation on free movement, while labour mobility between Member States and third countries increased enormously, labour mobility between European workers came to a stalemate.[60] In front of the stillness of free movement, considering also that the pre oil crisis economic growth had

[55] On this view see also Daniel Wilsher, "Economic Migration into the European Union: standing at the crossroads", *Yearbook of European Law* 21, no. 1 (2001).

[56] In this context we are talking about free movement of EU workers/citizens. However, attempts to enhance free movement of third country nationals, and therefore their integration in Europe, have recently been made over the years. On this point see in particular Sara Iglesias Sanchez, "Free Movement as a Precondition for Integration for Third Country Nationals in the EU", in *Illiberal liberal states: immigration, citizenship, and integration in the EU,* eds. Elspeth Guild, Kees Groenendijk, and Sergio Carrera, (Farnham: Ashgate Publishing, 2009).

[57] Geddes, *supra* note 8, 32, 46. It is interesting to note that Art. 48(1) of the Treaty of Rome made no reference to the fact that free movement was to be exercised only by the nationals of Member States. On this point see Anne P. Van Der Mei, *Free Movement of Persons Within the European Community: Cross-Border Access to Public Benefits*, (Oxford: Hart Publishing, 2003), 28.

[58] *Ibid.*, 48. Until Council Regulation 1612/1968/EEC, Member States were still able to control entry, residence and access to employment. After this regulation they were no longer capable to do so because their competence in this area was ceded at supranational level.

[59] Geddes, *supra* note 8, 32. See *Levin* (Case 53/8 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035) and *Lebon* (Case 316/85 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 281).

[60] Van Der Mei, *supra* note 57, 26.

largely solved the Italian unemployment problem,[61] the EU started to refer to free movement of workers not as a macroeconomic need but more as an individualistic right. Indeed, shortly after the adoption of Regulation 1612/1968/EEC, Lionello Levi Sandri referred to free movement as an embryonic form of European citizenship.[62]

From the early CJEU case law it is evident how the Court immediately started to interpret free movement provisions broadly in order to promote mobility. This originally consisted of extending the conditions of free movement outside the original category of workers and provide total equality among European nationals coming from different Member States. The Court in particular focused on the definition of the term "worker" and insisted that this was a matter for EU law and not national law because if the definition was a matter relegated to national law competence "it would therefore be possible for each Member State to modify the meaning of the concept of migrant worker and to eliminate at will the protection afforded by the Treaty to certain categories of persons".[63] To this extent, immediately, it highlighted that part time workers should be covered by free movement rules too and that it is not relevant if workers have to supplement their income from private sources[64] or public funds from the Member State.[65] On the same matter, some time later, the Court made a step forward and defined as genuine and effective work the essential feature of an employment relationship according to which "for a certain period of time a person performs services for and under the direction of another person in return of which he receives remuneration",[66] regardless the amount of pay or even when payment is not existent at all.[67] Furthermore the Court pointed out that, despite the silence of Art. 45 TFEU, also the job seekers can benefit from free movement laws,[68] showing clearly its purposive

[61] *Ibid*.
[62] Bulletin of the European Communities, vol. 1(11), 1968, at 6.
[63] Case 75/63 *Hoeckstra v. Bestuur der BedriJfsvereninging voor Detailhandel en Ambachten* [1964] ECR 177, 184.
[64] Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035. Although the Court in Levin made clear that the reason for undertaking work was not to be relevant to his genuineness, in other cases the Court examined the purpose of the work performed. To this end, in the *Bettray* case (Case 344/87 *Bettray v. Staatssecretaris van Justitie* [1989] ECR 1612) the fact that the only purpose of the job was to rehabilitate the person rather than a genuine economic need triggered a ruling against the applicant. In *Brown* (Case 197/86 *Brown v. Secretary of State for Scotland* [1988] ECR 3205) the fact that the applicant was undertaking a job in order to pay for his university courses in Cambridge did not entitle him to all the same social advantages as a fully-fledged worker under EU law.
[65] Case 139/85 *Kempf v. Staatsecretaris vaan Justitie* [1986] ECR 1741.
[66] Case 66/85 *Lawrie-Blum v. land Baden Wurttemberg* [1986] ECR 2121.
[67] Case 196/87 *Steymann v. Staatsecretaris van Justitie* [1988] ECR 6159.
[68] Case 48/75 *Procureur du Roi v Royer* [1976] ECR 497, para. 31; Case 292/89 *R. v. Immigration Appeal Tribunal, ex p. Antonissen*, [1991], ECR I-745.

approach in suggesting a wider scope for Art. 45 that its words could actually convey.[69] Finally, the Court interpreted the secondary free movement legislation in a broad manner, in particular with regard to equality. Art. 7(2) of Regulation 1612/68/EEC provided for the same social and tax advantages for nationals and non-nationals, pushed for equal access to vocational training and declared void any discriminatory provisions of collective or individual employments agreements. Initially, the Court read this article limitedly and ruled that it concerned just benefits concerning with employment.[70] Shortly after however, the Court departed from this interpretation and stated that Art. 7(2) should be read to include also social and tax advantages, to apply not just to workers but also to surviving family members of a deceased worker or to any family member that provides an indirect advantage to the worker.[71]

By the end of the eighties, in the light of the steps made by the CJEU's jurisprudence, the European legislator was ready to act again. In 1989, the Commission withdrew its proposal of a Directive on the right of residence of all nationals of a Member State on the territory of another Member State[72] and instead of a single directive extending the right of residence to all citizens the Commission[73] proposed three "Residency Directives" (90/364/EEC[74], 90/365/EEC[75], 90/366/EEC[76]) that opened the right of movement and residence also to students, retired persons and more generally to all the economically inactive persons.[77] The Residency Directives extended the scope of residence rights to non-economically active migrants and their third country national family members, provided they were covered by sickness insurance

[69] Paul Craig, Grainne De Burca, *EU Law: Text, Cases and Materials*, (Oxford: Oxford University Press, 2011), 727.
[70] Case 76/72 *Michel S. v. Fonds National de Reclassement Handicapes* [1973] ECR 457.
[71] Case 32/75 *Cristini v. SNCF* [1975] ECR 1085, Case 63/76 *Inzirillo v. Caisse d'Allocations Familiales de l'Arrondissement de Lyon* [1976] ECR I-2957; Case 94/84 *ONE v. Deak* [1985] ECR I-1873; Case 152/82 *Forcheri v. Belgium* [1983] ECR I-2323; Case 65/81 *Reina v. Landeskreditbank Baden-Wurttenberg* [1982] ECR 33.
[72] COM (79) 215 final.
[73] The Commission decided to change its approach given the fact that multiple amendments had made its proposal more restrictive than existing policies. For this reason the Commission realized that the draft Directive was no longer appropriate to enable the Council to reach positive conclusions on that issue.
[74] OJ 1990, L 180/26; concerning a general right of residence.
[75] OJ 1990, L 180/28; concerning a right of residence for pensioners.
[76] OJ 1990, L 180/26; concerning a right of residence for students; after annulment by the CJEU (in Case 295/90 *European Parliament v. Council* [1992] ECR I-4193) replaced by Directive 93/96/EEC, OJ 1993, L 317/59. For a summary of the case see Siofra O'Leary, "Case note on Case C-295/90 European parliament v. Council, Judgment of 7th of July 1992", *Common Market Law Review* 30, no. 3 (1993).
[77] The Commission previously proposed to introduce a generalized right of residence into EU law already in 1979. The idea of a single directive granting a general right of residence to community nationals and not just to workers was strongly supported by Adonnino (see first report of the Commission on the Citizen Europe).

and had sufficient resources not to become a burden on the host Member State's welfare system.

The introduction of the Residency Directives and of the concept of EU citizenship in Maastricht,[78] gave the Court a source of inspiration in order to pursue the objective of creating an area of free movement that all the citizens, despite of being involved in a job activity, should be able to enjoy. In order to develop a real right to free movement of people, the Court argued for the creation of substantive equality social treatment of European nationals neither economically active nor economically self-sufficient with the nationals of the host Member State. One of the first leading cases in this field was *Martinez Sala*[79] which concerned a Spanish national, resident in Germany, who applied for a child raising allowance under national law despite not being a worker and being in receipt of social assistance. The Court ruled that, as long as an EU national is legally resident in another Member State, he/she deserves equal treatment with the other Member States' nationals on a combined reading of Art. 18 and 20(2) TFEU. A similar reasoning was deployed also in *Grzelczyk*,[80] where a French national studying in Belgium was granted the right to apply for a social assistance scheme as all the other Belgian students owing to the application of Directive 93/96/EEC and Art. 18 TFEU.

Little by little, the Court engaged more and more with the concept of free movement of European citizens not occupied in an economic activity. In the *Baumbast* case,[81] the CJEU relied on the weight of the concept of Union citizenship, and ruled that "although before the Treaty on European Union entered into force the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty […] it is none the less the case that, since then, Union Citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States".[82] In the given case therefore Mr. Baumbast was granted the right of residing in the UK although he was not longer a worker there. Although the Court specified that the right of residence as simple citizens of the Union was not

[78] The concept of EU citizenship will be discussed later in the chapter.
[79] Case 85/96 *Maria Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691.
[80] Case 184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies – Louvain la Neuve* [2001] ECR I-6193.
[81] Case 413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I- 7091.
[82] *Ibid.*, para 81.

absolute[83], the Court also made clear that any limitations and conditions imposed on that right had to be applied in compliance with EU law and in accordance with the principle of proportionality.[84] The interpretation offered in *Baumbast* strongly diluted the link between the economic status of a worker and the right to free movement. Being a worker that took up an economic activity in another Member State was not anymore the only way to see the right of residence in another Member State recognized. In other words, the concept of the worker was still important in order to determine the scope of application of EU law but "failure to qualify as a worker did not entail anymore an immediate failure to being granted rights by Community law."[85] The same reasoning was adopted later on in *Trojani*,[86] in which a French national was allowed the right to apply for the Belgian minimex on the base of Art. 18 TFEU deriving his status as legal resident from the concept of EU citizenship alone.

The approach of the CJEU was not simply confined to some law cases but reflected broader normative aspirations. These aspirations eventually found their way.[87] In 2001 the Commission pointed out that "residence rights were becoming an integral part of the legal heritage of every citizen of the European Union and, for this reason, had to be formalized in a common corpus of legislation, irrespective of the fact that they (citizens) pursued a gainful activity or not."[88] It was therefore necessary, as it was stated in recital 3 of the preamble of the proposal, "to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as

[83] *Ibid.*, para 87: "As regards the limitations and conditions resulting from the provisions of secondary legislation, Article 1(1) of Directive 90/364/EEC provides that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence."

[84] *Ibid.*, para 91.

[85] Agustin J. Menedez, "European Citizenship after Martizez Sala and Baumbast: Has European Law Become More Human but Less Social?", in *The past and the future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, eds. Miguel P. Maduro and Loic Azoulai, (Oxford: Hart Publishing, 2010), 21. See also Dora Kostakopoulou, "European Union Citizenship: Writing the Future", *European Law Journal* 13, no. 5 (2007).

[86] Case 456/02 *Troyani v. Centre Public d'Aide Sociale de Bruxelles* [2004], ECR I-7573.

[87] On this point see Ferdinand Wollenschlager, "The judiciary, the legislature and the evolution of Union citizenship", in *The Judiciary, the Legislature and the EU Internal Market*, ed. Phil Syrpis, (Cambridge: Cambridge University Press, 2012), 302. From the same volume see also Niamh N. Shuibhne, "The Third Age of EU citizenship: Directive 2004/38/EC in the case law of the Court of Justice", 331. Both the authors in these pieces, looking at the concept of EU citizenship, try to explore the difficult relationship between legislation and judiciary, especially in terms of their institutional positions. In the first piece the author reminds us that Directive 2004/38/EC is a way to codify and develop personal free movement rights and not to limit the activity of the Court, although in some cases such as *Metock* the discrepancy between legislation and the Court becomes too evident. In the second piece instead the author shows how both the legislature and the judiciary are trying to fill gaps for the protection of EU citizenship rights.

[88] Commission Proposal on Commission Directive 2004/38/EC OJ C 270 E, 25.9.2001, 150.

well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens." In April 2004 the scattered framework of secondary law on free movement of persons, from the sixties until the Residency Directives, was consolidated into one single instrument: Directive 2004/38/EC.[89] This directive aimed to 'simplify and strengthen' Union citizens right of free movement and residence.[90] As the Economic and Social Committee itself underlined, this directive was "a step forward, as it comprehensively recognized the right of every Union citizen to move and reside freely in any Member State."[91] For the first time in the secondary legislation all the European citizens regardless of being workers or not, were entitled to move and reside within the European Union. Since 2006 all the citizens, and not just workers, with a valid identity card or passport are officially entitled to enter in the territory of another Member State up until a period of three months without any conditions or formalities other than the required identity documents.[92] European citizens are also entitled to enter and stay in another Member State for a period superior of three months if, apart from being in possession of the required identity documents, they are also workers or self-employed persons in the Member State, or have sufficient resources for themselves and their families and they are covered by a sickness insurance, or are attending their studies or a vocational training and have sufficient economical resources and are covered by a sickness insurance, or are companying EU family members of a EU citizen satisfying one of the previously listed conditions.[93] Finally, if a Union citizen has resided legally and continuously for a period of at least five years within the host Member State he/she is entitled to the right of permanent residence.[94]

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[89] Directive 2004/38/EC [2004] OJ L 158/77.
[90] Preamble of Directive 2004/38/EC, third recital.
[91] OJ 2002, C 149/46.
[92] Art. 6(1).
[93] Art. 7(1). Third country national EU family members are allowed to enter the territory of the host Member State without showing any document. Art. 5 brings Directive 2004/38/EC completely into line with the ruling of *MRAX* (Case 459/99 *Mouvement contre le racisme, l' antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECR I-6591) which will be discussed more in detail in the next chapter.
[94] Art. 16(1). Directive 2004/38/EC introduced also some novelties with regards to the previous free movement legislation. Whereas, for example, Art. 10(1) of Council Regulation 1612/1968/EEC talked about the "right of installation" of the family members of the worker "who is a national of one Member State and who is employed in the territory of another Member State", Directive 2004/38/EC abandons the old economic orientation by recognizing as beneficiaries of the Directive all the Union citizens who have exercised their right to move and reside and their family members who join and accompany them (Art. 3(1)). The group of family members allowed to reunify with the EU citizen, once again, are the same as the ones listed in the secondary legislation of the sixties. However, the new conceptions of what a family group entails saw a change of treatment of unmarried partners (On this point see the proposal of the Commission on the Citizens Directive at page 7 and 8). Directive 2004/38/EC includes registered

3.2 Promoting mobility through the application of the market access model

In parallel to the attempt of extending the right of free movement to a broader category of sponsors than simply workers, the Court worked on the enhancement of the right of free movement of persons by interpreting it in accordance to the market access model. As Barnard highlights, there are two approaches underpinning the Common Market: the centralized and the decentralized model. While the centralized model consists in establishing a single set of rules to apply to all the Member States (harmonization), the decentralized model leaves the freedom to regulate matters to the Member States as long as the national rules do not create obstacles to movement.[95] With particular regard to this second model, the key principles that characterize it are non-discrimination[96] and market access. The non-discrimination model, despite its utility,

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partnerships, within the protected families, and also requires Member States more generally to facilitate the admission of companions of a durable relationship (Art. 3 (1) in connection with Art. 2 (2), the direct descendants and the dependent direct relatives in the ascending line include those of the spouse or registered partner). On this point see Craig, de Burca, *supra* note 69, 753. See Citizen Directive at Art. 2(2)(b) and Art. 3(1). The Directive introduced some novelties also with regard to divorced couples. Before the introduction of the Directive the Court was called to face this issue. With regards to the category of the spouse the Court ruled that the spouse remains a spouse until the marriage is fully dissolved, regardless the state of divorce proceedings or the separation of the spouse. In *Singh* (Case 370/90 *R. v. IAT and Singh ex parte Secretary of State* [1992] ECR I-4265) the Court stated that even if between the EU spouse and the third country national spouse a decree nisi of divorce occurred, the third country national spouse does not lose the right of residence while the marriage was still actually in existence (para 12). A similar outcome can be noticed in the *Diatta* case (Case 267/83 *Diatta v. Land Berlin* [1985] ECR 567). A.G. Darmon stated that the expression "to install themselves with the worker" adopted by Art. 10 Regulation 1612/68/EEC could not be interpreted restrictively in the sense that the third country national had to be obliged to live under the same roof of the worker (Opinion Diatta page 572). Therefore, according to him, since Ms. Diatta was just separated from the husband and living in a different house but, nevertheless, the marital relationship was not dissolved, Ms. Diatta could rely on Art. 10 and, therefore, could be granted the right to stay (Opinion *Diatta*, 570). The Court followed the same approach and further held that "the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority"(*Diatta*, para. 20). Later on the Court in *Baumbast* also ruled that that a non EU national spouse could, after the divorce, continue residing in the host Member State under EU law where the children, whether or not they had EU nationality, were exercising their educational rights under article 2 of the regulation and the divorced third country national spouse was their primary career (para. 64 *et seq.*). The Court's activity on this issue was finally crystallized in Art. 13 Directive 2004/38/EC. Art. 13 now provides that even after divorce, annulment of marriage or termination of a civil partnership, the right of residence of the family members who are non-EU nationals will not be affected. With regard to the other relatives who do not belong to the core group of family member, Art. 3 of the Directive eliminated the requirement of living under the same roof and simply stated that those who are entitled to get a facilitation in entering the state are those who, despite of not belonging to the core family members group, "are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen" (Art. 3(2)(a) Citizen Directive 2004/38/EC) or are "the partner with whom the Union citizen has a durable relationship, duly attested" (Art. 3(2)(b). Finally, once again, all these rights are granted regardless the nationality of the family member (Art. 3(2)(a) Citizen Directive 2004/38/EC).

[95] Catherine Barnard, "The Substantive Law of the EU: the Four Freedoms", (Oxford: Oxford University Press, 2010), 18.

[96] *Ibid*. The principle of discrimination on the ground of nationality is a core principle of EU law and pursues equality between workers, goods, services and capital coming from different Member States. In particular, "this model presupposes that domestic and imported goods, and national and migrant persons, services and capital are similarly situated and that they should be treated in the same way".

does not guarantee the perfect functioning of the Common Market since it still allows barriers to movement to remain by permitting "the host state to impose its own rules on imported goods/migrants provided those rules apply equally to domestic goods/persons".[97] The limits of non-discrimination triggered the introduction of the market access model. Unlike non-discrimination, according to market access the national rules posing obstacles to the market are always unlawful, irrespective they discriminate or not foreign goods or migrants.[98]

The market access model was applied for the first time in free movement of goods cases involving non-fiscal measures such as quantitative restrictions and measures having quantitative effect. In the famous *Dassonville* case[99] the Court ruled out the legality of a Belgian national provision without basing its reasoning on discrimination but simply stating that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra Community trade are to be considered as measures having an effect equivalent to quantitative restrictions".[100] *Dassonville*, according to Craig and De Burca, also sowed the seeds which bore fruit in the *Cassis de Dijon* case.[101] The applicant wanted to import a liqueur from France to Germany but the German authorities refused the importation because the drink was not sufficiently alcoholic. The Court pointed out that, although the national rule was not discriminatory towards the French product because it was applied exactly the same also to German products, "the minimum alcohol content for the purposes of sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provision of Art. 30 of the Treaty."[102]

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[97] *Ibid.,* 19.
[98] *Ibid*.
[99] Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.
[100] *Ibid*., para. 5.
[101] Craig, De Burca, *supra* note 69, 640.
[102] Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649, para. 14. Other more recent cases concerning free movement of goods have referred to market access. Among all see *Monsees* (Case 350/97 *Wilfried Monsees v. Unabhängiger Verwaltungssenat für Kärnten* [1999] ECR I-2921) where the Court said that Austrian rules stating maximum journey time and distances for the transport of animals before being slaughtered constituted an obstacle to free movement of goods; *Commission v. Austria* (Case 320/03 *Commission v. Austria* [2005] ECR I-7929) in which the Court stated that the prohibition for heavy goods to be driven along the motorway A12 obstructed free movement of goods and Case 110/05 *Commission v. Italy* (trailers), [2009] ECR I-519. More recently the issue of what it means to hinder the market access has been raised. In some cases it consists with the actual interference with trade (Case 65/05 *Commission v. Greece* (computer games) [2006] ECR I-10341). In some other cases obstacles of market access can be considered to occur when the national rule generate additional costs (Case 270/02 *Commission v. Italy* (foodstuffs for sportsmen and women) [2004] ECR I-1559; Case 189/95 *Public Prosecutor v. Harry Franzen* [1997] ECR I-5909). A.G. Poiares Maduro specified instead that "a measure constitutes a barrier to access to a national market where it protects the acquired positions of certain economic operators on a national market or where in makes

As hinted before, although the model of market access arose in particular with regard to free movement of goods soon after it started to be applied also to cases of free movement of workers and to freedom of establishment and the provision of services. The *Bosman*[103] ruling is a clear example of application of market access to free movement of workers cases. The CJEU found that the transfer system developed by national and transnational football associations was in breach of Art. 45 TFEU because, despite not being discriminatory since it applied in the same way both to national and non-national teams, it was found to still directly affect players' access to the employment market in other Member States.[104] Moreover, the Court went even forward in the adoption of the market access model by scrutinizing national rules that just potentially could be capable to prohibit, impede or restrict the individual right of free movement.[105] This formulation has been adopted in *Gebhard*[106] in which the Court stated that national measures that are able to hinder or make less attractive the exercise of the fundamental freedoms are in breach of the Treaty.

The Court made use of the market access formula also in free movement of workers cases, often recurring to the words "restriction" or "obstacle" to free movement.[107] This is the same formulation that we will see applied in many cases concerning free movement of citizens and third country nationals starting from *Singh*, as it will be seen in the next chapter.

In the light of this analysis it seems that over the years free movement of persons has developed both as a right to be applicable also to non workers and as a primary aim to be achieved by the Union, to the extent that every single national measure that hinders it should be considered an unlawful obstacle to such freedom.

4. Introduction of the concept of EU citizenship

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intra-trade more difficult than trade within the national market" see joined Cases 158/04 and 159/04 *Alfa Vita Vassilopoulos AE v. Greek State* [2006] ECR I-8135, para. 44.

[103] Case 415/93 *Football Association ASLB v Jean- Marc Bosman* [1995] ECR I-4921.

[104] The Bosman ruling has been applied in other following cases such as Case 464/02 *Commission v. Denmark* [2005] ECR I-7929 and Case 232/01 *Openbaar Ministerie v. Hans van Lent* [2003] ECR I-11525.

[105] Case 76/90 *Sager v. Dennemeyer & Co Ltd* [1991] ECR I-4221. The same principle was applied in *Kraus* (see Case 19/92 *Kraus v. Land Baden-Wuerttemberg* [1993] ECR I-1663), according to which the national measure, although it was not discriminatory, "was liable to hamper or to render less attractive the exercise of the fundamental freedoms guaranteed by the Treaties".

[106] Case 55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e dei Procuratori di Milano* [1995] ECR I-8453.

[107] Barnard, *supra* note 95, 256.

Up until the mid seventies the concept of European citizenship[108] was still completely alien to the European plethora.[109] In 1992 the new concept of Union

[108] Literature on the concept of EU citizenship is abundant. See Jo Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in *The Evolution of EU Law*, eds. Grainne de Burca, Paul Craig, (Oxford: Oxford University Press, 2011); Luigi Moccia, *Diritti Fondamentali e Cittadinanza dell'Unione Europea*, (Milano: Franco Angeli publishing, 2010); Joseph H.H. Weiler, "Europa: Nous coalisons des États nous n'unissons pas des homes", in *La Sostenibilita' della democrazia nel XXI secolo*, eds. Marta Cartabia, and Andrea Simoncini, (Bologna: Il Mulino publishers, 2009); Dora Kostakopoulou, "European Union Citizenship: The Journey Goes On", in *Fifty years of European integration: foundations and perspectives,* eds. Andrea Ott, and Ellen Vos (The Hague: TMC Asser Press, 2009); Jo Shaw, "The Constitutional Development of Citizenship in the EU Context: With or Without the Treaty of Lisbon", in *Ceci n'est pas une constitution-constitutionalism without constitution?,* eds. Ingolf Pernice, and Evgeni Tanchev, (Baden-Baden: Nomos Verlagsgesellschaft, 2009); Patrick Dollat, *La Citoyennete' Europeenne: Theorie et Status,* (Brussels: Bruylant Ed., 2008); Xavier Groussot, "Principled Citizenship' and the Process of European Constitutionalization—From a Pie in the Sky to a Sky with Diamonds", in *General Principles of EC law in a process of development*, eds. Ulf Bernitz, Joakim Nergelius, Cecilia Cardner, and Xavier Groussot, (Alphen aan den Rijn: Wolters Kluver, 2008) ; Stefan Kadelbach, "Union Citizenship", in *Principles of European constitutional law,* eds. Armin von Bogdandy, Jurgen Bast, (Oxford: Hart Publishing, 2006); Jo Shaw, "The Interpretation of European Union Citizenship", in *Modern Law Review* 61, no. 3 (1998); Massimo La Torre, *European Citizenship: An Institutional Challenge*, (The Hague: Kluwer Law International, 1998); Siofra O' Leary, *The evolving concept of Community Citizenship,* (The Hague: Kluwer Law International, 1996); Ferdinand Wollenschläger, "A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration", *European Law Journal* 17, no. 1 (2011); Niamh N. 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Weiler, (Cambridge: Cambridge University Press, 1999); Dora Kostakopoulou, "Towards a Theory of Constructive Citizenship in Europe", *Political Philosophy* 4, no. 4 (1996); Dimitry Kochenov, "Citizenship Without Respect: The EU's Troubled Equality Ideal", (Jean Monnet Working Paper No. 08/10, 2010), accessed Mary 2013, available at <http://centers.law.nyu.edu/jeanmonnet/papers/10/100801.pdf>; Patricia Mindus, "Europeanisation of Citizenship within the EU: Perspectives and Ambiguities", Università degli Studi di Trento, Working Paper WP SS 2008 No. 2, 2008.

[109] This approach should not surprise since in the early stages of the evolution of the European Community, the major concern of the Institutions was the development of the economic integration of Europe. On this point see Stijn Smismans, "The European Union's Fundamental Rights Myth", *Journal of Common Market Studies* 48, no. 1 (2009), 46-47.

citizenship was introduced. This concept was located "immediately after principles and before Community policies, and this marked out its general importance within the system of the Treaty".[110] In this part I will briefly show the process that led to the birth of the concept of EU citizenship and how this concept was interpreted as a source of independent rights by the CJEU.

The concept of European citizenship was not born suddenly in the Maastricht Treaty but it was the result of an ongoing process. It was the year 1967 when Walter Hallstein, the first president of the European Commission, in his speech for the 10th anniversary of the signature of the Treaty of Rome, stressed how the achievement of the free movement of workers was a step to be taken in order to allow the blossoming of the European integration.[111] The issue of European integration was raised seriously in the debate during the Paris Summit of October 1972.[112] The spirit of the summit was in fact, apart from the creation of an Economic and Monetary Union, clearly based on finding solutions for improving the integration and the social and political face of Europe. This can be noticed in the summit declaration: "the Member States reaffirm their resolve to base their community development on democracy, freedom of opinion, free movement of men and ideas and participation by the people through their freely elected representatives" and in the opening speech of the President of the French Republic George Pompidou: "Europe, the community of prosperity, must not become a community of inflation. But Europe must not become a community of tradesmen. Europe must be designed and constructed in the service of mankind."[113]

The willingness to promote integration in Europe characterized also the Paris Summit of December 1974. The task of this second summit was to overcome all the difficulties deriving from a profound recession of the oil crisis by giving a new momentum to the process of European unification.[114] Practically, Heads of the Government were instructed with the task of verifying "the possibility of establishing a passport union"[115] and to give to the citizens of the Member States "special rights as

[110] Massimo Codinanzi, Alessandra Lang, and Bruno Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, (Leiden: Martinus Nijhoff Publishers, 2008), 1.
[111] Walter Hallstein, "Halfway to Europe Unity", EU speech held in occasion of the 10th anniversary of the signature of the Rome Treaty, published in Die Zeith, 17 and 24 March 1967, accessed March 2012, available at the Archive of European Integration, University of Pittsburgh, http://aei.pitt.edu/13606/01/S22.pdf>.
[112] The Paris Summit of 1972 was called mainly to establish a Monetary Union by 1980. However, the outcome of this summit went far beyond what was originally thought and ended up discussing many other issues such as cooperation and integration.
[113] Bulletin of the European Communities, vol. 5(11), 1972, at 14.
[114] Bulletin of the European Communities, vol. 7(12), 1974, 6, para. 1102.
[115] Bulletin of the European Communities, vol. 7(12), 1974, 8, para. 10.

members of the community".[116] Although there was not a definition of these special rights it was argued that "the linking of the concept of citizens and special rights might even suggest that the will existed to confirm the civil and political character of these special rights".[117]

It was 1976 when finally Tindemas, the Belgian prime minister at the time, was asked to prepare a report on the overall concept of European Union.[118] Among the various policies he developed, he dedicated the whole paragraph IV of his report to the "Citizen's Europe".[119]Although, again, he did not mention expressly the word European citizenship, he referred to "Europeans" as people of a unique country. Tindemans believed in fact that, in order for Europe to be close to its citizens, it was necessary "to adopt a further protection of the rights of the Europeans" and to pursue "a concrete manifestation of European solidarity by means of external signs discernible in everyday life"[120].

The Tindemans Report did not have immediate direct consequences on the development of the concept of European citizenship.[121] It was just ten years after the 1974 Paris Summit that some concrete actions were taken. In the middle of the eighties, the debate on European citizenship restarted under the more committed and more driven motivation of giving to the citizens of Europe a deeper identity and image, within Europe and towards external countries.[122]This trend was made apparent in the Fountainbleau European Council of 1984.[123] In this occasion an Ad Hoc Committee was set up to promote the identity and the image of the Union. The results of this

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[116] *Ibid.*, 8, para 11.
[117] Guido Van de Berghe, *Political rights for European citizens*, (Gower Publishing Company Limited, 1982), 32.
[118] Bullettin of the European Communities, Supplement 1/76.
[119] *Ibid.*, 11.
[120] *Ibid.,* 26.
[121] Although no concrete action was taken immediately after the Tindemans report, the idea of citizenship was still present. In October 1978, in Florence, the Round Table Conference on "Special Rights and a European Community Civil Rights Charter" organized by the European Parliament with the participation of representatives of the Community Institutions, members of the national parliaments and experts in general, took place. At that time "nobody wanted a super constitution" but simply a "transformation from a Community of states to a community of people" (See proceedings of the round table on special rights and a charter of the rights of citizens of the European community and related documents, Florence, 26-28 October 1978, Luxemburg, European parliament, September 1979.) and EU citizenship was considered the adequate instrument to get to that stage.
[122] Mehan argued that the strengthening of the European Union as a political unified entity, allowed a "resuscitation of the idea of citizen as human being". Elisabeth Mehan, *Citizenship and the European Community*, (London: Sage Publications, 1993), 147.
[123] Bulletin of the European Communities, June 1984, N. 6.The Fountainbleau European Council was held on the 25-26 of June 1984. The conclusions of this Council put a particular emphasis on the necessity to strengthen and promote the identity and the image of the European Community among its citizens and in the world.

summit were two reports from the Ad Hoc Committee on a People's Europe that took the name after their chairman, Mr. Adonnino. The first of these reports was specifically focused on certain matters such as freedom of movement and wider opportunity for workers relating to employment and residence.[124] The second report instead gave a concrete shape to the concept of special rights to be associated to the idea of European citizenship (such as the participation of citizens in the political process of the Member states or the need of assistance in case of travelling outside the community).[125]

Simultaneously, some lawyers started to talk about "incipient form of European citizenship" looking at the case law of the CJEU. The Court in fact, in some of its cases, began to interpret the treaty rights of free movement and non-discrimination with the willingness of extending them also to people that did not belong to the traditional group of economically active persons protected by the EEC Treaty (workers, self employed and service providers).[126] In *Gravier*,[127] for example, a French national who was studying for a course in strip-cartoon design in Belgium was granted the right not to pay an additional fee for non Belgians under the now Art. 18 TFEU (the right of not being discriminated on the grounds of nationality), although she was not involved in a job activity. Similarly, in *Cowan,*[128] a British tourist in France was granted compensation for victim of violent crime through the application of Art. 18 TFEU despite not being a worker but a recipient of services. Following the CJEU approach, in the nineties secondary legislation regulating the right of residence of the economically inactive was introduced too.[129]

With the fall of the Berlin Wall the development of European citizenship was finally advanced. In the changed geopolitical context, one of the main key concerns of the Dublin Summit of April 1990 was to shape the future political Union by introducing European citizens' rights. One of the questions that the states submitted to the Council was: "how will the Union include and extend the notion of Community citizenship

[124] People's Europe Bull. Supp. 7/85, 12-14.
[125] *Ibid.*, 28.
[126] Jo Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in *The Evolution of EU Law*, eds. Grainne de Burca, Paul Craig, (Oxford: Oxford University Press, 2011), 584.
[127] Case 293/87 *Gravier v. City of Liege* [1985] ECR 593.
[128] Case 186/87 *Cowan v. Le Tresor public* [1989] ECR 195. In this case the Court referred to *Luisi and Carbone* (Cases 286/82 and 26/83 *Luisi and Carbone v. Ministero del Tesoro* [1984] ECR 377) in which the Court, for the first time, confirmed that the Treaty covers the situation of recipients as well as providers of services.
[129] Council Directive 90/366/EEC on the right of residence of students [1990] OJ L 180/30, replaced by Council Directive 93/96/EEC [1993] OJ L317/59; Council Directive 90/365/EEC on the right of residence for employees and self employed persons who have ceased their occupational activity [1990] OJ L180/28, and Council Directive 90/364/EEC on a general right of residence [1990] OJ L180/26.

carrying with it specific rights (human, political, social, the right of complete free movement and residence etc.) for the citizens of Member States by virtue of these states belonging to the Union?"[130] In this backdrop, it was the Spanish Prime Minister Felipe Gonzales that urged the official inclusion of the concept of European citizenship in the European Community Treaty.[131] By the time that the Heads of governments reconvened in Dublin, they agreed to call for another Intergovernmental Conference (IGC) on political union parallel with the one on the EMU.[132] In preparation of the IGC, Spain tried to define the concept of European citizenship in a memorandum called "Towards a European Citizenship".[133]The content of this memorandum was based on the idea that the European citizen was not just a privileged foreigner but also a fundamental actor in the life of the European Institutions. It underlined how the European citizen had to be conceived as a subject with duties and rights stemming not just from the Member States but also from the Community.[134]

The following European Council held in Rome in October 1990 unfolded this statement by listing a number of defined rights: right to participate to the election of the European Parliament and local elections, freedom of movement irrespective of the economic activity, protection of citizens outside the EU border and right to petition to Obudsman.[135] The result of the European Council of Rome was adopted by the Treaty of Maastricht for the first time.[136]Part II of the Maastricht Treaty was completely dedicated to the citizenship of the Union. Art. 8(1) stated "every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship" and Art. 8(2) that "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby". The other paragraphs of Art. 8 were related to the right to freedom of movement of European Citizens (art. 8 a) who have the right to move and reside freely within the territory of the Member States, right to vote in the municipal

[130] Bull. EC 6-90, I Annex I.
[131] Michael Lister, and Emily Pia, *Citizenship in Contemporary Europe*, (Edinburgh: Edinburgh University Press, 2008), 164.
[132] *Ibid.*
[133] Towards a European Citizenship, in Europe Documents No 1653 October 1990. For a detailed explanation of the content of the memo see Handoll, *supra* note 1, 175- 276.
[134] *Ibid.*.
[135] Rome European Council 27, 28 October 1990. The Rome Council, however, failed to identify duties of European citizens properly. This is a deficit that can still be noticed today in the provisions dedicated to EU citizenship.
[136] The Maastricht Treaty is the first treaty that mentioned explicitly the concept of EU citizenship. The Single European Act, in 1986, very timidly addressed in its preamble the issue of political rights of national of Member states, without, however, expressly referring to European citizenship.

elections and in the elections of the European Parliament (art. 8 b), protection of the diplomatic and consular authorities of any other Member State in any territory of third countries (art. 8 c), right to petition to the European Parliament and to the Ombudsman (art. 8 d). Nothing more was added in the Amsterdam Treaty whereas the Charter of Fundamental Rights of the European Union, proclaimed at Nice in 2000, included a full Chapter (Chapter V) totally dedicated to Citizens' Rights. This chapter however just added the rights of good administration and the right of access to documents (Arts 41 and 42) but it basically ended up replicating the provisions already mentioned in the previous Treaties. Finally, in December 2009, the Lisbon Treaty entered into force. Although the main structure of the articles dedicated to European citizenship remained more or less the same, two interesting modifications are worthy of notice. First of all, the idea that EU citizenship should complement national citizenship has been modified with Lisbon. Art. 20 (1) TFEU in fact states that "Citizenship of the Union shall be additional to and not replace national citizenship". Moreover, the Lisbon Treaty makes clear that the rights listed in the Treaty are not an exhaustive group but are rights "inter alia".[137]

The content of Maastricht on citizenship testified how the Union managed to move beyond its economic and market oriented views towards a deeper idea of integration. This point was highlighted as well in the Report from the Commission on citizenship of the Union, which stressed how "the introduction of these new provisions underscores the fact that the Treaty of Rome is not concerned solely with economic matters, as is also plainly demonstrated by the change of name of the EEC to the EC."[138] Moreover, the following Lisbon Treaty managed to create an even more autonomous status of EU citizenship, that now is not just complementary but it is even additional to the status of national citizenship, and is willing to encompass a series of rights whose Art. 20(2) represents a not exhaustive list. By introducing the concept of EU citizenship the legislator has therefore "created a direct political link between the citizens of the Member States and the European Union […] with the aim of fostering a sense of identity with the Union."[139]

The concept of EU citizenship, far from being an empty shell as some scholars suggested, was immediately object of further interpretation by the CJEU. The Court interpreted the new concept of EU citizenship according to what is called new

[137] Art. 20(2) TFEU.
[138] COM (93) 702 final.
[139] *Ibid.*

constitutionalism, a theory that engages with the question of what it means to be a European citizen regardless the classic EU rules of supremacy, direct effect, transnationalism and freedom of movement.[140] In other words, if in free movement cases the Court tried to pair the concept of EU citizenship to free movement, in cases concerning static citizens the Court stressed the intrinsic value of the concept of EU citizenship as a source of self-standing rights, regardless the exercise of the right of free movement.

The initial challenges for the Court in these directions concerned the issue of wholly internal situations and raising the problem of reverse discrimination,[141]

[140] Jo Shaw, *supra* note 126, 585.

[141] There is a vast literature on the phenomenon of reverse discrimination. Among all see in particular Cyril Ritter, "*Purely internal situations, reverse discrimination", European Law Review* 31, no. 5 (2006); Camille Dautricourt, and Sebastien Thomas, "Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?", *European Law Review* 34, no. 3 (2009); Siofra O'Leary, "The past, the present and the future of the wholly internal rule", *Irish Jurist* 44, (2009); Niamh N. Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?", *Common Market Law Review* 39, (2002); Miguel P. Maduro, "The scope of European remedies: The case of purely internal situations and reverse discrimination" in *The future of Remedies in Europe,* eds. Claire Kilpatrick, Tonia Novitz, and Paula Skidmore, (Oxford: Hart publishers, 2000); Enzo Cannizzaro, "Producing 'Reverse Discrimination' Through the Exercise of EC Competences", *Yearbook of European Law* 17, no. 1 (1997); Alina Tryfonidou, "The outer limits of Article 28 EC: Purely internal situations and the development of the Court's approach through the years", in *The Outer Limits of European Law,* eds. Catherine Barnard, and Okeoghene Odudu (Oxford: Hart Publishers, 2009). Since the late seventies, there have been a number of cases in which individuals tried to rely on one of the fundamental freedoms not against the host Member State but also against their own state. The first case in which the wholly internal rule was mentioned, apart from *Knoors* (Case 115/78, *Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399) in which it was just an *obiter dictum*, was the *Saunders* case (Case 175/78 *R. v. Saunders* [1979] ECR 1129). In this case a British national working in the United Kingdom relied on the now Art. 45 TFEU before an English court, claiming that the UK had acted contrary to that provision because it had imposed a restriction on her right to move freely within its territory. In reply the Court held that the situation fell outside the scope of EU law because it was a wholly internal situation. The *Saunders* case can be considered a typical example of reverse discrimination because the treatment reserved to the national applicant was worse than the one potentially reserved to a EU citizen of another nationality in the same situation. With regards to freedom of movement of goods, reverse discrimination arises when nationals products of a Member State are disadvantaged because they are subject to a national measure, while (a) nationals products that can show a link to EC law, even though they are from the same Member State, are not and (b) when nationals products from another Member States are protected from that national measure by virtue of EU law. In the cases of *Smanor* and *Pistre* (Case 298/87 *Smanor v. Commission* [1988] ECR 4489 and Case 321–4/94 *Criminal Proceedings against Jacques Pistre and Others* ECR 1-2343), the Court held that there was no reason to verify whether or not national legislation was in compliance with the now 34 TFEU because the situation was completely internal, given that the products were national, and therefore the stricter national legislation had to apply. In the *Guimont* case (Case 448/98 *Criminal Proceedings against Jean-Pierre Guimont* [2000] ECR I-10663) the Court said that domestic rules fell under Art. 34 TFEU only if they had to deal with imports. Nevertheless, the Court went on to state that a preliminary reference request from a national court will only be refused if it is quite obvious that the interpretation of Union law sought bears no relation to the actual nature of the case or to the subject matter of the main action. This approach was upheld in *Carbonati Apuani* (Case 72/03 *Carbonati Apuani Srl v. Comune di Carrara* [2004] ECR I-8027) when the Court in its judgment confirmed its previous case law according to which the well-established purely internal situations doctrine no longer applied to cases involving the imposition by Member States of customs duties on goods circulating within the internal market. On freedom of movement of goods see Alina Tryfonidou, "Carbonati Apuani Srl v. Comune di Carrara: should we reverse "reverse discrimination"?", *King's College Law Journal* 16, no. 2 (2005); Alina Tryfonidou, "Reverse Discrimination in Purely Internal

according to which a static home national may be treated less favorably than someone from another Member State who could invoke EU law in similar factual circumstances. The CJEU initially ruled[142] that the concept of EU citizenship was not intended to extend the scope *ratione materiae* of the Treaty provisions also to internal situations that had no link with community law. Hence, situations of discrimination towards nationals of the Member State had to be dealt necessarily by the national legislation.[143] Already from this early stage, however, not everybody shared the views of the Court. In his opinion in the *Shingara* case[144], A.G. Ruiz-Jarabo Colomer seemed to suggest that the drafters of the Maastricht Treaty were seriously trying to create a meaningful

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Situations: An Incongruity in a Citizen's Europe", *Legal Issues of Economic Integration* 35, no. 1 (2008); Pedro Caro de Sousa, "Catch me if you can? The market freedoms' ever –expounding outer limits", *European Journal of Legal Studies* 4, no. 2 (2011), and Cyril Ritter, "Purely internal situations, reverse discrimination, Guimont, Dzodzi and Art. 234", *European Law Review* 31, (2006). With regard to reverse discrimination and freedom of movement of workers, a national of a Member state cannot rely on the now Art. 45 TFEU when his or her situation is considered purely internal. Hence, persons working in their own Member State who are unable to demonstrate a link with EC law can be the victims of reverse discrimination. Originally, the Court took the view that reverse discrimination exercised by a Member State against its own nationals who fall outside the scope of Art. 45 was not a form of differential treatment that violated EU law. This principle is at the base of the rationale of *Morson and Jhanjan* case (Case 35 and 36/82 *Morson and Jhanjan v. the Netherlands* [1982] ECR 3723) and *Hurd v. Jones* case (Case 44/84 *Hurd v. Jones* [1986] ECR 29) and in the case of *French community and Wallon government v. Flemish government* (Case 212/06 *French community and Wallon government v. Flemish government* [2008] ECR I-1683). In some more recent cases the Court has tried to avoid reverse discrimination by making the link with EU law to be established more easily. There are different groups of cases belonging to this category that can be mentioned such as the group of family reunification cases that will be analyzed later on (*Singh*, *Carpenter, Jia* and *Eind)* and the educational qualification cases of which the most prominent one is *Angonese* (Case 281/98, *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-04139). With regards with the freedom of establishment and reverse discrimination, in the *Nino* case (Case 54/88, 91/88, 14/89, *Criminal proceedings against Nino, Prandini and Others* [1990] ECR I-3537) the Court held that since all the accused were Italian nationals who qualified as biotherapists and pranotherapists in Italy and who had been charged under Italian legislation as a result of treatment administered solely within Italy, they were in a purely internal situation and thus the now 49 TFEU could not be applied. However, further on, also in the freedom of establishment case the Court managed to protect nationals who obtained qualifications in another Member State and tried make use of them in their state of origin. Throughout the years, it was made clear that the purely internal rule was also applicable in the context of free movement of services. In 1979, in the *Debauve* case (Case 52/79 *Procureur du Roi v Debauve and Others* [1980] ECR 833) the CJEU pointed out that "provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State". However, later on the Court broadened the possibility of finding a link with EU law in cases that at a first glance could appear simply internal situations. In the *Corsica Ferries* case (Case 18/93 *Corsica Ferries v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783), the Court found that the situation was not purely internal to a Member State, although the facts involved an Italian company relying on the now Art. 56 against Italy, since the contested measure would prevent that company from exporting its services to another Member State.

[142] Case 299/95 *Kremzov. Austrian State* [1997] ECR I-2629 and Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet v. Land Nordrhein-Westfalen* [1997] ECR I-3171.

[143] Craig, De Burca, *supra* note 69, 829. See also Alina Tryfonidou, *Reverse Discrimination in EU Law*, (The Hague: Kluwer Law International, 2009), 142. The Court repeated that instances of reverse discrimination still fall outside the scope of EU law also in recent cases such as Case 148/02 *Garcia Avello v. Belgian State* [2003] ECR I-11613 and Case 403/03 *Egon Schempp v Finanzamt München* [2005] ECR I-06421.

[144] Joined Cases C-65/95 and C-111/95 *The Queen v Secretary of State for the Home Department ex parte: Shingara et Radiom* [1996] ECR I-3343.

citizenship status.[145] He stated in fact that "the creation of Citizenship of the Union, with the corollary […] of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward that […] separates that freedom (freedom of movement) from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union."[146]

The bold approach of A.G. Colomer was initially isolated.[147] Nevertheless, some years later, the Court seemed to be more willing to rule favorably also in cases in which applicants did not exercise their free movement rights. In *Garcia Avello*[148] and *Chen*[149] for example "the treaty provisions on citizenship conferred rights on the applicants in a situation where they had never left the territory of the Member State other than that of the host state."[150] The *Garcia Avello* case concerned a dispute between Mr. Avello and the Belgian state regarding the refusal of the latter to grant his children, of Belgian and Spanish nationality, the double surname as in the Spanish tradition. The Court held that, in principle, this was a matter that fell within the competence of the Member States. However, the simple fact that the children had double nationality and were residing in Belgium enabled them, without necessarily having to physically move to another Member State, to be granted protection under Art. 18 TFEU on non-discrimination. In *Garcia Avello, Chen* found its roots. Pursuant the peculiarities of Irish citizenship law at the relevant time, the daughter of a Chinese couple who was born in Belfast, i.e. UK territory, acquired Irish nationality and was thus a Union citizen. When the mother and the little daughter decided to move to Cardiff and were refused a residence permit, the CJEU held that the little child[151] could nevertheless rely on what is now Art. 21 of TFEU[152]. In the first part of the verdict, the Court was engaged in answering the objection raised by the English and Irish Government, that upheld how the facts of the

[145] Tryfonidou, *supra* note 143, 143.
[146] *Ibid*. See also Opinion in Joined Cases 65/95 and 111/95 *Shingara and Radiom* [1996] ECR I-3343, para. 34.
[147] Tryfonidou, *supra* note 143, 143-144.
[148] Before *Garcia Avello* also the *Micheletti* case was decided (Case 369/90. *Mario Vicente Micheletti a.o. v. Delegación del gobierno en Cantabria* [1992] ECR I-4239). Also in this case the Court granted to an Italo-Argentinian the right to reside in Spain owing to his Italian citizenship without having ever resided in Italy.
[149] Case 200/02 *Zhu and Chen v. Secretary of State for the Home Department* [2004] ECR I-09925.
[150] Craig, De Burca, *supra* note 69, 830.
[151] The Court found that also the mother had the right of residence on the grounds that she was the primary carer of the little Catherine. This specific point will be faced in Chapter 4.
[152] *Chen* judgment, para. 26.

case could be described as purely internal for the simple reason that the little Catherine never physically moved from a state to the other and, therefore, protection to her could be granted just by the national legislation. To this objection the Court answered by stating that the link with EU law could be established even when a person having nationality of a Member State resided in another Member State without having necessarily exercised his/her right to free of movement.[153]

In both *Garcia Avello* and *Chen* the Court decided that, in order to be able to be granted the more favorable protection under the EU citizenship status, it was not necessary to have exercised the right to move to another Member State but the simple mismatching of nationalities was enough to make the situation fall under EU competence. In more recent years however the Court pushed itself forward considerably and begun to offer protection through the use of Art. 20 TFEU, despite the exercise of the right of free movement. The *Rottman* case[154] found its grounds in an application made by a German national against the German administrative authorities that deprived him of his German nationality because they found out that the German citizenship had been acquired in a procedure vitiated by fraud. The decision of the German authorities to withdraw his German nationality, given that he already lost his Austrian nationality of origin once he became German citizen, would have had rendered him stateless and deprive him of his status as a Union citizen and of the rights attached to that status. Despite many states arguing that the situation was completely internal both the A.G. and the Court took a different path. While the advocate general tried to encompass the situation within the boundaries of EU competences using the logic of freedom of movement,[155] the Court simply stated that: "it is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 20 of the TFEU and the rights attaching thereto falls, by reason of its nature and its

[153] *Chen* judgment, para. 19 (taken directly from *Garcia Avello*).
[154] Case 135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449.
[155] In the view of A. G. Maduro the applicant was born Austrian and had only acquired German nationality as a result of availing of his free movement rights and settling in that Member State. In other words a border had been crossed and movement had occurred, although in the past. Para. 13: "The fact nevertheless remains that the exercise by Mr. Rottmann of his right, as a citizen of the Union, to move and reside in another Member State had an impact on the change in his civil status: it was because he transferred his residence to Germany that he had been able to satisfy the conditions for acquiring German nationality, namely, lawful habitual residence within that country's territory. The existence of such a link is sufficient for acceptance of a link with Community law […]".

consequences, within the ambit of European Union law". In other words, the link with EU law became the status of EU citizen itself: the threat of losing the status of EU citizen was so great that it was enough to bring the situation within the scope of EU law.[156] The attempt of the Court to give a more meaningful role to the concept of European citizenship strengthened with *Zambrano*[157] and was more delineated in the post-*Zambrano* line of cases, as it will be seen in Chapter 4.

In conclusion, on the top of the cases involving moving EU citizens, the Court's activity also focused on developing the concept of EU citizenship regardless its connection with the right of free movement. This process started conceiving EU citizenship as a source of self-stemming rights.

5. Conclusions

In this chapter I have presented an account of the relevant factors that characterized the EU from the post oil crisis. In particular, it has been noted that while free movement and EU citizenship rights became more and more generously fashioned, Member States (initially individually and later at intergovernmental and at EU level) began to collaborate more closely over the issue of third country national legal and illegal immigration. Chapter 1 and Chapter 2 have been crucial for the description of the historical background underpinning the CJEU's decisions on the third country national residence rights that we are about to discuss. In Chapter 1 it has been pointed out how the first family residence rights were introduced as incentives to enhance the movement of Italian workers abroad and how this period was characterized by a liberal approach towards third country national immigration. In Chapter 2 it has been underlined how, while the aim of the EU and of the Court after the 1970s was still the promotion of workers and people's mobility (and the enhancement of the idea of EU citizenship as a source of independent rights), the immigration approach towards third country nationals

[156] O'Leary, *supra* note 141, 13 *et seq*. Apart from this discussion scholars interrogated themselves on the loss of states' sovereignty over national rules granting citizenship. It seems that the majority agreed on the fact that state sovereignty in deciding who can be citizen of the state was seriously curtailed by the CJEU interpretation of the concept of EU citizenship. Among all, on this point see Jessurun H. U. d'Oliveira, "Court of Justice of the European Union decision of 2 march 2010, Case C-315/08 Janko Rottman v. Freistaat Bayern case note 1: decoupling nationality and Union Citizenship?", *European Constitutional Law Review* 7, no. 1 (2011); Gerard R. De Groot, and Anja Seling, "Court of Justice of the European Union decision of 2 march 2010, Case C-315/08 Janko Rottman v. Freistaat Bayern case note 2: the consequences of the Rottmann judgement on Member State autonomy – the European Court of Justice's avant-gardism in nationality matters", *European Constitutional Law Review* 7, no. 1 (2011); Sandra Mantu, "Janko Rottman v. Freistat Baern", in *Journal of Immigration Asylum and Nationality Law* 24, no. 2 (2010).

[157] Case 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-1177.

overall became stricter.

Border restrictions versus European intra-migratory integration are the base of the fundamental EU-Member States clash underpinning family residence right cases involving EU citizens and third country nationals. A better understanding of the origins of the first free movement provisions and of the historical context in which the case law can be placed are crucial to try to decipher the deeper reasoning deployed by the Court in its jurisprudence.

In the next two chapters -Chapters 3 and 4- starting from background delineated in the current and in the previous chapter, I will explain how historical circumstances and trends exposed before influenced and shaped the outcome of the Court. In order to analyse the Court's jurisprudence I will distinguish between cases concerning free moving EU citizens and cases concerning EU static citizens. The free moving EU citizens cases concern circumstances in which a cross border movement can be individuated. The EU static citizens cases are cases in which the Court had to face circumstances in which the free movement legislation could not be applied because the sponsor did not exercise his/her right of free movement. In these cases the Court legitimately wondered whether the Treaty concept of EU citizenship could be applied instead. However, this distinction is not such a clear cut. In fact, to the first group also the *Eind* case was included which, despite the presence of a cross border movement, was decided in the light of EU citizenship. At the same time, to the second group, also the *Chen* and the *Iida* case have been added despite the fact that, in the first case, a sort of fictional movement did occur and, in the second one, the EU sponsor did move to another Member State. Nevertheless, since in *Eind* the free movement logic was still applied and given that with both *Chen* and *Iida* the Court excluded the applicability of the free movement legislation and contemplated the possibility of relying on the concept of EU citizenship (with a positive result in *Chen* and with a negative one in *Iida*), I suggest that this subdivision, despite its imperfections, can still be a useful tool to understand the differences between the two approaches adopted by the Court.

Chapter 3: Free moving EU citizens law cases

1. Introduction

In the previous chapters an account of the historical trends and changes occurring from the post World War II period to the present has been offered. Since the Treaty of Rome, the Union introduced the idea of free movement, which was soon developed in the first Council regulations of the sixties. To these regulations family reunification provisions were added as ancillary rights in order to promote the primary right of free movement of European workers with the main purpose, at the time, to create incentives for Italian workers to move to the northern European Member States. However, while in the postwar period immigration was perceived as a resource, after the oil crisis Member States developed a suspicious attitude toward third country nationals and started to adopt much stricter policies with regard immigration more generally. The more stringent approach toward immigration was accompanied by a continuous enhancement of free movement rights, which at some point were extended to citizens who were not engaged in a working activity, and of the birth and rapid development of the concept of EU citizenship.

Interestingly, during the first decade after the introduction of the free movement legislation no applications concerning the issue of family reunification between EU citizens and third country nationals can be found. Since the eighties several cases concerning third country national family members were submitted to the Court, with most activity occurring after 2000. Without speculating on the reasons why the Court was required to act after twenty years the first family reunification provisions were introduced on family reunification issues, it is an interesting coincidence the fact that the applications on family reunification cases between EU citizens and third country nationals begun to be filed when the immigration concerns, as opposed to the enhancement of free movement and EU citizenship, increased.[1]

In this chapter I will particularly focus on the analysis of the first group of case law concerning the issue of family reunification between EU moving citizens and third

[1] It could be argued that one of the reasons that triggered the beginning of the Court's activity was the increase of mixed marriages with third country nationals and the fact that the original family reunification provisions did not match the new society's trends any longer. From the nineties the rate of mixed marriages increased (see Giampaolo Lanzeri, "Mixed Marriages in Europe: 1990-2010", in *Cross-Border Marriage: Global Trends and Diversity*, ed. Doo-Sub Kim, published by Korea Institute for Health and Social Affairs (KIHASA), available at https://www.academia.edu/2565558/Mixed_Marriages_in_Europe_1990-2010) reaching a peak around 2000 (see data available from 2006 in Research note, Mixed Marriages in the EU, 2008, available at http://www.emnbelgium.be/sites/default/files/attachments/eurostat_mixed_marriages.pdf).

country nationals. I will show how these cases found their roots on the interface between free movement and Member States' concerns over immigration, and how these two currents ended up shaping the reasoning of the Court. Indeed I will point out that the reasoning of the Court, far from being the result of schizophrenic choices, was the fruit of the Court's attempt to accomplish both Member States' concerns over immigration and free movement stances. Finally I will show that, although the Court shaped its reasoning between the trends mentioned above, in its outcomes it prioritized free movement protection over immigration concerns.

This chapter will be divided in nine parts. After this brief introduction, I will dedicate parts 2, 3, 4, 5, 6, 7 and 8 to a detailed explanation of the leading law cases on this topic starting from *Singh*[2] until *Metock*[3]. In this excursus I will show how the Court, with the exception of the *MRAX*[4] case, considered in its reasoning both EU free movement stances and the Member States' immigration interests. Finally, part 9 will be dedicated to the conclusions. I will underline how free movement and immigration concerns have been at the base of the Court's activity and how its judgments have been shaped around these two currents although, overall, eventually their outcome prioritized free movement over border protection. This analysis will point out that the judgments' inconsistencies and incongruities are not the result of the Court's lack of accuracy but find their reason in the bigger willingness of the Court of taking into account both free movement and immigration concerns.

2. *Singh*

The first case on the issue of family reunification between EU citizens and third country nationals, *Morson and Jhanjan*,[5] appeared at the beginning of the eighties and set out a basic rule for the application of family residence rights contained in the free movement legislation. The CJEU stated that EU free movement law and family residence rights were not applicable in the circumstance in which a national of a Member State did not move from his/her state of origin.[6] In other words the Court made

[2] Case 370/90 *R. v. IAT and Singh ex parte Secretary of State* [1992] ECR I-4265.
[3] Case 127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.
[4] Case 459/99 *Mouvement contre le racisme, l' antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State* [2002] ECR I-6591.
[5] Joined cases C- 35 and C-36/82 *Morson and Jhanjan v. The Netherlands* [1982] ECR 3723.
[6] The Court applied the purely internal rule established in the *Saunders* case (Case 175/78 *R. v. Saunders* [1979] ECR 1129). For a comment see Alina Tryfonidou, "Family reunification rights of (migrant) union citizens: towards a more liberal approach", *European Law Journal* 15, no. 5 (2009), 636. For a comment

clear that, in absence of a situation governed by EU law, the favourable rules on family reunification could not be applied.[7] Bigger challenges for the Court started to arise when Member States began to deny family residence rights to third country national family members, despite the fact that right of free movement had been exercised. This was exactly what happened in the *Singh* case. Surinder Singh, an Indian national, married Rashpal Purewal, a British national in 1982 in the UK. They then decided to move to Germany and work. In 1985 the couple returned to the UK to set up a business. Mr. Singh was initially admitted to the UK for one year as the husband of a UK national. When the marriage broke down and the husband was refused indefinite leave and became an overstayer, the Secretary of State initiated deportation proceeding, against which Mr. Singh appealed. He argued that the Home Office had been wrong in admitting him only for a year under the British Immigration rules. Since his wife was an EU worker she was entitled to have her husband granted a long-term residence permit. Precisely, the question submitted for the preliminary ruling by the national Court concerned whether Art. 52 of the Treaty (right to establishment) and Directive 73/148/EEC required that "the Member State should accept within its territory the third country national spouse of one of its nationals when, after having moved to another Member State to take up a job position, he decides to return to his Member State of origin to establish himself."[8] The CJEU held that a national of a Member State might be discouraged from leaving his country of origin if on returning his conditions (in this case the right of residence of the spouse), were not at least equivalent to those which he would enjoy under EU law in the territory of any other Member State.[9] The Court applied this rule to the situation at stake and concretely held that the right of Mrs. Singh of moving back to the UK would have been obstructed if, when she decided to return, Mr. Singh was not granted the same residence rights as the ones accorded to him in Germany. In other words, by using the market access language the Court introduced the idea that family residence rights find protection under EU law when their denial would obstruct the primary right of free movement. Given that Mrs. Singh's free movement right would have been obstructed had long-term residence been denied to her third country national husband, the Court decided to grant him the right to stay under EU law.

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on this case see also Gavin Barret, "Family matters: European Community Law and third country national family members", *Common Market Law Review* 40, no. 2 (2003), 377-378.

[7] *Morson and Jhanjan* judgment, para. 16.

[8] *Singh* judgment, para. 11.

[9] *Singh* judgment, para. 23.

In the light of the Court's decision scholars proposed two readings of the case, according to which the decision can be perceived either bad or good.[10] The sustainers of the idea that the Court struck an unfair balance between the state and the Union interests believe that a person in Mrs. Singh's position could see her right of leaving her Member State of origins obstructed only 1) if upon her return her position would be worse off than if she had remained; 2) if she would be prevented from enjoying any goods or qualification obtained during her stay in another Member State.[11] Apparently, neither of these two options happened in *Singh.* Hence, why should Mrs. Singh be deterred from moving from the UK to Germany knowing that her spouse had a limited right to stay in the UK anyway in the first place? On the other side a more practical view on the Court's decision can be applied and, in this eventuality, the decision of the Court could be seen as a good decision. Indeed, instead of considering the right of free movement obstructed from the moment of the departure from the state of origin, the right of free movement could be realistically obstructed in the moment of departing the host Member State towards the state of origin. As a matter of fact, realistically, the individual could be deterred from going back to the state of origin once he/she has experienced better treatment in the host Member State. Avoiding the possibility of enjoying the same rights once back to the country of origin "would arguably damage the notion of Common Market involving free movement of workers and self employed persons".[12]

Interestingly however, this position follows a narrower line of argument than the one endorsed by the CJEU. The Court, as mentioned above, did not state that the right of free movement of Mrs. Singh would have been obstructed from going back to the state of origin because Mr. Singh would have not been able to enjoy the same long term residence right as the one accorded to him in Germany but stated that Mrs. Singh would not have had any incentive to move from the UK in the first place, should not she have had the certainty that Mr. Singh would have had exactly the same residence rights enjoyed in Germany once back in the UK. The Court's broad interpretation of the ancillary scope of third country national family residence rights surely grants a deeper protection than the more limited view of those who considered *Singh* a good decision. The Court's approach indeed is characterized by a less rigorous test: once abroad willing to come back to the state of origin with the third country national family

[10] Tryfonidou, *supra* note 6, 639-640.
[11] Miguel P. Maduro, "The scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination" in *The future of remedies in Europe,* eds. Claire Kilpatrick, Tonia Novitz, and Paula Skidmore, (Oxford: Hart Publishing, 2000), 124.
[12] Barret, *supra* note 6, 379.

member, the sponsor can just expect his/her national Member State to grant the same family rights as the ones granted by the host Member State to his/her third country national relative simply alleging that, otherwise, he/she would have probably decided not to leave the home state in the first place. However, this is an unverifiable assumption that is potentially able to cover any kind of circumstances as judges will never be able to know whether it is true or not that the European sponsor would have never left his/her state of origin.[13]

Leaving the issue of the Court's application of the ancillary relationship between free movement and family reunification provisions aside for a moment, it is interesting to point out that in this judgment the Court's activity is based on the interplay of Member States' sovereignty over immigration and the enhancement of the right of free movement of workers. The argument submitted by the UK government shows the government concerns towards third country national immigration. On one side, the UK used the division of competences argument by claiming that EU law was not applicable because a EU returnee worker re-enters the state of origin by virtue of national law. For this reason, national immigration laws should be applied also to the third country national family member.[14] On the other side, the UK argued that allowing the third country national spouse to enter by virtue of EU law would increase the possibility of fraud and sham marriages.[15] The words of Mr. Singh and the Commission show instead that the right of free movement and residence should take priority over immigration concerns.[16] From their submission it is clear how their concern was focused on the fact that a Member State national that exercised his/her right of movement to another Member State and then decided to go back to the state of origin should be treated in the same way as a national of another Member State who comes to establish himself in that country in accordance to the prohibition to discrimination,[17] and that national rules should not be taken into account.

The above mentioned analysis and comments over the different interpretations of the ancillary relationship between free movement and family reunification provisions

[13] *Ibid*. The reconstruction of the Court was nevertheless subject to criticism. Against the reasoning of the Court Barret argued that it seems odd to say that an individual would be limited from going to another Member State because the conditions of entry and residence in that Member State are much better than the one of origin. It is more likely that the worker would be more deterred from leaving the host Member State to go back home if the conditions there are more favorable than the state of origin rather than deterred from leaving the state of origins in the first place as the Court suggested.
[14] Singh judgment, para. 14.
[15] *Ibid*.
[16] *Ibid.,* para. 13.
[17] *Ibid.*

suggest that the pronouncement of the Court has been built upon the idea of enhancing free movement and removing the national measures that can create an obstacle to the exercise of the right of free movement. The endorsement of the market access language in interpreting the relationship between free movement and family reunification provisions, for the first time in a case concerning free movement and third country nationals residence rights, frames *Singh* within the broader free movement EU jurisprudence that gives priority to the protection of the right of free movement unless a justification such as protection of public policy, security and health can be found.

Nevertheless, it can be also argued that the Court's approach might also have been driven by Member States' immigration concerns. As a matter of fact, from the text of the original provisions on family reunification contained in the free movement legislation, it seems that the intentions of the EU legislator were simply to guarantee a corollary right of residence to family members of EU workers once the right of free movement was exercised by the latter. The idea of granting family reunification just when free movement would be obstructed was indeed a jurisprudential endorsement of the market access approach, adopted by the Court in cases involving free movement and family reunification for the first time in *Singh*. By using the "obstacles to free movement" language the assessment of the right of entry of a third country national family member still remains within the Member States' competence when a denial of this right would not have any effect over the exercise of free movement. In other words, by applying the *Singh* interpretation on the relationship between free movement and family reunification provisions, Member States can still claim sovereignty over immigration of third country nationals in cases in which the exercise of the EU citizen's right of free movement is not affected at all by the denial of family reunification rights.

In conclusion, it can be said that in the *Singh* judgment the Court upheld a position that prioritized the right of free movement over member States' immigration concerns. However, the application of the idea that residence family rights should be granted when their potential denial would hinder the right of free movement of the sponsor seems to take into account Member States' concerns over immigration too.

3. *Carpenter*[18]

Mrs. Carpenter was a national of the Philippines who had married a UK national while being present in the UK in breach of immigration legislation. Her application for

[18] Case 60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-06279 9.

a residence permit as the spouse of a UK national was refused and an order removing her to the Philippines was issued. Mrs. Carpenter appealed against that deportation order, claiming that she was entitled to a right to remain in the UK under EU law. She essentially argued that Mr. Carpenter was exercising a Treaty freedom since a substantial part of his business entailed providing services in other Member States. Her deportation would have been an obstacle to his right of providing services, since her taking care of his children facilitated Mr. Carpenter's travelling in other Member States. In order for the Court to assess whether family reunification rights should have been granted, it was necessary to verify firstly whether the situation presented a link with EU law and secondly whether the denial of family reunification rights would have obstructed the exercise of the EU worker primary EU right of free movement.

A.G. Stix Hackl found no difficulty in finding a link with EU law. After having stated that third country national family members' right of residence in a Member State depended "on the position of the citizen of the Union"[19], that is whether or not the sponsor is exercising one of the treaty freedoms, she found that the right being exercised by Mr. Carpenter was the freedom to provide services.[20] In other words another freedom apart from the freedom of movement was relevant for the establishment of a link with EU law. Once the link with EU law was established, in order to verify whether Mr. Carpenter' right to provide services would have been obstructed by the potential denial of Mrs. Carpenter's residence rights in the UK, she compared the situation to *Singh*.[21] In her view the two cases were comparable, despite the different circumstances, first of all because both had to deal with the exercise of a treaty freedom, and secondly because the Court in *Singh* did not treat the situation at stake as a returnee case but saw the situation as "Mrs. Singh moving to another Member State to exercise her EU rights there, namely the freedom of movement for workers".[22] Indeed, the Court in *Singh* focused on the discouragement effect that the denial of family reunification provisions would have had on Mrs. Singh's decision of leaving her Member State of origins and not on the deterrent effect that these norms would have had on her returning back home from the host Member State. For this reason, the fact that Mr. and Mrs. Singh settled in another

[19] *Carpenter* opinion, para. 42.
[20] *Ibid.*, para. 59.
[21] *Ibid.*, paras. 59 *et seq.*
[22] *Ibid.*, paras. 65-66. As explained above with regard to the *Singh* case, the Court applied the concept of deterrence to the movement that occurred from the state of origin and not to the movement that occurred from the host Member State back to the state of origin.

Member State was not a legally relevant feature of the case[23] and, hence, the *Singh* test was applicable to *Carpenter* too. Having found these similarities between the two, she concluded that the situation was not wholly internal and hence it could be solved through the utilization of EU law. The outcome was that a right of residence was granted to Mrs. Carpenter[24] relying on Directive 73/148/EEC, without verifying whether or not the possibility of Mr. Carpenter to exercise his right to provide services abroad was connected to the presence of Mrs. Carpenter in the UK.[25]

Differently from what was stated by the advocate general, the Court ruled out the possibility of applying Directive 73/148/EEC on the grounds that both its wording and objective implied that it did not govern the right of residence of a service provider's spouse in his Member State of origin.[26] On the other hand, the Court found that the link with EU law, and hence Mr. Carpenter's rights, could directly be derived from Art. 49 EC on the right to freely provide services.[27] As the advocate general, the Court argued that the deportation of Mrs. Carpenter would have been detrimental to Mr. Carpenter family life because it would have been an obstacle to a condition under which he exercised his freedom of providing services.[28]

It is worth noting that, despite the differences in the factual circumstances, the reasoning proposed by the Court in *Carpenter* is very similar to the one proposed in *Singh*. First of all, in both cases a link with EU law was established, although in *Singh* it was found under the free movement of workers legislation and in *Carpenter* under the treaty article on freedom to provide services. Secondly, in both cases the Court referred to the idea of deterrence[29] in order to justify the residence right of the third country national family member: the denial of the right of residence to Mr. Singh and Mrs. Carpenter would have created obstacles, both Mrs. Singh's right of moving from her own state of origins and Mr. Carpenter's right to provide services outside the UK. The

[23] *Carpenter* opinion, para. 67.
[24] *Ibid.*, para. 73.
[25] A.G. Stix Hackl found of no relevance the circumstance that Mrs. Carpenter cared for Mr. Carpenter' children in order to evaluate whether or not the latter had exercised his rights in such a way to grant his spouse the right of residence under EU law. See para. 103.
[26] *Carpenter* judgment, paras. 32 et seqq.
[27] *Ibid.*, paras. 30 and 37.
[28] *Ibidem*, para. 39. The Carpenter judgment raised a lot of criticism. Among the critical literature see See Peter Oliver and Wulf Henning Roth, "The Internal Market and the Four Freedoms", *Common Market Law Review* 41, no. 2 (2004); Gareth Davies, "Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State", editorial in *Common Market Law Review* 40, (2003); Alina Tryfonidou, "*Mary Carpenter* v *Secretary of State for the Home Department*: *The Beginning of a New Era in the European Union?*", *King's College Law Journal* 14, (2003) and Laurent Jadoul, and Frederic Vanneste, "Casenote under case C-60/00. Mary Carpenter v. Secretary of State for the Home Department (ECJ July 11, 2002)", *The Columbia Journal of European Law* 9, no. 3 (2003).
[29] See Singh paras. 19, 20 and 23 and Carpenter para 39.

reiterated application of the idea of turning down national measures that can hinder the right of free movement suggests that also in *Carpenter* the concern of the Court lay in making free movement more effective and efficient, although this time not with regard to the right to move and reside in another Member State but with regard the right to provide services abroad.[30]

In particular on this second similarity among the two cases it is worth noting that the reference to deterrence[31] by the Court in *Carpenter* was probably the way to take into account the UK stances over immigration. The UK government, surprisingly supported by the Commission too, pointed out that the right of providing services abroad and its derivative right of residence of family members could not be claimed, given that there was no link with EU law because Mr. Carpenter did not exercise his right of movement and residence in another Member State.[32] Hence the situation, in the UK view, had to be considered purely internal. Nevertheless, in reply the Court found that a link with EU law existed and consisted in Mr. Carpenter's exercise of the right to provide services and that Mrs. Carpenter right of residence in order not to hinder the former's exercise of a fundamental freedom. In this way, the Court was able to protect the third country national right of residence but, at the same time, not to extend this protection to all the cases in which a third country national is an EU sponsor relative but just to those cases in which the denial of his right of residence would create obstacles to the primary right of the EU sponsor to provide services abroad. In this way, implicitly, the Court confirmed that when a relation of deterrence with EU law does not exist it is up to the national Member State to assess whether a third country national is entitled to reside within its territory.

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[30] The Court ruled out the application of Directive 73/148/EEC and relied instead on Art. 49 EC (See *Carpente*r judgment, paras. 28-36).

[31] It has been argued that both the Court and the advocate general failed to give a proper reason on why the deportation of Mr. Carpenter could be detrimental to Mr. Carpenter's family life. The reason that grounded these comments is given by the fact that the deterrence argument providing the necessary link with EU law was dealt with in the single paragraph 39 of the judgment and the obstacle raised, the disturbance of family life, was only described in vague terms without really engaging with the importance of the child care provided by Mrs. Carpenter for the success of her husband business. In this way, the CJEU "seemingly bypassed any need for the obstacle to be direct and substantial". On this point see Helen Toner, 'Comments on Mary Carpenter v. Secretary of State, 11 July 2002 (Case C-60/00)', *European Journal of Migration and Law* 5, (2003), 169. Some other scholars even argued that the deportation in *Carpenter* was not a measure that could hinder the freedom to provide services to another Member State because the same effect would have happened even if the business of Mr. Carpenter was just confined within the UK borders. See in particular Davies, *supra* note 28, 541; Solvita Harbacevica, and Norbert Reich, "Citizenship and family on trial: a fairly optimistic overview of recent court practice with regard to free movement of persons", *Common Market Law Review* 40, no. 3 (2003), 628.

[32] *Carpenter* judgment, paras. 22-27.

Finally, a last reflection is needed. Unlike *Singh*, it is worth noting that in *Carpenter* the Court does not seem to attempt to balance free movement and Member States' immigration concerns exclusively. Indeed, it seems that another of Court's main concerns consisted of the fact that the deportation order affected Mr. Carpenter's right to family life as guaranteed by the ECHR.[33] Since the UK justified the application of the deportation order on grounds of public interest the Court, after having established the link with EU law and assessed that the absence of Mrs. Carpenter would have limited the right of Mr. Carpenter to provide services,[34] scrutinized the deportation order in terms of its compliance with the right to family life as enshrined in Art. 8 ECHR and protected by EU law by virtue of Art. 6(2) EU. Finally, the Court found that Mrs. Carpenter's deportation would have been disproportionate.[35] As Acierno confirmed in a case comment "once the Court has determined that the deportation order of Mrs. Carpenter constitutes a restriction to Mr. Carpenter's right to freely provide services the judgment moves on to the heart of the matter: the influence of fundamental rights".[36] Acierno's reading is bolstered also by the historical circumstances in which the judgment was delivered. As a matter of fact, the national limitations of the time in which *Carpenter* was released in terms of Human Rights protection (the Human Rights Act was adopted by the UK but not yet enforced) are likely to have led the national Court to look into EU law and make use of the preliminary procedure, instead of exhausting all the national remedies to make an application to Strasbourg in order to ask for protection of the right to family life.[37]

In conclusion, it seems that also in *Carpenter* the Court took into account multiple concerns. In particular, the application of the *Singh* idea of deterrence between EU citizens and third country nationals' rights shows the Court's aim to prioritize free movement protection. However, at the same time, it can be argued that the Court, by granting its protection just to those cases in which the denial of his right of residence would create obstacles to the primary right of the EU sponsor to provide services, implicitly took into account the Member States' concerns over their right to assess the legality of a third country national entry within their territory. Additionally, the Court

[33] Eleanor Spaventa, "From Gebhard to Carpenter: Towards A (Non-) Economic European Constitution", *Common Market Law Review* 41, no. 3 (2004), 767. The author underlined that the Court failed to indicate how the deportation order could have been a barrier to one's ability to provide services abroad.
[34] *Carpenter* judgment, paras. 37-39
[35] *Ibid*., paras. 41 et seqq.
[36] Silvia Acierno, "The Carpenter judgment: fundamental rights on the limits of the Community legal order", *European Law Review* 28, no. 3 (2003), 405.
[37] *Ibid.*, 402.

seems to have taken into account Human Rights stances by granting protection to the fundamental right to family life.

4. *MRAX*[38]

The *MRAX* case involved a challenge, raised by an interest group, on the Belgian application of the EU legislation with regards to visa requirements. Among the questions that were asked of the Court, the most relevant to this analysis[39] was whether "Art. 3 of Directive 68/360/EC and Art. 3 of Directive 73/148/EC could be read as meaning that the Member States may, at the border, send back foreign nationals subject to a visa requirement and married to a EU national who attempt to enter the territory of a Member State without being in possession of an identity document or visa".[40]

A.G. Stix-Hackl delivered the opinion in this case. She stated that, according to Art. 3 of Directives 68/360/EEC and 73/148/EEC, Member States have the power to refuse entry at the frontier if the non-Member State family member does not fulfill the condition of the presentation of a valid passport or a valid visa.[41] However, in order to assess whether or not the Belgian national legislation really did comply with the EU directives, it is necessary to analyze whether the measure adopted complies with the principles of non-discrimination and proportionality in the first place.[42] With regard to the principle of non-discrimination, A.G. Stix-Hackl stated that the distinction between non-Member State nationals with and without a visa is *per se* not discriminatory, given the fact that the case concerns the difference between two different groups of family

[38] Case 459/99 *Mouvement contre le racisme, l' antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State* [2002] ECR I-6591.
[39] Apart from this question the others were: - should Member States refuse to issue a residence permit to the spouse of a EU national who has entered their territory unlawfully and issue an expulsion order against him?; - should Member States neither withhold a residence permit nor expel a foreign spouse of a EU national who has entered national territory lawfully but whose visa has expired when application is made for the issue of that permit; - should foreign spouses of EU nationals who are not in possession of identity documents or a visa or whose visa has expired have the right to refer the matter to the competent authority when applying for the issue of a first residence permit or when they have an expulsion order made against them? To the first question the Court answered that Member States are not allowed to refuse to issue a residence permit or to issue an expulsion order to the spouse of a EU national who can prove his/her identity and the relationship with the EU relative. On the second question the Court answered that Member State may neither refuse to issue a residence permit to a third country national married to a EU national and entered the territory of that Member State lawfully, nor issue an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit. Finally, on the last question, the Court answered that foreign national married to a national of a Member State has the right to refer to the competent authority a decision refusing to issue a first residence permit or ordering his/her expulsion before the issue of the permit, including where he/she is not in possession of an identity document, or has entered the territory of the Member State without a visa or his/her visa has expired.
[40] *MRAX* judgment, para. 37.
[41] *MRAX* opinion, para. 54.
[42] *MRAX* opinion, paras. 55-56.

members: third country nationals and EU national family members.[43] With regard to the principles of proportionality instead, she stated that the refusal of entry to a third country national family member at the border must be presumed as an interference with the right to respect for family life, unless the measure satisfies the requirement of Art. 8(2) ECHR.[44] She finally concluded that Member States can refuse entry to a third country national family member who is not in possession of a visa only if that measure is compatible with the right to respect family life and, in particular, with the principle of proportionality.[45]

The Court reached the same conclusions although through different arguments. First of all, the Court repeated what it had already stated in *Carpenter*, namely that the EU legislature had recognized the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.[46] Then the Court went on to hold that "the right of a third country national married to a Member State national to enter the territory of the Member States derives under EU law *from the family ties alone"*.[47] Subsequently the Court stated that, although the wording of Art. 3(2) of Directive 68/360/EEC and 73/148/EEC made the right of entry conditional to the possession of a visa, the same provisions accorded every facility to the third country national relatives for obtaining the necessary visas, which means that these documents have to be issued without delay.[48] Finally, the Court stated that it would have been "disproportionate and therefore prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirement of public policy public, security, and public health […]".[49]

Looking at the submissions reported in the judgment before the findings of the Court it seems that, once again, the Court had to make choices between promoting free movement and taking into account Member States' concerns over third country national's immigration. On one side, the submission of the Belgian state regarding the

[43] *MRAX* opinion, paras. 59-60.
[44] *MRAX* opinion, paras. 65-66. Art 8(2) states that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law an is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and the freedoms of others".
[45] *MRAX* opinion, para 72.
[46] *MRAX* judgment, para. 53.
[47] *Ibid.*, para. 59; emphasis added.
[48] *Ibid.*, para. 60.
[49] *Ibid.*, para. 61.

obligation for a third country national to apply for a visa before entering its territory was clearly connected to immigration concerns towards third country nationals, as the words of paragraph 44 clearly testify: "the Belgian State submits that the obligation to apply for a visa before entering the territory of a Member State provides the Member States with means of checking both whether a third country national who wishes to enter their territory as the spouse of a Member State national fulfils the requisite conditions and whether he does not fall within the category of persons liable to be refused entry on grounds of public policy, public security or public health […]". On the other side, the Commission's submission gave priority to the free movement legislation provisions on residence rights of family members of EU migrant workers. According to the Commission reading, which was shared by the Court, when "a person establishes family ties with a migrant EU worker, the visa has a merely formal character and must be issued virtually automatically by the Member State through which he enters the EU. His right to enter the EU is not founded in any way on the visa but derives, pursuant to EU law, from the family ties alone."[50]

However, unlike the previous *Singh* and *Carpenter*, the reasoning of the Court this time did not seem to contemplate any possible hypothesis in which a Member State could be allowed to refuse the entry of a third country national EU family member. As a matter of fact, the Court did not make any reference to the idea of deterrence and to the fact that the right of entry should be granted to the third country national family member in order not to discourage the primary right of free movement of the EU worker. The Court simply stated that family residence rights were granted because they derive from the family ties alone. In more technical terms, through the statement that the right of a third country national family member to enter the territory of a Member State are given by the family ties alone, the Court engaged explicitly just with the scope *ratione personae*, assuming without further discussion that the case would have fallen under the EU law umbrella. The position of the Court therefore seems simply focused on protecting the right of free movement of the EU sponsors and their derivative rights of family reunification with third country national family members.[51]

[50] *Ibid.*, para. 51.

[51] For a clarification on this point see Alina Tryfonidou, "Jia or Carpenter II; the edge of reason", *European Law Review* 32, no. 6 (2007), 911. The author defines *MRAX* as a generous interpretation of family rights because, once the family link is established, EC law applies an automatic right to accompany the EU sponsor into the host Member state despite showing the link to the exercise of one of the fundamental freedoms.

This case is a clear example of how the Court, despite the evident contrasting claims between free movement and immigration concerns, did not take into account the Member State' concerns over immigration issues and built its reasoning only around the aim of protecting free movement. The reasoning proposed by the Court in MRAX is surprisingly bold and consistent with the literal meaning of the family reunification provisions contained in the free movement legislation.

5. *Akrich*[52]

Less than one year after the Court pronounced itself on *Carpenter* and *MRAX* the Court changed its approach in *Akrich*. Mr. Akrich was a Moroccan national who was deported from the UK and prohibited from re-entry and residence due to being convicted of criminal offences. He however returned to the UK and, while being present there unlawfully, he married a UK national. His subsequent application for a residence permit as the spouse of a British citizen was refused and Mr. Akrich was deported to Ireland, where his spouse had meanwhile taken up residence rights. After having worked in Ireland for a few months, the couple claimed a EU law right of residence for Mr. Akrich in the UK, relying on the CJEU's ruling in *Singh*.

It is interesting to look first at the opinion of A.G. Geelhoed. In his view this particular case posed a dilemma in terms of the approach that the Court had to take with regards family reunification between EU citizens and third country nationals. In his view, following the *Singh* reasoning would have meant that anytime a third country national was married to a Member state national, regardless being legally or illegally present within the territory of the Union, the national migration rules could have been overcome.[53] In other words, according to the advocate general, granting the right of family reunification to a European worker who wants to rejoin with a third country national relative without the previous assessment of the host Member State constituted a legal anomaly[54] which the Court needed to deal with.[55]After having argued how the Court, in previous freedom of movement cases, applied a "friendly" interpretation of family reunification,[56] A.G. Geelhoed posed the question that was crucial for the solution of the case: "must the Court's extensive case-law, as expressed, inter alia, in the

[52] Case 109/01 *Secretary of State for the Home Department v. Akrich* [2003] ECR I-9607.
[53] *Akrich* opinion, para. 10.
[54] *Ibid.*, para. 62. The advocate general underlined the difference with third country nationals that reunify with a national of a Member State that has never exercised his right to move and that, therefore, have to comply with the national more stringent immigration rules.
[55] *Ibid.*, para. 125.
[56] *Ibid.*, paras 65 to 108. (summary from 109 till 112).

Singh judgment, entail the consequence that national immigration legislation must always remain inapplicable where spouses from outside the European Union are involved who are married to Community nationals but are not lawfully on the territory of the European Union?"[57] In his view, *Singh* created both a right to move and reside in another Member State with the third country national relative, and a right to be accompanied and reside in the Member State of the EU national on the way back. In this second hypothesis, the third country national relative should not be subject to any previous individual assessment by the Member State of origin.[58] However, according to his reading of the case, *Singh* did not create a right in favor of the third country national to enter the territory of the European Union.[59] Based on these grounds, the solution of the dilemma was straightforward: "the right conferred on the spouse of the migrant worker under Article 10 of Regulation No 1612/68/EEC may be limited[60] in a case involving a spouse who is a national of a non-Member State and has not been granted entry to the European Union in conformity with immigration law."[61]

The Court started by stating that the situation at stake could amount to a legitimate exercise of the right of freedom of movement of workers. On this background, the Court pointed to the fact that Regulation 1612/68/EEC only covered freedom of movement within EU law and was silent regarding the right of first entry.[62] The Court concluded that a third country national, in order to be able to exercise the rights stemming from Regulation 1612/68/EEC and enjoy the favorable family residence rights provided by it, had to be lawfully present in a Member State first.[63] In order to justify this assertion the Court proposed a new and stricter interpretation of the ancillary role between free movement and third country national residence rights. According to the Court, "if the citizen's spouse has a valid right to remain in another Member State, Art. 10 of Regulation 1612/68/EEC applies so that the citizen of the Union is not limited from exercising his or her rights to freedom of movement on returning to the Member State of which he or she is a national. If, conversely, that citizen's spouse does not already have a valid right to remain in another Member State,

[57] *Ibid.*, para.108.
[58] *Ibid.*, para.133.
[59] *Ibid.*, para. 134.
[60] It has been argued that the opinion of the advocate general lacked of persuasiveness because it failed to explain how a non-limited right could be limited. See on this point Eleanor Spaventa, "Case C-109/01, *Secretary of State for the Home Department v. H. Akrich*, judgment of the Full Court of 23 September 2003", [2003] ECR I-9607", *Common Market Law Review* 42, no. 1 (2005), 230 et seq.
[61] *Akrich* opinion, para. 136.
[62] *Akrich* judgment, para. 49
[63] *Ibid.*, para. 50.

the absence of any right of the spouse under Art. 10 aforesaid to install himself or herself with the citizen of the Union does not have a dissuasive effect in that regard".[64] In other words, if the third country national relative is not legally resident within the territory of the Union, according to this reading of the relationship between family member residence rights and free movement rights, the denial of granting family reunification between the latter and the EU worker is not considered a dissuasive factor that could hinder the decision of the worker to install himself in another Member State.

A strong criticism[65] underlined the difficulty of placing this judgment within the background of the previous case law. For this reason, *Akrich* has been classified as "surprising judgment that created uncertainty as the position of family members from third countries".[66] This uncertainty was triggered in particular because the Court, in plain contrast to *MRAX* [67] and *Carpenter*[68], did not apply a broad reading of free movement provisions and, on the contrary, even characterized the right of first entry as a matter of national competence.[69] By acting in this way however the Court ended up making up the condition of the previous lawful residence, which was not contemplated

[64] *Ibid.*, para. 54. For a clarification of this point see also Tryfonidou, *supra* note 6, 637-638.

[65] This judgment triggered also few positive reactions. See for example see Tryfonidou, *supra* note 6, 637-638. Tryfonidou praised the approach of the Court by defining *Akrich* a "rationalizing judgment". According to her, the introduction of the requirement of the previous lawful residence complies with the deterrence factor: if no right of previous lawful residence is enjoyed by the third country national family member in the territory of the State from which he/she moved with his/her European sponsor it seems that "the refusal of a right of residence for family members in the receiving State would not have any impact on the exercise of the freedom to move and, thus, would not have a sufficient link with the economic aims of the market freedoms". Nevertheless, the deterrent effect was also criticized. See on this point Steve Peers, "Free movement, immigration control and constitutional conflict", *European Constitutional Law Review* 5, no. 5 (2009), 181. He considered the deterrence argument profoundly unconvincing given that the whole point of moving to Ireland was to avoid the more restrictive national law on family reunion. If the same advantage was not granted on the way back to the UK this would be a great deterrent for the EU citizen to move back.

[66] Samantha Currie, "Accelerated justice or a step too far? Residence rights of non EU family members and the court's ruling in Metock", *European Law Review* 34, no. 2 (2009), 321.

[67] Cathryn Costello, "Metock: free movement and normal family life in the Union", *Common Market Law Review* 46, (2009), 593. In regard to this point Professor Peers argued that since Art. 10 Regulation 1612/68/EEC did not mention at all the requisite of the previous lawful residence it was not the task of the Court to introduce it. Indeed, the question of the initial admission of Mr. Akrich to join a UK citizen in the United Kingdom was outside the scope of Art. 10. See Peers, *supra* note 65, 181. See also Spaventa, *supra* note 60, 232. She hinted at the possibility that in *Akrich* the Court overruled *MRAX* without even mentioning it in the latter case.

[68] As a matter of fact, in this case, the marriage between Mrs. and Mr. Carpenter practically rectified an illegal status by avoiding immigration deportation. On this point see Matthew Elsmore, and Peter Starup, "Case C-1/05, Yunying Jia v. Migrationsverket", *Common Market Law Review* 44, no. 3 (2007), 196.

[69] It seems that the distinction of competences established by the deterrence principle was blurred by a statement made by the Court. In its view the Member State, when making the first assessment on whether or not family reunification rights should be granted by national law, should have regard to the need to respect to family rights (*Akrich* judgment, para. 58). On this point see Cristophe Schiltz, "Akrich: A Clear Delimitation without Limits", *Maastricht Journal of European and Comparative Law* 12, no. 3 (2005), 250–251. On the same point see also Niamh N. Shuibhne, "Margins of Appreciation: national values, fundamental rights and EC free movement law", *European Law Review* 34, no. 2 (2009), 235.

in the previous case law –in the *Carpenter* case Mrs. Carpenter was in fact illegally resident and in *MRAX* the Court did not make any distinction between lawfully and unlawfully family members as the right to entry of the third country national derives from the family ties alone- and that a literal interpretation of the provision excluded anyway.[70] Moreover, as seen before, after creating the condition of the previous lawful residence the Court linked it to a stricter interpretation of the ancillary relationship between residence rights of third country nationals and free movement rights. In simple terms, whereas the Court in *Carpenter* held that also the denial of granting residence rights to an illegal third country national family member could have hindered the rights of the EU relative to provide services abroad, in *Akrich* the illegal residence of the third country national family member within the territory of the Union did not count as being a hindering factor on the decision of the sponsor to move to another Member State.

What did trigger the special focus of the Court on the previous right of lawful residence? Surely, from the case analysis above presented, a strong free movement rationale is at the base of this judgment. In fact, as before in *Singh* and *Carpenter*, the Court did not renounce to refer to the idea of applying article 10 Regulation 1612/1968/EEC in order not to deter the EU sponsor from exercising his right of free movement.[71] However, the strict interpretation of the ancillary relationship between free movement and family reunification provisions showed how the reasoning of the Court was likely driven by the sense of protecting Member States' sovereignty on immigration. This was expressed by affirming the UK's right of assessing the right of first entry of a third country national within its territory in accordance to its national rules. The claim of the United Kingdom, as summarized by A.G. Geelhoed in his opinion, fundamentally expressed the fear that, were the Court to decide that Mr. Akrich had a right under EU law to remain in the UK, that would have made possible for all spouses from non-Member States to evade national law with impunity and marginalize Member States' right to adopt measures to combat abuse.[72] The Court endorsed this claim by basically filling the silence of the legislation with the specific requirement of previous lawful residence and by supporting it with a stricter explanation of the ancillary relationship between free movement and family residence rights.

[70] Peers, *supra* note 65, 181. On the literal interpretation he stated that while Regulation 1612/68/EEC set out a condition relating to accommodation of family members, it made no reference to any condition relating to their prior residence in another Member State. For this reason, the requirement of the previous lawful residence of the third country national was completely made up, in contrast with the legislation and the previous line of law cases.
[71] See in particular paras. 53 and 54.
[72] *Akrich* opinion, para. 114.

The decision to endorse this approach was probably bolstered by the concrete circumstances of the case. It is important to remember that, unlike *Carpenter* for example, Mr. Akrich did not just become illegal after having overstayed in the UK but rather managed to elude the UK immigration laws several times.[73] Moreover, *Akrich* was pronounced "when the 2004 enlargement and the connected sensitivities around free movement were particularly prevalent in discussion and discourse at Union and Member State level".[74] As seen before, the EU enlargement provoked serious fears towards immigration of third country nationals[75], which were exorcised by the continuous strengthening of the external borders through stricter measures on illegal and legal immigration. In other words, it is likely that the several attempts of Mr. Akrich of entering illegally in the UK and the increasing states' concerns over third country nationals likely pushed the Court to completely accommodate its decision according to Member States' sovereignty.[76]

Finally, there is a last aspect that is worth exploring further. The border protection approach endorsed in *Akrich* was blurred by a statement of the Court concerning the right to family life. Although the CJEU had ruled out the possibility of granting to Mr. Akrich a right of residence, it nevertheless stated that "regard must be had to respect for family life under Article 8 of the [ECHR]".[77] Is this simply a statement to remind the Member States of their obligations as parties to the ECHR? An indicator militating against such an interpretation is the fact that the CJEU underlined that the right to family life as established by Art. 8 ECHR was among the fundamental rights protected in the EU legal order by virtue of the Court's settled case law and Art. 6 (2) EU.[78] There is not a definitive answer to this question but it seems that, with this cryptic referral to Art. 8 ECHR, the CJEU to a certain extent managed to limit the *Akrich* strict interpretation just to cases that involved a convicted criminal.

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[73] Mr. Akrich was deported to Algers after having been convicted for attempted theft and possession of a stolen identity in 1991. The year after he re entered the UK illegally and was re arrested and deported again.
[74] Currie, *supra* note 66, 321, footnote 56.
[75] Jacek Wieclawski, "The Eastern Enlargment of the European Union: Fears, Challenges and Reality", *Globality Studies Journal*, (2010), 22.
[76] Clifford J. Carrubba, and Matthew Gabel, "Do Governments Sway European Court of Justice Decision-making?: Evidence from Government Court Briefs", in IFIR Working Paper Series, 2005, paper no. 6, accessed March 2012, available at <http://www.ifigr.org/workshop/fall05/gabel-workshop.pdf>. In this paper the authors elaborated an empirical test of Member State influence on CJEU decisions over the time span of three years and demonstrated that the Court really takes into account the concerns and the views of Member States in order to ponder its decisions.
[77] *Akrich* judgment, para. 58.
[78] *Ibid*.

In conclusion, also in the *Akrich* case it is possible to see in the Court's reasoning a tension between free movement and Member States' immigration concerns. Unlike the previous cases though, the Court utilized for the first time an utterly strict and peculiar interpretation of the ancillary relationship between family residence and free movement rights. In this way this time the free movement rationale was not capable of determining the outcome of the judgment and the Court instead opted for taking into account Member States' concerns over immigration. On the other side however, the reference to Art. 8 ECHR was indicative of the fact that this strict approach had to be curtailed within particular boundaries and of the fact that an approach willing to prioritize again free movement over immigration had not been completely ruled out for future cases.

6. *Jia*[79]

Ms. Jia, a Chinese national, sought right of residence in Sweden in order to rejoin her son and her German daughter-in-law who were working and residing there. Coming directly from China, Ms. Jia entered the Swedish territory with a tourist visa and subsequently applied for a permanent residence permit. The central question submitted to the Court consisted of whether she could rely on Art. 1 of Directive 73/148/EEC.[80] Once again it was A.G. Geelhoed who was required to face the sensitive issue of family reunification between third country nationals and European workers. The point that he recognized as crucial for the solution of the case was whether a situation in which the applicant was not illegal, but nevertheless trying to reside according to the EU rules without going through the first assessment of the Member State, had to be ruled by the more recent *Akrich* case or by the previous more liberal *MRAX* case.[81] The advocate general answered this question by referring to the issue of division of competences. First of all he underlined that, whereas freedom of movement was fully governed by EU law, in immigration issues the Treaty "does not confer directly effective rights but provides for the legal bases for a legislative program for the harmonization of national legislation."[82] After that he stated that Member States retained competence on most aspects of immigration and, in particular, they still had the right to decide, according to their legislation, the first admission of a third country

[79] Case 1/05 *Jia v. Migrationsverket* [2007] ECR I-1.
[80] *Jia* judgment, para. 24.
[81] *Jia* opinion, para. 1.
[82] *Ibid.*, para. 32.

national within their territory.[83] For this reason, the fact that relevant secondary legislation to the case, Regulation 1612/68/EEC and Directive 73/148/EEC, was silent as to the first entry requirement did not mean that there was a vacuum that had to be filled by a generous interpretation of the Court on family reunification but simply that, in line with the division of competences, the first entry assessment was a matter that had to be decided upon by the Member State itself.[84] Moreover, allowing third country nationals to enjoy automatic right of residence by virtue of EU provisions on freedom of movement and on the basis of the family relationship alone would make it possible for them to circumvent national immigration laws.[85] For all these reasons, in the view of A.G. Geehoeld, *Akrich* and not *MRAX* was the convincing judgment.

The CJEU however did not follow this path and, instead of engaging with the issue of division of competences preferred to endorse the *MRAX* approach by stressing the factual differences between the circumstances of this case and *Akrich*. In pointing to the fact that Ms. Jia neither resided unlawfully in Sweden nor did she seek to evade national immigration law,[86] the Court stated that the condition of prior lawful residence as formulated in *Akrich* could not apply to her.[87]

This case was, not surprisingly, an object of profound criticism. One of the main reasons consisted in the fact that, according to many, the Court missed the occasion to clarify whether the first entry within the European Union of a third country national EU family member was a matter left to the competence of the Member States or of the EU.[88] Furthermore, another significant shortcoming was that the Court in *Jia*, by trying to step back from the strictness of *Akrich*, ended up contradicting both *Akrich* and all the previous more liberal readings on the issue of family reunification that found their apex in *MRAX*.[89] As a matter of fact, the Court distanced itself from *Akrich* because, instead of using the reasoning applied in it, it preferred to stress the differences of their factual circumstances: since Mrs. Jia never resided unlawfully the *Akrich* logic could not be applied.[90] Moreover, the Court distanced itself from the automatic right of

[83] *Ibid.*, paras. 32-33.
[84] *Ibid.*, para. 66.
[85] *Ibid.*, para. 67.
[86] *Jia* judgment, paras 31-32.
[87] *Ibid.*, para. 33. See Ben Olivier, and Jan H. Reestman, "Yunying Jia v Migrationsverket–Court of Justice of the European Communities", *European Constitutional Law Review* 3, no. 3 (2007), 471.
[88] Peers, *supra* note 65, 183.
[89] Olivier, and Reestman, *supra* note 87, 475 and Elsmore, and Starup, *supra* note 66, 801.
[90] Alina Tryfonidou, "Jia or 'Carpenter II': the edge of reason", *European Law Review* 32, no. 6 (2007), 910. The author highlighted the position of the advocate general, that stated that the approach of the Court in *Akrich* should be the general principle used in all family reunification cases and not only cases whose

admission granted in *MRAX* too, because it implicitly accepted that, in case of unlawful presence in the Member State the *Akrich* logic could still be applied.

It is difficult to fully understand the rationale behind the decision adopted by the Court. For the reasons described above *Jia* could just be considered as a happy medium solution. Nevertheless, surely it cannot be denied that this judgment shows well, once again, the tension between protection of borders from third country national immigration and free movement. The submissions of the UK and of the Netherlands highlighted how the concerns of the Member States over third country nationals being granted first access and residence rights within their territory as family members of a EU moving worker were still very much an issue. As summarized in the opinion of A.G. Geelhoed, they remarked that "the Member States are responsible for the first admission of third country nationals to the territory of the Community on the basis of an individual assessment" and how it is crucial the EU law "must not be interpreted in such a way that third country nationals who do not have a valid residence permit can escape the application of national immigration law."[91] It is probably in order to take into account Member States' concerns that the Court in *Jia* was not bold enough to state that it is the EU that can claim its total competence to assess the right of first entry of third country national EU family members into the territory of a Member State, as it did in the later *Metock* case.

At the same time however, the fact that the Court restricted the ruling of *Akrich* just to cases of illegal residence, practically turning it into an exception, it shows how the Court's attempt was to give priority to protection of free movement by granting a corollary and automatic family residence right to third country nationals EU family members, as the previous *MRAX* did. The attention to free movement can also be found in the second part of the judgment when referring to the issue of dependency. On the question submitted by the national court on the real meaning of dependence (Mrs. Jia claimed the right to stay as dependent ascending relative of a EU citizen) the Court answered that there was no need to determine the reason for the recourse of the EU relatives' support, that the Member States should assess whether, having regard to the financial and social conditions of family members claiming dependence, the applicant is not able to support himself/herself and that the material support should exist either on

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facts are similar to the *Akrich*'s ones. This is because *Akrich* "accords fully with [the] division of competences between the Community and the Member States".

[91] *Jia* opinion, para. 19.

the state of origin or in the state in which the family members file the application.[92] Such an interpretation of the concept of dependence should be applied by the Member State in order to "ensure both the basic freedoms guaranteed by the EC Treaty and the effectiveness of directive containing measures to abolish obstacles to free movement".[93] It seems that, despite the attempt of following a more literal interpretation of the right of free movement as in *MRAX*, also in *Jia* the Court did not renounce considering the right of free movement as the fundamental priority to fulfill, to the extent that even the concept of dependence in the family reunification provisions should be interpreted as finalized to the full exercise of this basic freedom.

In conclusion, it seems that the Court in *Jia* had to deal both with free movement and immigration concerns. However, as in the previous *Singh*, *Carpenter* and *MRAX*, the Court once again made the choice of prioritizing free movement, curtailing *Akrich* to a mere exception.

7. *Eind*[94]

Soon after *Jia* the Court of Justice delivered the *Eind* judgment. Mr. Eind, a Dutch national, moved to the UK in order to work. His Surinamese daughter, coming directly from her home country, later joined him there. As established in the order for reference, Ms. Eind enjoyed a right of residence in the UK under Art. 10 of Regulation 1612/68/EEC. Mr. Eind and his daughter then decided to go back to the Netherlands, however Ms. Eind was refused a residence permit. The essential question was whether she could rely on EU law to grant her a right of residence in her father's state of origin. In order to answer to the question A.G. Mengozzi, at first, further qualified the meaning of the requisite of lawful residence introduced by *Akrich*. He stated that the fact that she had been accorded the right to reside lawfully in the UK by Art. 10 of Regulation 1612/68/EEC did not mean that she had to be granted automatically the same right in the Netherlands since the effect of this article "is clearly limited to the territory of the issuing Member State".[95] However, given that the third country national has to be lawfully resident within the Union before being able to enter the host Member State, it is nevertheless not important whether the source of lawful residence in the first Member State is granted by national law or by EU law.[96] However, A.G. Mengozzi continued by

[92] *Jia* judgment, paras. 36-37.
[93] *Ibid.*, para. 40.
[94] Case 291/05 *Minister voor Vreemdelingenzaken en Integratie v Eind* [2007] ECR I-10719.
[95] *Eind* opinion, para. 35.
[96] *Ibid.*, para. 48.

stating that before Ms. Eind could be entitled under Regulation 1612/68/EEC the right to reside in the Netherlands, it was necessary to verify whether the return home of Mr. Eind could be classified as workers' right of free movement, i.e. whether the situation could fall under the EU law, granted by the Treaty and by the above mentioned regulation, given that he was no longer engaged in an economic activity.[97] On this issue, A.G. Mengozzi concluded that the right to return to the national Member State should not be made "conditional upon the performance, upon his return, of an economic activity […]".[98] The status of a migrant worker in fact also includes the right to re-enter the Member State of which he is a national after employment in the host Member State has come to an end[99] because, if this would not be the case, the useful effect of the provisions guaranteeing free movement of workers would not be ensured.[100]After having established that the return of an EU worker, although not engaged anymore in a working activity, was granted by Art. 39 TEC and Art. 1 Regulation 1612/68/EEC,[101] and therefore that the situation fell under EU law, the advocate general focused on the right of residence of Ms. Eind. He held that Mr. Eind could enjoy the family rights in accordance to Art. 10 of the same Regulation because "the Community right of the worker to return to his state of origin would not be effective if he could be dissuaded from exercising it by obstacles raised in that state to the residence of his closest family members".[102] On the deterrent effect to the exercise of free movement by the EU citizen the advocate general, in answering to the contentions raised by the Dutch and the Danish governments[103], specified that free movement rights can be hindered by the denial of residence rights to the third country national even when the latter became a family member after the EU worker moved into the host Member State.[104]

The Court initially followed the opinion of A.G. Mengozzi. It stated as well that the fact that Ms. Eind was granted a resident permit in the UK under Regulation 1612/68/EEC did not require the authorities of the Netherlands to automatically grant her the same right.[105] However, in a departure from the advocate general's opinion, the Court did not consider the option of encompassing the circumstances of the case under Art. 10 Regulation 1612/68/EEC, but it referred to the idea of European citizenship.

[97] *Ibid.*, para. 72.
[98] *Ibid.*, para. 97.
[99] *Ibid.*, para. 99.
[100] *Ibid.*, para. 101.
[101] *Ibid.*, para. 102.
[102]*Ibid.*, para. 103.
[103]*Ibid.*, para. 104.
[104]*Ibid.*, paras. 105-106.
[105]*Eind* judgment, paras. 25-26.

Firstly the Court stated that "under Art. 18(1) EC the right of every citizen of the Union to reside in the territory of the Member States is recognized subject to the limitations and conditions imposed by the Treaty and by the measures adopted for its implementation".[106] Then however, instead of suggesting that Art. 1(1) of Directive 90/364/EEC had to be applied to the circumstances of the case[107], it pointed out that the right of Mr. Eind to return to his state of origin could not be made conditional to the fact of being engaged in an economic activity: being a Dutch citizen was enough to allow him to re-enter to the Netherlands although he was not actively working anymore.[108] In simple terms, the Court found that the link with EU law was given simply by the fact that Mr. Eind was an EU citizen returning home, although he was not working anymore. This right was conferred to Mr. Eind by EU law "to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC and the provisions adopted to give effect to that right, such as those laid down in Regulation No 1612/68"[109]. After having underlined the right of Mr. Eind to return to his country, the Court answered the contention raised by the Netherlands and Denmark on the relationship of deterrence between the right of free movement and family reunification rights[110]. The Court, repeating the *Singh* doctrine,[111] stated that barriers on family reunification were liable "to undermine the right to free movement which the nationals of the Member States have under Community law […]."[112] In particular, the national of a Member State could be deterred from leaving his Member State of origin in order to take up an economic activity in another Member State "if he does not have the certainty to be able to return to his Member State of origin"[113], certainty that can be given by the faculty of continuing living with his closest relatives in that same state.[114] Finally, the Court denied that the fact that Ms. Eind did not previously enjoy residence in the

[106] *Ibid.*, para. 28.
[107] According to this provision the Member States may require citizens of the Union who are not economically active and wish to enjoy the right to reside in their territory, to ensure that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence. See para. 29.
[108] *Ibid.*, paras. 28 ss.
[109] *Ibid*., para. 32.
[110] *Ibid.*, para. 33. The Dutch government, in particular, claimed that "Mr. Eind could not have been deterred from exercising that freedom, through moving to the United Kingdom, by the fact that it would be impossible for his daughter to reside with him once he returned to his Member State of origin, given that at the time of the initial move Miss Eind did not have a right to reside in the Netherlands".
[111] Jeremy B. Bierbach, "European Citizens' Third-Country Family Members and Community Law", *European Constitutional Law Review* 4, no. 2 (2008), 353.
[112] *Eind* judgment, para. 37.
[113] *Ibid.*, para 35.
[114] *Ibid.*, para. 36.

Netherlands could have a negative effect on the granting the same right now, first of all because such a requirement was not provided in any provision of EU law[115] and, secondly, because "such a requirement would run counter to the objectives of the EU legislature, which has recognized the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty".[116]

Once again one can notice that the judgment of the Court found as background the interplay between immigration concerns and free movement. The submission of the Dutch and Danish governments showed how concerns about immigration of potential third country national family members in the same situation of Ms. Eind were quite heated. In particular, in the written observations of the Dutch and Danish government they contented that a EU national is unlikely to be deterred from moving to a Member State in the prospect of not being able, once back in the Member State of origin, to continue the family life established in the host Member State.[117]

On the other side, with regard to the right of free movement, in the judgment the Court again pointed out the primacy of this right by stating that "barriers to family reunification are liable to undermine the right to free movement which the nationals of the Member States have under EU law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter."[118] Also the advocate general stressed this point by observing that "the right of residence conferred by EU law on family members of a person who takes advantage of freedom of movement for persons is intended to remove any obstacle to the exercise of that right by such a person deriving from the inability of members of his family to accompany him or join him in that host Member State […]".[119]

As seen before in *Singh* and in other following cases, the application of the market access rationale has been capable of prioritizing the protection of the right of

[115] *Ibid.*, para. 43
[116] *Ibid.,* para. 44.
[117] *Ibid.,*para. 33.
[118] *Eind* judgment, para. 37.
[119] See *Eind* opinion at para. 55. At rec. 56 the advocate general supported this point by quoting the preamble to Regulation 1612/68/EEC: "the fifth recital in the preamble to Regulation No 1612/68/EEC states that the right of freedom of movement, in order that it may be exercised by objective, standards in freedom and dignity requires that obstacles to the mobility of workers shall be eliminated as particular as the worker's rights to be joined by his family and the conditions for the integration of that family into the host country". The advocate general finished by stating that "the right to family reunification provided for by Community law within the scope of the EC treaty provisions on the free movement of persons within the Community therefore aims at guaranteeing the effective exercise of that freedom and presupposes the existence of a situation in which it can be said that that freedom has been exercised" (*Eind* opinion, para. 57.)

free movement and, at the same time, has preserved the sovereignty of the Member States over immigration in circumstances in which a relation of deterrence between free movement and family reunification rights does not occur. However, it is worth noting that the way in which the Court applied the *Singh* logic to the *Eind*'s facts ended up reaching broader consequences as far as protection of free movement is concerned.[120] In replying to the Netherlands and Denmark submissions, the Court denied the governments' assertion by stating that deterrence indeed operates in the original decision of the EU worker to move from the Member State of origin. Hence, if in *Singh* the obstructing effect of the denial of residence rights to family members could play a role only when the family was established in the home Member State at the time the family decided to move, with *Eind* the Court considered that the denial to family reunification could determine an obstructive role on the decision of Mr. Eind of moving from the state of origin even if Ms. Eind, at the time of Mr. Eind's initial move from the Netherlands, did not have a permit to reside there.[121] The fact that the denial of family reunification is, since *Eind*, openly considered to be obstructive to the exercise of the right of free movement also in cases in which the EU sponsor decided to move regardless of his/her family bonds, suggests that any movement of the latter could be obstructed by the denial to family reunification at any time he/she takes the decision to migrate to another Member State. Therefore it seems that, according to the Court, the right to family reunification should be always granted in order to preserve the primary family right of free movement.

In conclusion, once again this case has been built upon free movement and immigration concerns. However, overall, it seems that the Court's main aim was driven by achieving the protection of the primary right of free movement. The broad interpretation offered by the Court to the ancillary relationship between free movement and family reunification rights seems to have turned the latter into corollary rights that should always be granted in order to preserve the right of free movement. Hence, even if family reunification are still conceived as functional to the exercise of the right of free movement, the broad interpretation of their relationship offered by the Court seems to have reduced the hypothesis in which the Member States could still have a say in

[120] Peers, *supra* note 65, 184.

[121] See *Eind* judgment from paras. 33 till 37. This understanding of deterrence also attracted a lot of criticism. Tryfonidou pointed out that in reality, the right of family reunification was granted on the grounds of a not existing link with EU law. In fact Ms. Eind did not enjoy a right of residence in the Netherlands before Mr. Eind exercised his freedom of movement to the UK and, therefore, it was perfectly right that, on Mr. Eind's return to the Netherlands, the Dutch authorities applying Dutch law did not grant her a right of residence. See Tryfonidou, *supra* footnote 6, 645.

deciding whether the third country national family members should be granted the right to reside.

8. *Metock*[122]

In the previous case the Court hinted to the fact that free movement was not simply a right to be enjoyed by workers but also by EU citizens. Soon after, the protection of the right of free movement of citizens was crystallized in *Metock*. The case was brought before the CJEU by a reference from the Irish High Court, which had to deal with four third country national applicants challenging Irish national law implementing Directive 2004/38/EC. The third country nationals had entered Ireland coming directly from outside EU and subsequently married migrant Union citizens residing there. Their applications for residency cards were refused on the grounds that they did not meet the requirements laid down in the Irish implementing law, namely prior lawful residence in another Member State and having obtained the status of family members before entering the host Member State of the Union citizen. The four applicants applied for judicial review before the Irish High Court. The latter sent a preliminary ruling to the CJEU asking whether Directive 2004/38/EC precluded the legislation of a Member State from requiring the previous lawful residence in another Member State and whether the third country national spouse could benefit from the Directive irrespective of when and where the marriage took place and of the circumstances in which he/she entered into the host Member State.

With regard to these two questions it is worth analyzing the opinion of A.G. Maduro in detail. The advocate general started his opinion by focusing on a crucial question: "does Directive 2004/38 guarantee for non-EU nationals who are family members of a Union citizen only freedom of movement within the territory of the Union or also, in certain cases, access for them to the territory of the Union?"[123] In order to answer this question, since this piece of legislation was silent on this point, it was necessary to look at the general scope of Directive 2004/38/EC which was, as Maduro clearly underlined, the "primary and individual right to move and reside freely within the territory of the Member States' conferred on Union citizens directly by Article 18 EC."[124] Having regard not just to the right of free movement but also to the right of

[122] Case 127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.
[123] *Metock* opinion, para. 4.
[124] *Ibid.*, para. 5.

residence of the European citizen, A.G. Maduro reassessed the interpretation of the ancillary relationship between free movement and family residence rights. He pointed out that applying the *Akrich* logic[125] -requirement of previous lawful residence- also to Directive 2004/38/EC would end up infringing "the right of the Union citizen to lead a normal family life and, therefore, his right to reside in the host Member State."[126] In fact, not allowing the applicants the right to be rejoined by their third country national family members coming directly from outside the EU would obstruct the applicants free choice of living in Ireland and would, consequently, push them to move to another state in which family reunification is guaranteed.[127] For all these reasons he concluded that "the effectiveness of the right of a Union citizen to reside in a Member State other than his State of origin requires that the consequential right of residence conferred on non-EU national members of his family by Directive 2004/38/EC must be construed as entailing the right to join him, including directly from outside the Union".[128] Finally, using the same functional interpretation A.G. Maduro, on the question on whether a national of a non-member country could rely on the provisions of Directive 2004/38/EC to obtain the right to reside in the host Member State with the Union citizen who is his/her spouse, even though the Union citizen entered the host Member State before the marriage took place, answered that, since Directive 2004/38/EC was meant to protect not just the right of free movement but also the right of residence of the Union citizen, not allowing him/her to reunify with his/her third country national family member would hinder his/her right of residence regardless of the time in which the third country national became a member of his/her family.[129]

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[125] It is interesting to see how the advocate general dismissed the contention of Ireland and the other intervening states that the entry of the family members had to be based on the requirement of the previous lawful residence as set out in *Akrich*. First of all, A.G. Maduro underlined the fact that *Akrich* could not be considered the right solution in cases involving EU citizens and third country nationals because it conflicted with a trend of case law that conferred the right of residence of a third country national EU family member based only on the family relationship (see *Metock* opinion, para. 11). Moreover, the subsequent *Jia* case linked the condition of the previous lawful residence only to the specific factual circumstances of the case in *Akrich* (see *Metock* opinion, para. 12). Finally, even contemplating the possibility that *Akrich* was not linked simply to the specific circumstances of the case (abuse of rights), the case was decided in the light of Regulation 1612/68/EEC that has as a scope the only freedom of movement of European workers. On the other side, *Metock* was decided in the light of Directive 2004/38/EC which relates, "to the right of Union citizens not only to 'move' but also to 'reside' freely within the territory of the Member States"(see *Metock* opinion, para.13). Therefore, if before the introduction of Directive 2004/38/EC emphasis was put more on the deterrent effect of entering or leaving the Member State, with the introduction of this new piece of legislation equal emphasis is placed on the right to reside and on the stability of the permanence of the European citizen in another Member State.

[126] *Ibid.*, para. 9.

[127] *Ibid*.

[128] *Ibid*.

[129] *Metock* opinion, paras. 16 et ss.

The CJEU's approach was very similar to the one endorsed by A.G. Maduro, although less expeditious and incisive.[130] With regard to the first question the CJEU, like the advocate general, argued that no provisions in the Directive made its application conditional on prior lawful residence in another Member State[131] and this was supported by previous case law.[132] To this respect, the Court boldly stated that the decision in *Akrich* had to be reconsidered on the grounds that "if Union citizens were not allowed to lead normal family life in the host Member State the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed".[133] Unlike the explanation given by A.G. Maduro, who suggested that it was a result of the introduction of the Citizen Directive that the right of residence in another Member State -and not just the right of movement- became a distinct right[134] (and, owing to this new piece of legislation, *Metock* could be decided differently from *Akrich*), the Court simply singled out *Akrich* as the odd case and stated that, since the right to reside was granted to third country nationals despite their lawful residence even before through Regulation 1612/68/EEC,[135] "the same interpretation must be adopted a *fortiori* with respect to Directive 2004/38 EC […] as Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals".[136] In this way the Court did not have to refer, as Maduro did, to the scope of the Directive as conferred by the then Art. 18 of the Treaty, that is the right to move and reside of Union citizens. Nevertheless, although the Court did not openly address the right to reside of the EU citizen in the host Member State, it subtly approached the issue anyway by suggesting that, in order "to lead a normal family life in the host Member State",[137] the Union citizen should be allowed to move to and reside in that Member State. Indeed, more precisely, the Court stated that "the refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State

[130] This fact should not surprise because the judgment was approved on an accelerated hearing. Art 23a of the statute of the Court of Justice states that the Court will rule after hearing the advocate general anyway. This probably explains why the content of the judgment is in accordance with the advocate general although not as accurate. For a detailed explanation of the accelerated procedure adopted in Metock see Currie, *supra* note 66, 317-318.
[131] *Metock* judgment, paras. 49 et ss.
[132] *Ibid.*, see para. 56. Apart from *Carpenter*, *MRAX* and *Eind*, the Court quoted also Case 157/03 *Commission v. Spain* [2005] ECR I 2911, para. 26; Case 503/03 *Commission v. Spain* [2006] ECR I 1097, para. 41; Case 441/02 *Commission v. Germany* [2006] ECR I 3449, para. 109.
[133] *Metock* judgment, para. 58.
[134] *Metock* opinion, para. 13.
[135] *Metock* judgment, paras. 56-57.
[136] *Ibid.*, para. 59.
[137] *Ibid*., para. 62.

[…]".[138] On these grounds the Court then reached the same conclusion endorsed by A.G. Maduro: since the refusal of a Member State to grant the right of entry end residence to a third country national family member, regardless the fact that he/she is not already present within the borders of the EU, would discourage the European citizen from moving or residing in that Member State, the EU legislature has the competence to regulate the entry and residence of third country national EU family members who are not already lawfully resident within the Member State.[139] Finally on the second question the Court, consistently with Maduro opinion,[140] stated that a national of a non-member country can accompany or join the Union citizen in the host Member State irrespective of when their marriage took place and of how the national of a non-member country entered the host Member State.[141]

The approach of the Court was both criticized and praised. Among the numerous critiques, some argued that the Court was too liberal. For instance, Professor Dashwood denounced the detachment of the right of residence to the right of entry and movement. In his view the right of movement should be asserted before the right of residence can arise in order to avoid the "perverse consequence of enabling third country nationals to circumvent Member States' immigration rules".[142] *Metock* was also perceived as part of a cumulative build up of judgments on free movement and this triggered, as Currie underlined, serious dissatisfaction in the Member States.[143] Some others instead underlined that the approach of the Court was too narrow. It was pointed out that the Court was guilty of "fundamental rights reticence" as the only fundamental right referred to the judgment was the "[…] right of residence of Union citizens in a Member State other than that of which they are national"[144] and the final reference to fundamental rights at paragraph 79 "serves simply to remind the Member States of their duties when they act purely in internal situations".[145] On the other side, *Metock* was praised because it clarified the ambiguities introduced by *Akrich* by clearly setting the limits between state and EU competences:[146] the CJEU concluded in fact that the EU is in charge of regulating the entry and the residence in the Member States of third country

[138] *Ibid.*, para. 64.
[139] *Ibid.*, paras. 64-65.
[140] *Ibid.*, paras. 81 ss.
[141] *Ibid.*, paras. 64-65.
[142] Alan Dashwood, "Judical Activism and Conferred Powers – Is the CJEU Falling into Bad Habits?", 10th IEL (Institute of European Law) Annual Lecture, Birmingham University, 27th June 2012.
[143] Currie, *supra* note 66, 326.
[144] *Metock* judgment, para. 89.
[145] Costello, *supra* note 67, 611.
[146] Nathan Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform", *Columbia Journal of European Law* 15, (2008), 332-333.

national EU family members and that Member States therefore cannot impose any condition of prior lawful residence.

Despite these lines of praise and criticism it can be noted that also in this judgment both Member States' concerns over immigration and free movement concerns underpinned the activity of the Court. The concerns of the Member States over their sovereignty upon migration are clear from their submissions to the Court. The Irish Minister for Justice plus several other governments[147] submitted that, in a contest characterized by a strong pressure over migration, it is fundamental for the Member States to be able to require prior lawful residence in another Member State in order not to undermine their capacity to control migration at their external borders.[148] At the same time it is evident from the reference to Directive 2004/38/EC that the circumstances at hand were based on a free movement issue.

The Court took into account both these stances by referring, as in *Singh*, to the ancillary relationship between free movement and family reunification provisions and, going beyond *Eind*, finally ended up prioritizing free movement over immigration concerns. By looking at the judgment as a whole, it is evident how protection of free movement plays the most important role in the Court's reasoning. As a matter of fact, the Court in *Metock* interpreted the role of family reunification provisions as functional not just to the primary right of movement but also to the right of residence of the EU sponsor in the host Member State. The extension of the interpretation of the *Singh* test also to the right to reside is potentially inclusive of an indefinite amount of circumstances because, no matter when and how the relationship begun, it is always possible to argue that the denial to grant family residence rights would interfere with the right to reside of the sponsor in the host Member State.[149] Hence, the extension of the "obstacle to free movement" approach also to the right of residence of the EU worker, together with the reconsideration of the *Akrich* case with the repealing of the requisite of the previous lawful residence of the third country national family member within the territory of the EU, seems to have finally reduced the sovereignty of the Member States over immigration of third country national family members to a pure theoretical hypothesis.

In conclusion in *Metock*, once again, the Court's reasoning was built up on free

[147] Czech, Danish, German, Greek, Cypriot, Maltese, Dutch, Austrian, Finnish and the UK governments made submissions.
[148] *Metock* judgment, para. 71.
[149] Bierbach, *supra* note 111, 360. "But the reasoning behind the 'dissuasive effect' remains extremely conjectural, and could creatively be extended to cover almost any situation".

movement and immigration concerns. The new broad application of the *Singh* test also to the right to reside, together with the fact that finally the Court dismissed openly the requirement of third country national family members previous lawful residence, shows how the Court was mostly aiming toward protection of the EU citizen's rights to move and reside in a host Member State by granting him/her family reunification rights. Although the Court tried to take into account the Member States' claims over third country national immigration by pointing to the fact that national governments still had the possibility of controlling the entry of family members into their territory owing to the conditions of public policy, public security and public health and Art. 35 of Directive 2004/38/EC, [150] it is evident how finally in *Metock* the protection of the fundamental right of movement and residence of the EU sponsor has been prioritized over Member States' immigration concerns.

9. Conclusions

After the oil crisis of 1975, the ongoing development of Common Market and of the right of free movement in particular clashed with Member States' goals to enhance migration control and reduce inward immigration. From the eighties[151] the Court started to deliver its first judgments, reaching its apex in the first decade of the new millennium. In this chapter, I have shown how free movement and Member States' immigration concerns were not just playing their role in the background but determined the shape of the Court's reasoning. It was in *Singh* that the Court decided to apply the market access model for the first time to cases involving free movement and third country national family reunification rights by interpreting family residence rights as functional to the exercise of the primary right of free movement. This interpretation seems to seriously take into account both the priority of the right of free movement and the states' concerns over immigration of third country nationals, based as it was on family residence rights being functional to the enhancement of free movement. The *Singh* interpretation of the ancillary relationship between free movement and family reunification was adopted by the Court in *Carpenter*, in which we saw that the Court did not just have to deal with free movement and immigration concerns but also with

[150] *Metock* judgment, paras. 74-75. It is interesting to note that on the contentions of the Member States over border controls the Court also stated that that the issue of migration of third country national EU family members had little dimension because it affected just the family members within the meaning of Art. 2(2) and related to a citizen who exercised his/her right to free movement (*Ibid.*, para. 73).

[151] As mentioned earlier in this chapter the very first case on family reunification was *Morson and Jhanjan v. The Netherlands* which dates back to 1982.

the protection of the fundamental right of family life. The same reading was applied in later cases such as *Akrich*, *Jia*, *Eind* and *Metock*.

Looking at CJEU's reasoning in family reunification cases at the interplay between free movement and Member States' attempt to reduce inward immigration can help us to better understand the rationale behind certain decisions. For this reason, as seen before, the reference to Art. 8 ECHR in the *Akrich* case should not strike us as something extemporaneous but as a way to temper the strictness of the Member States' immigration control rationale in favour of future interpretation of free movement cases. In the same way, the fact that in *Jia* the Court avoided the problem of deciding the issue of to whom the competence of the first entry assessment of third country nationals belonged is probably indicative of the reluctance of the Court to decide whether Member States' sovereignty over migration should be restricted. Similarly, the reference to Art. 35 Directive 2004/38/EC with regard to the possibilities left to the national Member States to avoid the entry of third country national family members is a specification inserted in *Metock* to probably balance the definitive decision of the Court to deny the Member States' competence over third country national family members first entry immigration assessment.

Looking more closely to the cases that have been analysed above, it is also evident that the application of the *Singh* test has been expanded from case to case.[152] To this end, whilst in *Singh* the ancillary relationship between free movement and family reunification was applied in returnees cases, in *Carpenter* the same principle was extended also to citizens that never left their state of origins and that just provided

[152] After the ruling in *Singh*, nearly all of the following cases on family reunification opted for the *Singh* test rather than for a literal application of the family reunification provisions contained in the free movement legislation. This choice can be explained, as argued in this chapter, by the Court's attempt to take into account both free movement and Member States' immigration concerns. Beyond this reason another explanation could be based on path dependency theory. This theory has been borrowed from economics and applied to law. The path dependency theory in a law context is the idea that history matters and that choices made in the past can affect the choices that will be made in the future. One of the implications of this theory is that, as argued by Hathaway, "once a court makes an initial decision, it is less costly to continue down that same path than it is to change to a different path" (On this point see Oona A. Hathaway, "Path Dependence in the Law: the Course and Pattern of Legal Change in a Common Law System", 2003, John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, Paper 270, accessed October 2013, available at <http://digitalcommons.law.yale.edu/lepp_papers/270>, 107). One perhaps could see a path dependency trend in the post *Singh* case law. On path dependency see Paul Pierson, *Politics in Time: History, Institutions and Social Analysis*, (Princeton: Princeton University Press, 2004); William H. Sewell, "Three Temporalities: toward a sociology of the event", October 1990, CSST Working Paper 58, paper presented at a conference on "The Historic Turn in the Human Sciences" at the University of Michigan, accessed October 2013, available at <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/51215/448.pdf?sequence=1>; Lewis A. Kornhauser, "Modeling Collegial Courts I: Path-dependence", *International Review of Law and Economics* 12, no. 2 (1992).

services abroad. The broadening of the *Singh* test continued in the *Eind* case where the "obstacle to free movement" language was applied to grant to the third country national daughter the right of residence on the territory of father's state of origin despite the fact that the family bounds did not affect the first movement of the latter in the first place. Finally, the *Singh* test has been further developed in *Metock* too by connecting the functional relationship between family reunification provisions and free movement rights also to the right of residence. In this way, the Court overcame the anomalous *Akrich* case and granted a complete protection of free movement and family residence rights. Owing to the *Metock* ruling, potentially, it can be always possible to argue that, despite when and where the family relationship was born, denying the third country national the right to reside in the host Member State would hinder the exercise of the right of residence of the EU sponsor.

Tryfonidou suggested that over these years the CJEU has moved back and forth between liberal and less liberal positions. In her words "over the years, in the case-law of the European Court of Justice determining the availability of family reunification rights for migrant Member State nationals, the pendulum has swung back and forth, from a 'moderate approach' in cases such as *Morson and Jhanjan* (1982) and *Akrich* (2003), towards a more 'liberal approach' in cases such as *Carpenter* (2002) and *Jia* (2007)" while the most recent judgments of *Eind* and *Metock* "appear to have decidedly moved the pendulum towards the 'liberal approach' side".[153] However, in the light of this analysis, rather than an intermittent approach it seems instead that the Court has opted since the beginning for a liberal approach towards family reunification. As a matter of fact, by applying the *Singh* test to different circumstances, the Court ended up prioritizing free movement and the right of residence of third country national family members over immigration issues on a broader and broader spectrum of scenarios to the extent that now, after *Metock*, family residence rights are guaranteed despite when and where the family relationship was born and regardless the previous lawful residence within the European Union of the third country national family member.

The overall liberal approach of the Court with regard to free movement and third country national residence rights can also be seen as a reversal of the original intentions of the European legislator. As hinted before when analyzing the *Singh* case, it was the Court that introduced the idea of interpreting family reunification rights as functional to the right of free movement in accordance to the market access model originally

[153] Tryfonidou, *supra* note 6, 634.

developed in the free movement of goods cases. This interpretation, as mentioned in Chapter 1, was probably not in the original plans of the European legislator. It is very likely that the first family residence provisions inserted in the free movement legislation of the sixties, given the historical contingencies of the time, were drafted as bonus rights to be automatically granted once the primary right of free movement was exercised by the European sponsor.[154] Hence, as suggested already, the utilization of the *Singh* interpretation of the ancillary relationship between free movement and family reunification might have simply been a device in order to accomplish Member States' concerns, that developed after the oil crisis, over immigration of third country nationals. In other words, the Court preferred "buying umbrellas instead of mending the roof"[155] that means that, instead of referring to the literal significance of the free movement legislation, it preferred to follow a compromise solution in order to give the Member States an assurance that their sovereignty over immigration of third country national EU family members was still respected.

In the light of this analysis I propose these conclusions. From all the case law that has been analysed it is possible to note that the Court has been faced with free movement and immigration concerns. From the Court's reasoning it is seems that in all the cases, with the exception of *MRAX*, European judges have attempted to take into account both free movement and immigration stances, also by reading residence family rights as functional to free movement. The inconsistencies among these judgments are better understood if seen in the light of the Court's attempt to deal with this tension. However, overall, with the exception of *Akrich* (which however was soon repealed), the Court made the choice of prioritizing free movement and third country national residence rights over Member States' complains and concerns. This choice, as it will be soon seen, it very different from the one adopted by the Court in the cases involving static EU citizens.

[154] As seen before in the chapter the MRAX case was the only third country national family residence right case in which the Court refused to apply a functional reading between free movement and family reunification provisions and simply recurred to a literal interpretation.
[155] Alina Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe", *Legal Issues of Economic Integration* 35, no. 1 (2008), 43.

Chapter 4: EU static citizens law cases

1. Introduction

The idea of EU citizenship, which was considered by many scholars an empty concept, soon after its introduction in the Maastricht Treaty revealed itself to be much more than a simple academic exercise owing to the activity of the Court. Indeed, the Court to use the concept of EU citizenship in order to grant family protection also to EU citizens that never crossed their state of origin's borders. With *Garcia Avello* and *Chen* the Court started to grant several rights to EU citizens despite them not having exercised their right of free movement. In *Chen*, in particular, the Court for the first time accorded residence family rights to third country national family members despite the lack of cross border movement of the EU sponsor. As mentioned before, the expansion of the concept of EU citizenship developed after the oil crises, when the Member States already started to adopt stricter immigration policies compared to the years immediately following the Second World War. The aim of this chapter is to look at family reunification cases concerning EU static citizens and third country nationals in order to show how the Court's rulings have been shaped both by immigration concerns and the goal of strengthening the concept of EU citizenship. Indeed, it will be shown that the reasoning of the Court's most recent cases can be better understood if looked at in terms of the interplay between Member States' concerns over immigration and the idea of enhancing the EU citizenship status. As opposed to what occurred in cases involving EU moving citizens, in this strand of case law, overall, the Court let the aim of enhancing the concept of EU citizenship to be overtaken by Member States' concerns over losing their control on assessing the right of residence of third country national family members of EU static citizens.

This chapter will be divided into seven parts. After this brief introduction, parts 2, 3, 4, 5 and 6 will be dedicated respectively to the *Zambrano*, *McCarthy*, *Dereci*, *O and S* and *Ymeraga,* and *Iida* cases. In this analysis I will explore how the reasoning of the judgments are based on the interplay between Member States' concerns over immigration and the development of the concept of EU citizenship as a source of independent family residence rights. Finally, part 7 will be dedicated to the conclusions. This analysis will point out that the judgments' inconsistencies and incongruities can be explained in the willingness of the Court to take into account both EU citizenship and Member States' concerns over third country nationals immigration. I will also show that

overall, unlike the strand of case law analysed in the previous chapter, the Court preferred to endorse a strict approach that consisted in prioritizing Member States' concerns over immigration over the enhancement of the concept of EU citizenship as a source of independent family residence rights. I will suggest the reasons why this approach has been endorsed and that, nevertheless, the Court's approach has left significant space for future jurisprudential manoeuvres to further develop the concept of EU citizenship in favour of third country national family members.

2. The final detachment of the concept of EU citizenship from the right of movement: *Zambrano*[1]

The outcome of *Metock* was welcomed by many[2], quoted in later cases[3] and is likely to develop further in the future.[4] Nevertheless, *Metock* did not have a general application to all the European citizens. Family rights in *Metock* were in fact tied to the cross border movement of EU citizens: the case in fact reflected the transnational conception of European citizenship that is enshrined in Directive 2004/38/EC. While in 2001 the CJEU itself had proclaimed that "Union citizenship is destined to be fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for",[5] Directive 2004/38/EC only emphasized the transnational/cross border dimension of European citizenship.[6] Nevertheless, some years later, the Court seemed to overcome *Metock*'s limitations with *Zambrano*. *Zambrano* is the first case in which the Court openly

[1] Case 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-1177.

[2] The approach of the Court in *Metock* was highly praised within the academic community. Professor Peers considered *Metock* as a highly welcomed judgment since it was able to restore clarity after the uncertainties introduced by *Akrich* and for its practical implications on national legislation and proceedings. On this point see Steve Peers, "Free movement, Immigration Control and Constitutional Conflict", *European Constitutional Law Review* 5, no. 5 (2009), 191-196. See also Nathan Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform", *Columbia Journal of European Law* 15, (2008), 321, 334 and Catryn Costello, "Metock: Free Movement and Normal Family Life in the Union", *Common Market Law Review* 46, no. 2 (2009), 587.

[3] In some cases *Metock* constituted the line of reasoning and in some others it was just quoted. In *Sahin* (Case 551/07 *Sahin* v. *Bundesminister für Inneres* [2008] ECR I-1043), the outcome of *Metock* was used to allow a third country national pursuing asylum in Austria to derive her right of residence within the territory of state after marrying a German national residing there. In *Ibrahim* (Case 310/08 *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065) and *Teixeira* (Case 480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107), while granting under art. 12 of Regulation 1612/68/EEC the right of residence in the host Member State of a child in education and therefore the right of the parents to reside, the CJEU used *Metock* to underline the fact that Directive 2004/38/EC did not repeal art. 12 Regulation 1612/68/EEC because the scope of the directive is to simplify and strengthen the right of residence (for a deeper account of this case see Helena Wray, "Teixeira and Ibrahim: Looking back, looking forward or inward?", *FMW: Online journal on free movement of workers in the European Union* 2, (2011). In *Chakroun* (Case 578/08 *Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR I-01839) *Metock* was applied in a case involving Directive 2003/86/EC on the right of family reunification in order to forbid the discretion of Member States in deciding whether or not to introduce a distinction based on the time of marriage of the spouse. Finally in *McCarthy* (Case 434/09 *Shirley McCarthy v. Secretary of State for the Home Department*, [2011] ECR I-3375) the Court used the reasoning of *Metock* on the applicability of Directive 2004/38/EC and on the fact that it meant to enhance freedom of movement and residence of Union citizens in order to forbid family reunification rights to Mrs. McCarthy, who wanted to reunify with her Jamaican husband despite the fact that she had never moved to another Member State. This case will be analyzed later in this chapter.

[4] See Diego Acosta Arcarazo, "Immigration in the European Union: family Reunification after the Metock Case", in *University College Dublin Law Review* 9, (2009). The author wishes *Metock* to be applied also to cases involving family reunification just between third country nationals.

[5] Case 184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies – Louvain la Neuve* [2001] ECR I-6193.

[6] Costello, *supra* note 2, 616-617.

detached the protection granted to EU citizens and their third country national family members from the exercise of the right of free movement.

For the purpose of clarity, and in order to understand the significant change that occurred in *Zambrano*, it is necessary to recall the previously mentioned *Chen* case. In this part therefore I will begin by recalling the facts of *Chen* and looking more in detail at the reasoning endorsed by the Court in this case. This is not meant to be a mere repetition of concepts but a way through which I will be able to better highlight the elements of novelty introduced by *Zambrano*.

Pursuant on the peculiarities of Irish citizenship law at the relevant time, the daughter of a Chinese couple who was born in Belfast, i.e. UK territory, acquired Irish nationality and was thus a Union citizen. After some months, the mother and the little daughter decided to move to Cardiff and the former applied for a long-term residence permit as the mother of a EU citizen residing in another Member State. The national Court referred two interdependent questions to the CJEU: could little Catherine derive the right to reside in the UK in force of her Irish nationality and, in case of a positive answer, could the right to reside of the mother derive from it as well? A.G Tizzano, first of all, answered to the preliminary objection of the UK, which submitted that the facts at stake amounted to a purely internal situation. Basing his reasoning on *Garcia Avello* he dismissed the UK's claim on the grounds that "Catherine's Irish nationality is sufficient to establish that the proceeding between her, with her mother, and the Secretary of State are not purely internal to the United Kingdom law."[7] After this clarification he focused on Catherine's right of residence. He started his reasoning by saying that "the fact that a minor cannot exercise a right independently does not mean that he has no capacity to be an addressee of legal provisions on which that right is founded."[8] After having dismissed the original idea of protecting Catherine's right of residence under Directive 73/148/EEC on the right of establishment and the provision of services given that, under this piece of legislation, she could only claim a temporary right of residence[9], he asked whether the long term right of residence could derive from the now Art. 21 TFEU on EU citizenship and Directive 90/364/EEC, that set limits and conditions to the right of residence of a non-economically active person in another Member State. He found that the child, since she was covered by sickness insurance and

[7] *Chen* opinion, para. 34.
[8] *Ibid.*, para. 44.
[9] *Ibid.*, para. 61. The right of residence was temporary because it could be granted just for the period during which the services were provided.

possessed, through her parents, sufficient resources not to become a risk on the UK welfare system, could meet the requirements laid down by Directive 90/364/EEC and could therefore reside for an indeterminate period in the UK in force of her European citizenship status.[10] Finally, A.G. Tizzano concentrated on Mrs. Chen's right of residence. He found that Mrs. Chen could not be described as a dependent member of Catherine's family therefore neither Directive 73/148/EEC nor 90/364 EEC could be applied to grant her residence in the United Kingdom.[11] However, recalling *Baumbast*, he stated the mother's right to stay derived from the daughter's right of residence, being her primary carer.[12]

The Court followed entirely, but more synthetically, A.G. Tizzano's opinion. As Tizzano the Court in its preliminary considerations pointed out, quoting *Garcia Avello*, that the mere fact that a person did not exercise the right of freedom of movement does not necessarily mean that the situation does not fall under the competence of EU law.[13] With regard to the question of Catherine's residence, as suggested by Tizzano, the now Art. 21 TFEU and Directive 90/364/EEC conferred the little girl the right to reside for an indefinite period in the UK.[14] Finally, with regard to the right of residence of Mrs. Chen, the Court as well derived her right to reside from the right of her daughter by stating that "a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC (now Art. 21 TFEU) and Directive 90/364/EEC grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect."[15]

From the reconstruction proposed it is possible to note that in this case the Court initially was concerned in finding a link between the situation at stake and EU law. According to the advocate general and the Court the link lay in the entitlement arising

[10] *Ibid.*, paras. 63-78.
[11] *Ibid.*, paras. 86-87.
[12] *Ibid.*, paras. 91. More recently the Court employed a similar reasoning to *Baumbast* in Case 529/11 *Alarpe and Tijani v. Secretary of State for the Home Department* [2013] not yet reported.
[13] *Chen* judgment, paras. 20-21.
[14] *Ibid.*, paras. 24 et ss.
[15] *Chen* judgment, para. 45. Chen was the object of an intense debate among scholars. On one side it was highly praised for recognizing children as full legal personalities and for the refusal to rely on a definition of citizenship that would entail economic aspects. On this point see Caroline Sawyer, "Civis Europeanus sum: the citizenship rights of the children of foreign parents", *Public Law*, (2005). On the other side it was also underlined how the Chen judgment was "family reunification friendly" simply because there was no risk that the parties could become a burden on the social welfare state, given Catherine's health expenses were covered by a health insurance and her parents were able to look after her economically. On this point see Jean Y. Carlier, "Case C-200/02, Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department", *Common Market Law Review* 42, no. 4 (2005), 1131.

from the status of EU citizenship alone. Once the link was found with EU law, given that the provisions on family reunification of the secondary legislation could not be applied because the right of the sponsor was granted at treaty level and not by the secondary legislation on free movement, the Court derived family residence rights from the status of EU citizenship itself by stating that the departure of Mrs. Chen would have deprived the little Catherine of her primary right of residence within the Union. In this light it is worth pointing out that, although no objective physical movement from a Member State to the other occurred,[16] a fictional cross border element given by the mismatching of nationalities (little Catherine was an Irish national living in UK territory) was still present. Even the parties who submitted the question on whether the minor citizen of a Member State could claim the right of entry and residence in another Member State based their reasoning on this idea. For this reason, although a real cross border movement did not really occur, the reasoning of the Court was still based on the application of Art. 21 TFEU, which protects the right to move and reside.[17] It is exactly here that the main difference with *Zambrano* occurred. Indeed, as it will be soon pointed out the Court in *Zambrano*, owing in particular to the *Rottman* case which was decided some years after *Chen*, managed to untie the knot that still kept the concept of European citizenship attached the idea of free movement by relying on the application of Art. 20 TFEU.[18]

In *Zambrano*, the CJEU was faced with a situation involving the non-EU parents of two EU-citizen/children, born and resident in Belgium and that had never left that Member State. The facts of the case resembled *Chen* but this case took the ruling in *Chen* a step forward. Unlike the circumstances of *Chen*, in *Zambrano* the nationality matched the country of residence (the children involved, son and daughter of Colombian nationals, were born in Belgium and acquired Belgian nationality). The question referred to in this case by the parents was significant: can third country national EU family members enjoy the right of residence within the territory of a Member State due to their blood link to European citizens although the latter never exercised their right to move to another Member State? Eight Member States

[16] See Alina Tryfonidou, "Chen: Further Cracks in the Great Wall of the European Union", *European Public Law* 11, (2005), 539.
[17] Sara Lorenzon, "Cittadinanza europea e principio di attribuzione delle competenze: l'integrazione Europea alla prova del test di proporzionalita", in *Dieci casi sui diritti in Europa: uno strumento didattico*, ed. Marta Cartabia, (Bologna: Il Mulino publishers, 2011), 173.
[18] *Ibid.*, at 176.

intervened[19] in the case and argued that the situation at stake had to be labeled as wholly internal so that EU law on citizenship was not applicable. Both A.G. Sharpston and the Court did not agree.

A.G. Sharpston, in a frank and detailed account suggested two feasible options to the Court.[20] In the first one she challenged the legitimacy of the wholly internal rule in general and in the particular circumstances at stake. The advocate general started by pointing out that, although in many citizenship cases a clearly identifiable cross border element could be found,[21]there were some other cases in which the "element of true movement is either barely discernable or frankly not existent".[22] In the light of this backdrop, she questioned the real meaning of the core right of European citizenship, i.e. the "right to move and reside".[23] Reading the previous *Rottman* and *Chen* cases in conjunction, A.G. Sharpston concluded that European citizenship at Artt. 20 and 21 TFEU conferred a right to reside, which was independent from the right to move.[24] The facts of *Zambrano* could not therefore constitute a purely internal situation, even though the two little Zambranos did not make use of their right of free movement.[25] The little Zambranos were citizens of the Union and, therefore, entitled to reside wherever within the boundaries of the Union. However, given that the little Zambranos could not exercise their right of residence without the support of their parents, due to their young age, the refusal to grant a derivative right of residence to Mr. Zambrano would constitute an interference with their right of residence in their national state as Union citizens.[26]

With the second option, in case the first one was not accepted, she challenged the legitimacy of reverse discrimination. She started by defining the concept of reverse discrimination, which occurs when "static factors of production will be left in a worse

[19] Austria, Belgium, Denmark, Germany, Greece, Ireland, the Netherlands and Poland.
[20] In truth A.G. Sharpston advanced also a third option in case the first two were not accepted. She foresaw that the solution of the case could have been given by the application of fundamental rights in subjects covered by unique or shared competence of the Community, even in cases in which that competence was not applied yet (para. 163). However she underlined that this was not a feasible solution. Making the application of EU fundamental rights dependent solely on the existence of exclusive or shared competence would have introduced a federal element in the EU political system (para. 172). This is not a decision that can be taken unilaterally by the Court but it requires a political decision at its roots.
[21] *Zambrano* opinion, paras. 75-76.
[22] *Ibid.*, para. 77. At paras. 78-79 she gave also some examples such as *Garcia Avello*, *Chen* and *Rottman*.
[23] *Ibid.*, para. 80.
[24] *Ibid.*, paras. 94-96.
[25] *Ibid.*, para. 97.
[26] *Ibid.*, para. 102. The advocate general referred also to the concept of proportionality (paras. 109-122). For a more detailed discussion on this point see Chapter 5.

position than their mobile counterparts",[27] and wondered whether in the context of the citizenship of the Union the application of reverse discrimination was an acceptable result.[28] After having considered some cases including *Carpenter*, *Chen* and *Metock* she concluded that all these cases offered a broad interpretation of Art. 21 TFEU but ended up creating legal uncertainty.[29] Therefore, she proposed to avoid the temptation of stretching Art. 21 TFEU in order to cover the situations of those that did not exercise freedom of movement[30] and to start interpreting Art. 18 TFEU "as prohibiting the reverse discrimination caused by the interaction between Art. 21 TFEU and national law that entails a violation of a fundamental right protected under EU law where at least equivalent protection is not available under national law."[31]

The Court dismissed both of the A.G. Sharpston's clear reconstructions.[32] The reasoning of the Court focused solely on Art. 20 TFEU. The Court, by quoting *Rottman*, introduced the new test of the "genuine enjoyment of the substance of the citizenship rights" by stating that "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[33] It then concluded that the deportation of Mr. Zambrano would have had as a consequence the deprivation of the substance of the rights[34]conferred to the children by virtue of the citizenship of the Union because, due to their young age, they should have been forced to follow their family and, therefore, to leave the Union.[35] Hence, "Art. 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country

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[27] *Ibid.*, para. 133.
[28] *Ibid.*, para. 134.
[29] *Ibid.*, para. 141.
[30] *Ibid.*, para. 143.
[31] *Ibid.*, para. 144. However, she underlined that Art. 18 TFEU had to be used just under three cumulative conditions: 1) the claimant would have to be a citizen of the EU, resident in his member State of nationality who had not exercised free movement rights under TFEU but whose situation was comparable to that of the other citizen of the Union in the same Member State who were able to invoke rights under 21 TFEU; 2) a violation of a fundamental right under EU law should have occurred; 3) Art. 18 would be only a subsidiary remedy in case there were no adequate forms of protection (see paras. 146-147-148)
[32] It has been pointed out how the reasoning of the Court is particularly short compared the very well analyzed Sharpston's opinion. On this point see Elspeth Guild, EUDO comment 2011, accessed September 2011, available at <http://eudo-citizenship.eu/citizenship-news/453-the-court-of-justice-of-the-european-union-and-citizens-of-the-union-a-revolution-underway-the-zambrano-judgment-of-8-march-2011>; see also Niamh N. Shuibhne, "Seven questions for seven paragraphs", *European Law Review* 2, (2011).
[33] *Zambrano* judgment, paras. 40-42.
[34] Some scholars showed perplexity in decrypting the real meaning of the phraseology "substance of rights" used by the Court. Among all see Shuibhne, *supra* note 32, 161-162, Van Eiken, Sybe De Vries, "A new route into the promised land? Being a European citizen after Ruiz Zambrano", *European Law Review* 36, (2011), 713. See also Alicia Hinarejos, "Extending the scope of EU citizenship without the cross border", *Cambridge Law Journal* 10, no. 2 (2011).
[35] *Zambrano* judgment, paras. 41-44.

national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."[36]

As seen before, the Court in *Chen* used Art. 21 TFEU in order to grant the right of residence to little Catherine in the UK. Although a physical movement between the two Member States did not occur, the Court regarded the mismatching of nationalities as enough to constitute a link with EU law under Art. 21 TFEU. As well, A.G. Sharpston seemed to prefer, in the first solution proposed for the *Zambrano* case, to follow this same reconstruction. As seen, she suggested relying on a combination between Artt. 20 and Art. 21 TFEU but, eventually, broadening the meaning of Art. 21 to cover also situations in which there was no mismatch of nationalities -like in *Zambrano*- by detaching the right to move from the right to reside. The Court however refused to go down this line of argument and preferred to create the new "enjoyment of the substance of citizenship rights" test, basing its reasoning only on Art. 20 TFEU, instead of extending Art. 21 TFEU to situations of pure residence and no movement.

Suggesting the reasons why the Court decided to rely on Art. 20 TFEU alone, rather than holding on the same line of reasoning as *Chen* and extending Art. 21 also to mere situations of pure residence, might sound a bit speculative.[37] However, without attempting a definitive answer, some interesting considerations can be made. It is worth noting that also in this pronouncement the Court had to deal with the concerns of the Member States over third country national immigration. The Court indicated Member States' concerns at recital 37, where it pointed out the content of their submissions:[38] "all governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr. Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within

[36] *Ibid.*, para. 45.
[37] It is likely that if the Court had decided to adopt the broadened interpretation of Art. 21 TFEU proposed by Sharpston, the outcome of this approach would have probably been that other citizenship rights rather than family one could be invoked against the home Member State even in absence of movement or mismatching of nationalities and this would have brought a clear fracture in the Member State competences. See on this Ania 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)", *European Constitutional Law Review* 7, no. 2 (2011), 296.
[38] Belgium, Denmark, Germany, Ireland, Greece, the Netherlands, Austria and Poland made submissions to the CJEU.

the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings". These words showed clearly the Member States' intention to protect their sovereignty over immigration from possible friendly interpretations on family rights pursued by the CJEU. Following the first solution proposed by A.G. Sharpston to recognize an independent right of residence, detached from the right movement, through a combined interpretation of Artt. 20 and 21 TFEU would have probably put an end to wholly internal situations and, therefore, shrunk further the area of Member States' sovereignty over immigration. It is perhaps for this reason that the Court decided not to go down this line but to create a sort of exception[39] to the wholly internal rule. As in *Rottman*, also in *Zambrano* purely internal circumstances could be encompassed within the umbrella of EU law[40] when the threat to the status of European citizenship is too high to leave the situation outside the protection of EU law:[41] in *Rottman* the risk was to lose the European citizenship status, in *Zambrano* the risk was to lose the effective enjoyment of the substance of citizenship rights. In other words, since in this case the substance of citizenship rights was in jeopardy,[42] a purely internal situation could become exceptionally encompassed within the protection of EU law owing to the application of Art. 20 TFEU which, alone, could grant the right of residence to the EU citizens and to their third country national family members. To sum up, the more limited approach of the Court in comparison to the first solution proposed by Sharpston was likely endorsed in order to respect Member States' concerns over immigration.[43] This choice does not turn the status of EU citizenship into an automatic source of residence rights for third country national family members. In this way, Member States'

[39] Many scholars defined *Zambrano* as an exception to the principle of the wholly internal rule. Among all see Hinarejos, *supra* note 34, 311; Niamh N. Shuibhne, "Case Law: (Some of) the kids are alright", *Common Market Law Review* 49, no. 1 (2012), 365; Kay Hailbronner, and Daniel Thym, "Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)" , *Common Market Law Review* 48, no. 4 (2011),1260-1262.

[40] Since none of the children exercised the treaty right to move and reside in a Member State other than the one they were nationals it was crucial for the Court to determine whether a connecting factor, apart from the free movement one, could be established. On this point see Shuibhne, *supra* note 39, 365.

[41] Alicia Hinarejos, "Citizenship of the EU: clarifying genuine enjoyment of the substance of citizenship rights", *Cambridge Law Journal* 71, no. 2 (2012), 280.

[42] Hinarejos, *supra* note 34, 311.

[43] Since *Zambrano* Belgium attempted to change its national legislation with regards to EU static citizens. A legislative proposal of 2012 introduced more burdensome rights for static nationals when compared to other Union citizens, but made an exception for minor children and their parents. On this point see Nathan Cambien, "Union Citizenship and Immigration: Rethinking the Classics?", *European Journal of Legal Studies* 5, no. 1 (2012), 23.

sovereignty still remains protected in all the situations that do not clearly fall within the *Zambrano* exception.

At the same time however, it is worth noting how the decision of the Court has also been shaped around the enhancement of the concept of European citizenship as a source of independent family residence rights. In her opinion in *Zambrano* A.G. Sharpston asked "[I]s Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?"[44] Looking at *Zambrano* the pendulum seems to have swung more toward the second position. Indeed, the right of residence of the third country national family member was granted, despite the absence of legislative provisions at treaty level, as an ancillary right to the status of European citizenship that is when the former right is functional to the scope of preserving the substance of citizenship's rights.[45] Unlike the free movement cases in which the ancillary relationship between free movement and family reunification depends on the whether the denial to family reunification would create an obstacle to free movement, in cases concerning family residence rights and the enjoyment of the substance of the rights of EU citizenship this functional relationship applies when between the EU citizen and the third country national family member occurs a relation of dependence. Indeed in *Zambrano*, a functional relationship between family residence rights and the enjoyment of the substance of the rights of EU citizenship existed because the EU children were dependent on the third country national family member and, therefore, they could have never enjoyed their status of EU citizens without the presence of their father within the Belgian territory.[46] Through the dependency relationship applied to the enjoyment of the substance of citizens' rights the

[44] *Zambrano* opinion, para. 3.

[45] For the sake of clarity it is worth pointing out that the rights granted to the third country national family members in *Chen* and *Zambrano* were slightly different. In the case of *Chen*, the EU law granted the child's third country national caregiver the derivative right to reside in the host Member State as long as the former was covered by sickness insurance and both the child and the third country national parent had sufficient resources not to become a burden on the Member State. In *Zambrano* instead, the Court granted the father of two European children of the same nationality of the state of application the right of residence in the Member State as the refusal would have forced the children to leave the territory of the European Union. For the same reason the father was also granted a work permit because, without it, the risk would have been the lack of sufficient resources for himself and the family (*Zambrano* judgment, para. 44). On these two different paths see Van Eijken, and Sybe A. de Vries, *supra* note 34, 714.

[46] *Zambrano* judgment, para. 43.

simple status of EU citizenship, without free movement being involved, was turned into the source from which protection of the family unit stemmed.[47]

In conclusion, it seems the reasoning adopted by the Court in *Zambrano* was shaped around both Member States' immigration concerns and the pursuit of citizenship rights of static citizens. Overall, its outcome struck a balance in favour of EU citizenship's rights rather than immigration concerns. The precedent of *Zambrano* could have pushed the boundaries of the Member States national immigration laws in ways that states would have found challenging.[48] Nevertheless, as it will be soon seen, the activity of the Court was immediately focused in trying to narrow down the *Zambrano* principle and its future implications as much as possible.

3. The first *Zambrano* curtailment: *McCarthy*[49]

Zambrano was welcomed by many scholars for the solution proposed to the factual circumstances of the case. Some, however, hoped that one of the issues that the Court left unanswered, i.e. whether or not the new test should be limited to the simple parent-child physical dependency relation,[50] might lead to a more extensive application in future judgments and put an end to the wholly internal rule. The Court managed to clarify its position, in particular, in the following cases of *McCarthy* and *Dereci*. These two cases ended up curtailing the scope of *Zambrano* and did not put an end to the wholly internal rule. In this part I am going to analyse the approach of the Court in the first *Zambrano* curtailing case: *McCarthy*.

Shirley McCarthy was a British national who was born and had always resided in the United Kingdom. She also held Irish nationality. The case stemmed from a refusal from the Secretary of State and Home Department, in 2004, to issue a residence permit to her on the basis of EU law as an Irish national residing in the UK. That refusal was grounded on the basis that she was not a qualified person (a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of 'a qualified person'. The decision of applying for a residence permit from her home state on the basis of EU law was taken not because of doubts about her own entitlement

[47] Catherine Barnard, "Citizenship of the Union and the Area of Justice: (Almost) the Court's Moment of Glory" in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law,* eds. Allan Rosas, Egils Levits, and Yves Bot, (New York: Springer, 2012), 510-511.
[48] Jo Shaw, "Has the European Court of Justice challenged Member State Sovereignty in Nationality Law?", EUI working papers, 2011/62, accessed March 2012, available at http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law>, 38.
[49] Case 434/09, *McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375.
[50] Lansbergen, Miller, *supra* note 37, 296.

to live in the UK but because her husband, George McCarthy, was a Jamaican national who was not entitled to live there. Mrs. McCarthy was therefore hoping to be granted a residence permit in the UK through EU citizenship so that her husband would gain the automatically derived right to reside with her. The House of Lords referred two questions to the CJEU: 1) is a person of dual Irish and British nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38/EC? 2) has such a person resided legally within the host Member State for the purpose of article 16 of Directive 2004/38/EC in circumstances where she was unable to satisfy the requirements of Art. 7 of that Directive (self sufficiency)?[51]

On the first question regarding the application of Art. 3(1) Directive 2004/38/EC, A.G. Kokott stated that this provision and therefore the entire Directive could not apply, given that the Union citizen had never moved from her state of origin.[52] She continued by stating that this right could not be derived from primary law either and, in particular, from Art. 21 TFEU, given the fact that in her view this primary law provision does not protect the right of residence of Union citizens *vis a vis* the Member States of which they are nationals.[53] After having dismissed the applicability of Art. 3(1) Directive 2004/38/EC and Art. 21 TFEU, A.G. Kokott went on considering whether dual nationality instead could be the link to EU law on which rely in order to obtain family reunification.[54] Recalling the decision in *Garcia Avello* in order to verify whether the same rationale (using the citizenship of another Member State in order to overcome national rules for the sake of not being discriminated on the grounds of nationality) was applicable in a case involving the right of residence and family reunification,[55] she suggested that the question at stake was whether or not "the position of Union citizens differs, in view of their dual nationality, in a legally relevant way from the situation of other Union citizens who are nationals of the Host member State only."[56] Looking at the circumstances of the case she pointed out that "no particular factors arise from the dual nationality of a Union citizen in Mrs. McCarthy's position. From the point of view of the law on residence, she is in the same situation as all other British nationals who have always lived in England and never left their country of

[51] For a more precise summary of the facts of the case see Shuibhne, *supra* note 39, 353-354.
[52] *McCarthy* opinion, para. 30.
[53] *Ibid.*, para 31. Note that this position is exactly the opposite of the one supported by A.G. Sharpston in her first solution offered in the *Zambrano* case.
[54] *Ibid.*, para. 32.
[55] *Ibid.*, para. 34.
[56] *Ibid.*, para. 35.

origin […]. In fact, Union citizens such as Mrs. McCarthy neither suffer prejudice to their right of free movement nor are discriminated against compared with other British nationals who are in a comparable situation".[57] Finally, addressing the second question on whether Mrs. McCarthy resided legally within the host Member State for the purpose of article 16 of Directive 2004/38/EC in circumstances where she was unable to satisfy the self sufficiency requirements, she stated that allowing Mrs. McCarthy to establish permanent residence in the UK as an Irish citizen without requiring to meet the conditions of movement and self sufficiency "would ultimately result in cherry picking which does not accord with the spirit and purpose of the provisions of EU law on free movement and the right of residence."[58] A.G. Kokott concluded that Mrs. McCarthy could not rely on EU law at all and that, therefore, the situation had to be considered as wholly internal.

The Court, while reaching the same decision, differentiated itself from the advocate general's reasoning. Initially the line of reasoning was identical. The Court, as well as A.G. Kokott, did not consider that Art. 3(1) of Directive 2004/38/EC could bring the situation of a citizen who never moved to another Member State within the scope of EU law, irrespective of that citizen's dual nationality.[59] Unlike A.G. Kokott the Court reformulated the second question and asked instead whether the rights of Mrs. McCarthy could derive from Art. 21 TFEU even though she never exercised her right of movement.[60] The Court started by stating that the situation of a Union citizen that "has made no use of the right of freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation".[61] In order to support this statement the Court recalled the previous *Zambrano* case that not just underlined that the concept of EU citizenship was destined to become the fundamental status of the nationals of the Member States but also pointed out "that national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status" have to be dismissed.[62] The Court then considered Art. 21 TFEU as a substantive core right encompassed within the status of European citizenship. As a matter of fact it stated that "as a national of at least one Member State,

[57] *Ibid.*, paras. 37-38.
[58] *Ibid.*, para. 56.
[59] *McCarthy* judgment, paras. 31-43.
[60] *Ibid.*, para. 44. Note that, unlike *Zambrano*, the Court formulated its discussion under Art. 21 and not Art. 20. Art. 21, in this case, was meant to protect the potential right of free movement of Mrs. McCarthy that, in the view of the applicant, could be hindered in the event that her husband had to be sent back to Jamaica.
[61] *Ibid.*, para. 46.
[62] *Ibid.*, para. 47.

a person such as Mrs. McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States."[63] Nevertheless, in the circumstances at stake, the Court found that "[…] no element of the situation of Mrs. McCarthy indicated that the national measure at issue in the main proceedings had the effect of depriving her of the genuine enjoyment of the substance of the rights or impeding her right to move and reside freely within the territory of the Member States".[64] The Court concluded saying that the national measure at stake, unlike *Zambrano*, did not have the effect of obliging Mrs. McCarthy to leave the territory of the European Union.[65]

Comparing *McCarthy* to *Zambrano* we can note that the Court, in this case, seems to have explained the content of *Zambrano* by suggesting that the right of exercising free movement ex Art. 21 TFEU among the Member States had to be considered a substantive EU citizenship right.[66] In this way free movement became a right pertaining to the status of EU citizenship.[67] However, the Court did not just specify the content of *Zambrano* but also ended up curtailing its scope. As a matter of fact the Court in *McCarthy*, on one side, confirmed the principle created in *Zambrano* by applying it but, at the same time, "stripped it out" by finding that there was no deprivation of the genuine enjoyment of the rights attached to EU citizenship in the circumstances at stake.[68] This conclusion was delivered without real consistency with

[63] *Ibid.*, para. 48.
[64] *Ibid.*, para. 49.
[65] *Ibid.*, para. 50. The Court, in order to support its argument, contrasted it with the previous two cases *Garcia Avello* and *Grunkin and Paul*. It stated that in both cases the serious inconvenience that stemmed from the double nationality situation was liable to constitute an obstacle to free movement. This was not the case in *McCarthy*. On this point see Shuibhne, *supra* note 39, 358.
[66] See again *McCarthy* judgment, para. 48.
[67] At para. 48 the Court seems to suggest that also the potential future exercise of the right to move and reside are crucial for the determination of whether or not the situation falls within the scope *ratione materiae* of EU law. Concretely this means to verify whether or not the possibility of exercising free movement in the future could be considered as a core substantive EU citizenship right. On this point see Peter Van Elsuwege, and Dimitry Kochenov, "On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights", *European Journal of Migration and Law* 13, no. 4 (2011), 450-452. Nevertheless, some scholars offered a different interpretation and suggested that free movement was not a specification of the *Zambrano* test but an additional test to the enjoyment of the substance of citizenship rights. The idea of double step can be found in the piece of Shuibhne, *supra* note 39, 366. See also Roderic O' Gorman "Ruiz Zambrano, McCarthy and the purely internal rule", *Irish Jurist* 46, (2011), 225. Following this interpretation that could lead to a great deal of confusion especially considering the fact that in the next *Dereci* case, as it will be seen, there is no reference to free movement whatsoever. On this point see Shuibhne, *supra* note 39, 367. New reference to movement and to the double test will be seen in the following *Iida* case that will be analysed later on in the chapter.
[68] Lansbergen, and Miller, *supra* note 37, 298-299. Some argued that the argument over the unconditional right to reside should have been faced referring also to the principles of International Law. It would have

the previous *Zambrano* case. As a matter of fact in *McCarthy* the Court relied on International law in order to bolster the fact that the national measure would not force Mrs. McCarthy to leave the territory of the Union but this reasoning was not endorsed in *Zambrano*.[69]

In the light of the factual circumstances of these two cases it is difficult to understand why the Court reserved to them such a different treatment. Moreover, also the last part of the reasoning in which differences between *Garcia Avello* and *Zambrano,* on one side, and *McCarthy* on the other were underlined,[70] the Court was not capable of proposing a convincing explanation of the reasons why the national measure provoked a serious inconvenience to free movement for the Union citizens concerned in *Garcia Avello* and *Zambrano* and did not create such inconvenience for the enjoyment of the substance of citizenship rights in *McCarthy*.[71] As Shuibhne underlined, the fact that Mrs. McCarthy might have had to be forced to live in the UK without her husband, move to another Member State in order to invoke family reunification rights according to the more favorable EU free movement legislation or leave the territory of the Union to go to Jamaica are all situations in which the substance of citizenship rights could have been violated.[72]

How can the inconsistencies between the *McCarthy* reasoning and the *Zambrano* one be explained? Once again the path taken by the Court can be seen as a compromise. The need for a compromise can be traced to Member States' concerns over third country national residence rights, on one side, and EU citizenship on the other. With regard to immigration concerns, although neither in the judgment nor in the opinion it is

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been possible to argue simply that all nationals have the right to reside in the state by virtue of International Law. See on this point Helen Oosterom-Staples, "To What Extent Has Reverse Discrimination Been Reversed?", *European Journal of Migration and Law* 14, no. 2 (2012), 170. See also Shuibhne, *supra* note 39, 367; Van Elsuwege, Kochenov, *supra* note 67, 454. Authoritative doctrine however specified that *McCarthy*, although curtailed *Zambrano*, did not contradict it. This doctrine underlined the importance of European citizenship as a focal source of several substantive rights that the applicant could claim in front of his own Member State too at the condition, nevertheless, that the applicant was a minor. See Stephen Coutts, "Case C- 434-09: Shirley McCarthy v. Secretary of State for the Home Department", in EUDO blog, 2011, accessed January 2012, available at <http://eudo-citizenship.eu/eu-citizenship>.

[69] *Zambrano* judgment, para. 50.

[70] *McCarthy* judgment, paras. 51-53.

[71] Anya Wiesbroke, "Disentangling the Union Citizenship Puzzle? The McCarthy case", *European Law Review* 36, no. 6 (2011), 869. Some criticism was raised on this point. Because of the open formulation of the test, its exact meaning will have to be formulated on a case by case basis. See on this point Sandra Mantu, "Zambrano, McCarthy and Dereci", *Journal of Immigration Asylum and Nationality Law* 26, no. 1 (2012), 52.

[72] See Shuibhne, *supra* note 39, 368. In the first option her right to family right would be hindered, in the second option, although her right to free movement could theoretically be exercised, there could be some practical inconveniences that would prevent her from enjoying it. In the last circumstance, having to leave the territory of the Union, automatically hinders the substance of EU citizenship rights.

possible to find any reference to the submissions presented by the UK or by any of the Member States that joined its complaints, it seems that both the Court and the advocate general intentionally decided not to go down the broad route opened by *Zambrano* in order to preserve the Member States' sovereignty in the field of legal immigration. Indeed, the Court in *McCarthy* ended up referring to the old theory on internal and external situations started with *Morson and Jianhan*[73] and confirmed *Zambrano* as an exception.[74] At the same time the CJEU managed also to reap the *Zambrano* test as tight as it could be by stating, not very convincingly, that a situation such as the *McCarthy* one would not be at risk of seeing Mrs. McCarthy's substance of citizenship right violated or of seeing her right to free movement among Member States hindered. Unlike *Zambrano* no explicit reference to the concept of dependence was made. However, despite the lack of direct reference to dependence, it seems that the functional relationship between the genuine enjoyment substance of citizenship rights and the residence family rights of third country national family members did not apply since Mrs. McCarthy was an adult and not dependent on Mr. McCarthy.

Despite this strict reasoning the approach of the Court seems also to have been shaped by the idea of preserving and developing a concept of EU citizenship as a source of independent family rights. To this end, it can be noted how the Court explicitly extended the EU law competence to cases in which a cross border movement did not occur yet, such as cases of potential or future movement.[75] When in fact the Court considered Art. 21 TFEU as a substantive core right encompassed within the status of European citizenship clearly referred to a potential and future right of free movement, given that, from the facts submitted, it was evident that Mrs. McCarthy never exercised that right among Member States before the judgment. In other words, the Court considered that the right of exercising future and potential free movement should be protected as a substantive EU citizenship right by Art. 20 TFEU. This same point will be repeated in the following *Iida* case.

In conclusion, also in this case it is evident how the reasoning of the Court has been shaped around the willingness to protect Member States' sovereignty and to develop even further the concept of EU citizenship as a source of self-standing family rights. Indeed, on one side, the Court referred to the wholly internal rule theory and

[73] *McCarthy* judgment, para. 45.
[74] *Ibid.*, para. 47. Shuibhne pointed out that the language used by the Court was particularly ambiguous. Hence, it is difficult to understand immediately that *Zambrano* is perceived as an exception to the wholly internal rule. See Shuibhne, *supra* note 39, 366.
[75] See Wiesbroke, *supra* note 71, 866.

reduced *Zambrano* to a mere exception. Simultaneously, on the other side, the Court managed to also preserve the concept of EU citizenship as a source of self-standing rights specifying that even potential and future free movement amounted to substantive citizenship rights. Looking at the outcome of the case itself, overall it seems that the reference of the Court to the wholly internal rule in the application offered to the *Zambrano* test in *McCarthy* showed how the interest of the Court was to strike a balance in favor to the protection of Member States' sovereignty over immigration. Indeed it is very likely that, once it realized the potentially vast effect that *Zambrano* could have had in cases involving static EU citizens and third country nationals, the Court resolved to shrink as much as possible its consequences for the sake of preserving Member States' sovereignty over national immigration. However, as hinted before, the specification that even potential and future movements to another Member State have to be encompassed within the protection granted by Art. 20 TFEU shows the willingness of the Court to continue to expand the substantive rights amounting to the concept of EU citizenship regardless the strict position adopted in this case. This fact could suggest that the strict approach endorsed might be just temporary while the seeds for the creation of a full- bodied concept of EU citizenship are being planted.

4. The second curtailment of *Zambrano*: *Dereci*[76]

The second case that had an impact on *Zambrano* was *Dereci*. *Dereci* started with a series of refusals to grant residence permits to third country national family members of Austrian nationals who had never exercised EU free movement rights. In rejecting all of the applications the Ministry for the Home Affairs ruled out the application of EU law on the basis that the situation was purely internal. Nevertheless the referring court sought a preliminary ruling from the CJEU in order to clarify the scope of *Zambrano*.[77]

A.G. Mengozzi agreed with the referring court that "it is necessary to gain a better understanding of the implications of the judgment in *Ruiz Zambrano*".[78] He started by ruling out the application of Directive 2004/38/EC to any of the situations of *Dereci.*[79] After a brief exposition of the points of *Zambrano* and *McCarthy*,[80] he found

[76] Case 256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] not yet reported.
[77] For a more detailed summary of the case see Shuibhne, *supra* note 39, 358-360.
[78] *Dereci* opinion, para. 17.
[79] *Ibid.*, paras. 32 et seq. The advocate general stated that Directive 2004/38/EC was not applicable at none of the situations of *Dereci* simply because none of the applicants exercised his/her freedom of movement.

that none of the cases at hand were characterized by a risk of deprivation of the genuine enjoyment of the substance of the rights[81] because, as pointed out in the two above mentioned cases, the enjoyment of the substance of the rights test does not include "the right to respect for family life".[82] Moreover, with regard to the issue of family life, he then recalled the old free movement logic in order to bolster the view that no rights of residence could be granted to the third country national applicants. He stated that an European citizen, in order to be able to enjoy a family life in accordance with EU law, has to exercise one of the freedoms of movement laid down in the TFEU, something that the applicants in the situation at stake did not do at all. He concluded that "at the stage of development of Union law, the Court answer should be that Art. 20 must be interpreted to the effect that it does not apply to a Union citizen who is the spouse, parent or minor child of a national of a non-member country, where that union citizen has never exercised his right to move freely between the Member State and has always resided in the Member State of which he is a national, in so far as the situation of that Union citizen is not accompanied by the application of national measures which have the direct effect of depriving him of the genuine enjoyment of the substance of the rights attaching to his status as a union citizen or as impeding the exercise of his right to move and reside freely within the territory of the Member State".[83]

The Court started from questioning whether the provisions concerning the citizenship of the Union precluded the national state from refusing a residence permit to a third country national family member of a EU citizen who had never exercised his/her right to move.[84] Firstly, as well as A.G. Mengozzi, the Court ruled out the application of Directive 2004/38/EC[85] and, recalling *McCarthy*, stated that "a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national, is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38/EC, so that that directive is not applicable to him".[86] Secondly, as in *McCarthy*, the Court addressed the applicability of the EU citizenship treaty provisions. Basing its reasoning on Art. 20 TFEU, it reiterated the formulation of *McCarthy* that the non-exercise of movement rights did not imply assimilation to a

[80] *Ibid.*, paras. 18-30.
[81] *Ibid.*, para. 33.
[82] *Ibid.*, para. 37.
[83] *Ibid.*, para 50.
[84] *Dereci* judgment, para. 37.
[85] In reality the Court ruled also out the application of Directive 2003/86/EC (see paras. 46-49).
[86] *Ibid.*, paras. 54 et seq.

purely internal situation[87] and reconfirmed the *Zambrano* genuine enjoyment test.[88] Significantly the Grand Chamber then stated overtly what was already implied in *Zambrano* and *McCarthy*: the deprivation of the genuine enjoyment of the substance of citizenship rights is triggered when a Union citizen "has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".[89] The fact that it might appear desirable for the family to live together it is not enough to support the view that the European citizens will be forced to leave the territory of the Union if the right of family reunification was not granted.[90] Finally, with regard to the right to respect for family life, in line with A.G. Mengozzi, the Court recalled Art. 51(2) of the Charter of Fundamental Rights and pointed that the respect of the right to family life should be assessed only if the circumstance of the case fell within the EU competences. It then stated that it was up to the national court to determine whether or not the circumstance would fall within the umbrella of EU law and, consequentially, whether or not Art. 7 of the Charter had to be applied.[91]

Unlike *McCarthy*, the Court in *Dereci* did not try to specify the content of the genuine enjoyment of the substance of the citizenship rights test. Indeed also in this case, as it was before in *Zambrano*, it is not clear which rights pertain to the core substance of the EU citizenship. Despite the lack of specification of the rights that amount to the substance of EU citizenship, the Court in *Dereci* has the merit to have made clear when a national measure should be considered violating substantive EU citizenship rights. The Court underlined that a national measure has to be considered violating the substance of EU citizenship rights when it triggers the departure of the EU citizen not just from the Member State but also from the territory of the Union as a whole. This position, which was already hinted vaguely in *Zambrano* and in *McCarthy*, clarified finally the *Zambrano* principle and curtailed it even more. Indeed, if in reading *McCarthy* it seems that the Court proposed a distinction based on the age of the EU citizen -where being a minor would entail a violation of the genuine enjoyment of the substance of EU citizenship rights whereas the same violation would not occur if the one enjoying the EU citizenship status was an adult- the Court in *Dereci* dismissed

[87] *Ibid.*, para. 61.
[88] *Ibid.*, para. 64.
[89] *Ibid.*, para. 66.
[90] *Ibid.*, para. 68.
[91] *Ibid.*, para. 72. On the other hand, if the national court takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

totally this line of interpretation[92] and made clear that the outcome of a case should be based on whether the denial of residence rights to third country nationals would force the European citizen to leave the territory of the Union.[93] Therefore, potentially also in a case in which a EU minor is involved but he/she is not forced to leave the territory of the Union by a national measure applied to his/her third country national relative, this case will not be protected by the more favorable EU treaty provisions on EU citizenship but would fall within the competence of the Member State.

The *Dereci* case was subject to a lot of criticism with regard to its interpretation of the enjoyment of the substance of EU citizenship rights. First of all, it was argued that the *Zambrano* test was interpreted very strictly by the Court and that this interpretation would have limited its application to cases of absolute dependence of the citizen upon a third country national.[94] *Dereci*'s application of Human Rights was also strongly criticized. On one side the uselessness of the Human Right's reference in the *Dereci* judgment was pointed out. According to Professor Shaw, referring to fundamental rights after having ruled out that the circumstances fell under the umbrella of EU law is odd because, in order to grant protection to the family unit, it would be sufficient to conclude that the genuine enjoyment criterion is satisfied, without need for issues of family life to be engaged.[95] On the other side excluding the right to family life from the genuine enjoyment test was considered limitative to the development of the idea of EU citizenship as the fundamental status of the nationals of the Member States[96]. Another critique is related to the idea of reverse discrimination. Since the Court in *Dereci* interpreted the substance of citizenship rights in such a restrictive way this

[92] *Dereci* judgment, para. 74. On one side, the Court underlined that even if it appears desirable for economic or family reasons to grant residence to the third country national family members this does not mean that, without this concession, the European citizen would risk leaving the territory of the Union. On the other side, it conferred this assessment to the national courts. In simple terms, now the right to stay of the European citizen is determined neither by age nor by the economic situation but by an assessment of the national court that has to establish whether or not, on the circumstances at stake, the person should be forced to leave the territory of the Union.

[93] Stanislas Adam, and Peter Van Elsuwege, "Citizenship rights and the federal balance between the European Union and its Member States: Comment on Dereci", *European Law Review* 37, no. 2 (2012), 182. The authors underlined how this criterion is more consistent, considering the fact that there is no automatic connection between the age of a person and the "genuine enjoyment" of his rights: in principle, a minor child with the nationality of a Member State may, under certain circumstances, be able to conduct an autonomous life in the Union without the presence of his/her parents, whereas certain adults may require the support of other persons.

[94] Hinarejos, *supra* note 41, 281. See also Dimitry Kochenov, and Sir Richard Plender, "EU Citizenship: from an incipient form to an incipient substance? The discovery of the treaty text", *European Law Review* 37, no. 4 (2012), 395. The authors underlined that the substance of rights test should not be milder or stricter of the cross border situation test (the functional relationship between free movement and family reunification).

[95] Shaw, *supra* note 48, 39.

[96] Oosterom Staples, *supra* note 68,168

test, against the hopes of many scholars, did not put an end to the phenomenon of reverse discrimination but simply shrunk the area of what accrues to purely internal situations.[97] Finally, another source of criticism was related to the fact that the Court, instead of determining directly whether the action of the Member State amounted to a violation of the substance of citizenship rights, decided to delegate such a scrutiny to the national courts. This decision seems quite odd compared to *Zambrano* in which the Court took a much more directive approach by deciding itself, and not leaving to task to the national court, whether the children would be unable to exercise their Union citizenship rights if the parents had to leave.[98]

These copious criticisms can be taken as a symptom of the fact that, once again, the Court throughout its reasoning tried to find a solution of compromise between Member States' immigration concerns and enhancement of the concept of EU citizenship as a source of independent family residence rights. On one side, the Court had to take into account the Member States' claims. The Austrian, German, Irish, Dutch, Polish and UK governments submitted that the principles laid down in the *Zambrano* case apply to very exceptional circumstances in which EU citizens are at risk of leaving the territory of the Union or not being able to exercise their right of free movement and residence within the territory of the Member States.[99] The most evident way in which the Court managed to take into account the Member States' stances was by specifying overtly what was hinted already in *Zambrano* and *McCarthy*: the deprivation of the genuine enjoyment of the substance of citizenship rights is triggered when a Union citizen has not just to leave the territory of the Member State but also the territory of the Union as a whole.[100] Being forced to leave the territory of the Union embodies in fact a much higher threshold under which the Court decided that EU law could not be of any help and the sovereignty of the Member States had to be preserved.

On the other side, as in *McCarthy*, the idea of protecting the substantive rights stemming from the status of EU citizenship was reiterated and preserved. The proof of this fact is that, despite the outcome of the judgment, the Court did not repeal[101] what stated in *Zambrano* and *McCarthy* that is, firstly, that the situation of a Union citizen who has not made use of the right to freedom of movement cannot, for that reason

[97] Mantu, *supra* note 71, 53.
[98] Shaw, *supra* note 48, 39.
[99] *Dereci* judgment, para. 40.
[100] *Ibid.*, para. 66.
[101] The Court is not new in reconsidering the outcome of previous judgments. See for example *Akrich* and *Metock*.

alone, be assimilated to a purely internal situation[102] and, secondly, that the citizenship of the Union is intended to be the fundamental status of nationals of the Member States and, therefore, they can rely on the citizen rights pertaining to this status against the Member States by Art. 20 TFEU.[103]

To conclude, it seems that the reasoning of this judgment can be read once again as an attempt of the Court to find a solution at the interplay between Member States' concerns on third country national immigration and the idea of developing a concept of EU citizenship as a source of independent rights. Overall, it is apparent from the outcome of the judgment that, as well as in *McCarthy*, the Court preferred to swing the pendulum more towards the idea of not overriding the sovereignty of the Member States over immigration. The solution proposed by the Court ended up drawing safe and strict borders for the circumstances that could pierce the veil of the purely internal situations. As Shaw pointed out, the Court's approach in *Dereci* appears to be close to the guidance issued by the United Kingdom border agency on the applicability of *Zambrano*[104] and this shows that perhaps the Court, after *Zambrano*, was trying to reconcile its previous approach to the more stringent one endorsed by the national authorities.[105] Despite this change of route from *Zambrano,* the Court however was still keen to confirm and refer to the idea of EU citizenship as a source of self-standing rights and this choice perhaps, as suggested previously in *McCarthy*, could be the ground from which to develop more liberal solutions in the future.

5. *O and S*[106] and *Ymeraga*[107]

In late 2012, the Court of Justice delivered another judgment on the position of the third-country national family members of EU citizens that challenged the application of the Zambrano test. The joined cases of *O and S v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L* involved, once again, static EU citizens and their third country national family members.

In the case of *O and S*, Ms. S was a citizen from Ghana who migrated to Finland and lived there on the basis of a national permanent residence permit. In 2001, she

[102] *Dereci* judgment, para. 61.
[103] *Ibid.*, paras. 62-63.
[104] See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/ex1-guidance-1.pdf?view=Binary
[105] Shaw, *supra* note 48, 39. See also Mantu, *supra* note 71, 51.
[106] Joined Cases 356/11 and 357/11, *O and S v.Maahanmuuttovirasto* [2012] not yet reported.
[107] Case 87/12 *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration* [2012] not yet reported.

married a Finnish national with whom she had a child in 2003 who had Finnish nationality. In 2005 Ms. S and her husband got divorced and she was granted the sole custody over the child. In 2008 Ms. S married Mr. O, a national of Côte d'Ivoire. In 2009 Ms. S and Mr. O had a child, who was granted Ghanaian nationality. Since then, Mr. O lived with Ms. S and her two children. In 2009 Mr. O applied for a residence permit on the basis of the marriage that was, however, rejected on the grounds that he did not have secure means of subsistence. Mr. O then challenged that decision in front of the Helsingin hallinto-oikeus (Administrative Court of Helsinki), which dismissed the action. O and S therefore appealed against the judgment to the Korkein hallinto-oikeus (Supreme Administrative Court), which referred questions to the CJEU.

In the case of *L*, Ms. L was a national of Algeria who resided lawfully in Finland since 2003 owing to a national permanent residence permit obtained through her marriage to a Finnish national. In 2004 a child was born to Ms. L and her first husband; this child was granted Finnish nationality. The child had always resided in Finland. Ms. L and her first husband divorced in 2004 and Ms. L was granted sole custody of the child. In October 2006 Ms. L married Mr. M, a national of Algeria who arrived legally in Finland as an asylum seeker in March 2006. At the end of October 2006, Mr. M was returned to his country of origin. In November 2006 Ms. L applied for Mr. M to be granted a residence permit in Finland on the basis of their marriage. This request was rejected in 2008 on the grounds that Mr. M did not have any secure means of subsistence. In the meantime, in January 2007, a child was born to Ms. L and her second husband; this child was granted Algerian nationality. The Maahanmuuttovirasto (Immigration Office) rejected M's application for a residence permit. Subsequently, this decision was annulled by the Helsingin hallinto-oikeus. After the annulment, the Maahanmuuttovirasto brought an appeal against that decision before the Korkein hallinto-oikeus, which referred the case to the CJEU.

By order of the President of the Court, the two cases were joined. The first question that the referring national court asked was whether the Treaty provisions on EU citizenship should be interpreted "as precluding the Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a

third country national".[108] Moreover, the referring court also asked whether, in case of a negative answer, the fact that the third country national lives together with his spouse, is not the biological father and does not have the custody of the child may affect the interpretation given to these provisions.[109]

A.G. Bot immediately ruled out the applicability of Directive 2004/38/EC on the grounds that, since the children of S and L never exercised their right of free movement outside Finland and, therefore, they could not be covered by the concept of beneficiaries ex Art. 3(1).[110] Once excluding the application of Directive 2004/38/EC, the Court focused on the application of Art. 20 TFEU. After having recalled the *Zambrano* test according to which "national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union are precluded",[111] he found that the cases in the main proceedings are significantly different from the ones characterizing the *Ruiz Zambrano* case.[112] First of all, the applicants are not the parents of the EU children and do not exercise any authority on them.[113] Moreover, in case the EU children had to leave the territory of the Union, this would not be imposed under implementation of the national legislation but it would be dictated by simply by the free choice of their mothers.[114] In this regard, in his view, according to *Dereci* the reasons linked to the departure of a citizen of the Union from his territory are particularly limited to circumstances in which "the Union citizen has no other choice but to follow the person concerned, whose right of residence has been refused, because he is in that person's care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs".[115] These situations can cover the hypothesis of third country national parents on whom EU children are dependent or even adult children on whom a parent is dependent because of illness or disability but do not cover situations concerning third country nationals who do not exercise any parental or financial responsibility over the Union citizen[116] because, in this case, the risk would be to create a right of residence to any third country national on the sole basis of Art. 20 TFEU outside the provisions of secondary law expressly provided for by the Union

[108] *O and S* judgment, para. 35.
[109] *Ibid.*, para. 36
[110] *O and S* opinion, para. 32-34.
[111] *Ibid.*, para. 36.
[112] *Ibid.*, para. 39.
[113] *Ibid.*, para. 40.
[114] *Ibid.*, para. 42.
[115] *Ibid.*, para. 44.
[116] *Ibid.*, para. 45.

legislature.[117] In light of this account the advocate general analysed both judgments in order to show the reasons why neither of them could be covered by the *Zambrano* exception. With regard to the O and S case, it is true that the presence of a second child with the third country national could influence the mother to follow her spouse to his state of origin. However, such a decision, as seen above, would arise from the free will of the mother and not as the consequence of an imposition imposed by the national authority.[118] Likewise, in the case of M and L, considering in particular the fact that the couple lived together for a very short period of time and that, since the baby was born, the father never came to visit him, it is evident that whether the Union child is deprived of the substance of his rights deriving from the concept of EU citizenship "depends, above all, on the whims and vagaries of his mother's married life rather than a constraint imposed by the implementation of the national legislation".[119] Finally, he concluded that Art. 20 TFEU should be interpreted as not precluding the refusal of the Member State to grant a residence permit to a third country national because he does not have sufficient means of subsistence to reside in the Member State with his third country national spouse, mother of a EU citizen. The same provision should not be interpreted differently even if the third country national spouse lives together with the mother of the EU citizen.[120] Although the advocate general found that no protection could be granted under Art. 20 TFEU, he nevertheless stated that the circumstances at stake could be covered by Directive 2003/86/EC. The extent to which Directive 2003/86/EC can grant protection to third country national family members in the circumstances at stake is an assessment that the national courts themselves should be called to make. It is for the national court to assess whether "in the implementation of the criteria laid down in Directive 2003/86/EC and within the limits of the Member State's margin of discretion in the area, the competent national authority carried out a fair and balanced assessment of the competing interests at issue, seeking, in particular, to respect the family life of the parties concerned and to determine the best solution for the child" and to carry out "an in-depth examination of the family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature."[121]

As well as the advocate general, the CJEU immediately excluded the possibility

[117] *Ibid*.
[118] *Ibid.*, para. 51.
[119] *Ibid.*, para. 52.
[120] *Ibid.*, paras. 53-54.
[121] *Ibid.*, para. 90.

that Directive 2004/38/EC could find application over the circumstances at stake. Indeed, since the EU citizens concerned never made use of their right of free movement, they were not covered by the concept of "beneficiary" ex Art. 3(1) and, hence, Directive 2004/38/EC could not apply to either of them or to their third country national family members.[122] Following the steps of the advocate general, after having ruled out the relevance of Directive 2004/38/EC, the Court focused on the application of Art. 20 TFEU. The CJEU started recalling what was already stated in the previous pronouncements of *Zambrano*, *McCarhty* and *Dereci*. Nevertheless, unlike the advocate general who listed precisely the situations that should be covered by the *Zambrano* test, the court limited itself to a simple explanation of the outcome of the previous law cases. To this extent, the Court recalled that the simple fact that an EU citizen never made use of his/her right of free movement does not necessarily mean that the circumstances at stake have to be assimilated to a purely internal situation.[123] EU citizens can rely on the rights pertaining to their status, even against their state of nationality, if the national measure has the effect of denying the genuine enjoyment of the substance of citizenship rights.[124] Such denial occurs when the national measure forces the Union citizen not just to leave the territory of the Member State of which he/she is a national but also the territory of the Union as a whole.[125] Once again, contrarily to the advocate general that decided to assess directly the non applicability of Art. 20 TFEU to the circumstances at stake, the Court pointed out, on the same line of the previous *Dereci*, that it is for the referring Court to establish whether the refusal of granting the right of residence to the third country national family member entails a denial of the genuine enjoyment of the substance of the rights conferred by the status of EU citizenship.[126] To this extent, unlike its previous judgments,[127] the Court engaged in a thorough analysis of the factors that the national court should take into account in order to deliver its decision. Unlike the advocate general, the court did not use as an argument the fact that even if the children had to leave the territory of the Union the decision would be the result of the free wills of their mothers and not of an obligation of the national authority but it looked at other aspects. In particular, according to the CJEU, first of all, the national court

[122] *Ibid.*, para. 42
[123] *O and S* judgment, para. 43.
[124] *Ibid.*, para. 44-45.
[125] *Ibid.*, para. 47.
[126] *Ibid.*, para. 49.
[127] While in *Zambrano* and *McCarthy* the assessment on whether the national measure violated the genuine enjoyment of the substance of citizenship rights was already made by the CJEU, in *Dereci* the CJEU stated that such assessment was a matter for the national court to decide but it did not offer any criteria in order to pursue it. See *Dereci* judgment, para. 74.

should consider that the mothers of the Union citizens hold permanent residence permits in Finland and, therefore, there is no obligation for them or for the Union citizens to leave the territory of the Union.[128] On the other side, also the custody of the children and the fact that the latter are part of reconstituted families are also circumstances that should be taken into account. Indeed, the decision of Mr. S and Ms. L to leave the territory of the Union would deprive the EU children of their contacts with their biological fathers. On the contrary, if they decided to stay in Finland, such a decision would also harm the relationship of the third country national children with their biological fathers.[129] After having recalled the *Dereci* statement according to which the mere fact that it might appear desirable to preserve the family unit "is not sufficient in itself to support the view that the Union citizen would be forced to leave the territory of the Union if such a right of residence were not granted"[130], the CJEU continued to list other factors to which the national court should pay attention in its assessment. In particular, it pointed out that whether the person does or does not live together with the EU sponsor is not decisive in the assessment of the national court.[131] Moreover the Court also pointed out that, although the *Zambrano* test should be applied just in exceptional circumstances[132] this does not mean, in contrast with what the German and Italian governments submitted, that its application is confined to situations in which there is a blood relationship between the third country national and the EU sponsor.[133] Finally, the CJEU openly underlined, referring also to the opinion of the advocate general, that the national court should also take into account that the third country national step-fathers are not the ones on whom the EU children are "legally, financially or emotionally dependent", since it is precisely the dependency relationship that can force the EU citizen to leave the territory of the Union as a whole.[134] It also specified that, from the information available, it seemed that this dependency relationship in the circumstances at stake did not subsist.[135] The Court finally concluded by stating that Art. 20 should not be interpreted as precluding a Member State from refusing to grant a

[128] *O and S* judgment, para. 50.
[129] *Ibid.*, para. 51.
[130] *Ibid.*, para. 52.
[131] *Ibid.*, para. 54.
[132] In his opinion the advocate general, unlike the CJEU, made some examples of circumstances that can be considered exceptional. See *O and S* opinion, rec. 45: "those situations may concern parents who are third country nationals, on whom young children who are citizens of the Union are dependent as in *Ruiz Zambrano*. They might also concern adult children on whom a parent is dependent because of an illness or disability".
[133] *O and S* judgment, para. 55.
[134] *Ibid.*, para. 56.
[135] *Ibid.*, para. 57.

third country national a residence permit in the circumstances of these cases, provided that this refusal did not entail, for the EU citizen concerned, the denial of the genuine enjoyment of the substance of the citizenship rights.[136] Nevertheless, the Court suggested that the admission of the step-fathers of the EU citizens might possibly be required pursuant to Directive 2003/86/EC on family reunification between third country nationals. The last part of the judgment points out that the restrictions set out in this directive must be interpreted in accordance with the Charter, including respect of the rights of the children.[137]

As one can notice, this judgment completely fits within the approach adopted by the Court since the *McCarthy* case. In fact, despite the positive outcome reached in the second part of the judgment through the application of Directive 2003/86/EC, the Court decided to endorse once again a strict approach with regards the application of the *Zambrano* test. In doing so the Court endorsed the classic scheme of the previous *McCarthy* and *Dereci* case, which foresees first looking at the case potential applicability of Directive 2004/38/EC and secondly, in case of a negative answer, looking at the possible application of Art. 20 TFEU. Moreover, as well as in *Dereci*, the Court decided that the final assessment over the applicability of the *Zambrano* test was a task that needed to be left in the hands of the referring court.

Most importantly, once again as in the previous cases, it is evident how also in this occasion the Court delivered a judgment in which both Member State's concerns with regard to the right of entry of third country nationals and the idea of continuing to put flesh on the bones of the concept of EU citizenship as a source of self standing rights have been taken into account. Member States' concerns over a too liberal interpretation of Art. 20 can be found in the submissions of the Finnish, Danish, German, Italian, Netherlands and Polish governments. In their submissions they argued that the open interpretation of Art. 20 TFEU offered by the *Zambrano* case can be utilized only in exceptional situations in which the application of a national measure would lead to the denial of the genuine enjoyment of the substance of the rights accruing to the concept of EU citizenship. The Court answered positively these claims and upheld the position of the Member States and the Commission. Although, the CJEU specified that the final assessment on whether Art. 20 TFEU should be applied was a decision that had to be taken by the referring judges, nevertheless it reported a list of factors regarding the concrete circumstances at stake that suggested how the application

[136] *Ibid.*, para. 58.
[137] *Ibid.*, paras. 61-82.

of Art. 20 TFEU could not be claimed. Among the several factors above listed, the Court highlighted that the mothers have a long term residence permit in the EU citizens' Member State and they have the sole custody of the children, as if to say that the latter will never be forced to leave the territory of the Union, and therefore to fall within the area of protection offered by Art. 20 TFEU, unless the mothers decided to leave the Union themselves. On the other side, the Court also underlined how it is the relationship of dependency between the Union citizen and the third country national that is able to jeopardize the substance of the rights of the EU citizen in cases in which the third country national is granted the right to stay in the Member State and, consequentially, the EU citizen is forced to leave the territory of the Union. On this issue, although by leaving the last word to the national court, the CJEU highlighted that the information available suggested that such dependency relationship did not exist in the circumstances at hand.

On the other hand, despite the outcome of the case, it is evident how the Court worked on the enhancement of the concept of Art. 20 TFEU as a source of independent rights, perhaps for future applications. First of all, the Court stated that the exceptional circumstances covered by the *Zambrano* test could also encompass cases in which there is no blood relationship between the EU citizen and the third country national seeking a right of residence. This clarification is quite remarkable because it could lead, in the future, to granting the right of residence to third country nationals that perhaps would not be linked to the EU citizen by "official" family bonds, as long as the lack of the third country national's presence within the territory of the Member State concerned would hinder the genuine enjoyment of the substance of citizenship rights accruing to the EU citizen involved, due to the dependence of the latter upon the former, and would force the EU citizen to leave the territory of the Union. If this reading will be seriously developed, it may be able one day to open the door to third country national step-parents or even potentially to *de facto* couples not registered in civil partnerships composed of an EU citizen and a third country national, as long as a relation of dependency between the two occurs.[138] Moreover, the Court for the first time also described in more detail the relationship of dependency that should subsist, in order for the *Zambrano* test to be applicable and for the circumstances to fall into the competence realm of EU law, between the EU citizen and the third country national. In the previous cases, the Court did not offer a precise explanation of the meaning of this dependency

[138] Steve Peers, and Chiara Berneri, "Iida and O and S: further developments in the immigration status of static EU citizens", *Journal of Immigration, Asylum and Nationality Law* 27, no. 2 (2013), 172.

requirement. Only in *Zambrano* itself did the Court openly refer to the word "dependent" in its reasoning, probably meaning economic dependence. [139] As already mentioned in the *O and S* case, the CJEU, recalling the advocate general, highlighted that the dependency relationship is another factor that should be taken into account when examining whether, in the absence of this relationship, the EU citizen would still be capable of exercising the substance of the rights conferred by the status of EU citizenship. The Court described the idea of dependency as legal, financial or emotional. The fact that the Court used the word "or" could suggest that these conditions are not cumulative but alternative. As seen above, when discussing the issue of blood relationships between EU citizens and third country nationals, if this is the interpretation that will be endorsed for the future, the right of residence for third country nationals could potentially be opened not just to core family members but also to those upon whose legal, financial or emotional support the EU citizen relies such as legal guardians, non registered partners, third country national family members not encompassed within the category of beneficiaries according to Directive 2004/38/EC, including step parents, and perhaps even friends.[140]

Summing up, it can be noted that the outcome of this judgment completely fits the strict approach that the Court has decided to endorse since the *McCarthy* case with regards to third country national family members' rights to reside in a Member State. Despite this strict approach however, it is evident that the reasoning of this judgment can be read once again not just as an attempt of the Court to allay the Member States' concerns over immigration but also to enhance the development of the concept of EU citizenship as a source of independent family rights, probably in the hope of being able to endorse more liberal positions in the future.

Finally, it is just worth adding that a similar approach has been applied by the Court also in the more recent *Ymeraga and Others* case. The applicant, Mr. Kreshnik Ymeraga arrived in Luxembourg at the age of 15 to live with his uncle. After his situation was regularized in 2001 and he acquired Luxembourg citizenship in 2009, his parents and two brothers applied for a residence permit as family members of a citizen of the Union. The application was refused but, on appeal, the Administrative Court decided to refer the matter to the CJEU. The latter, after excluding the applicability of Directive 2003/86/EC and 2004/38/EC because in both cases the applicants could not

[139] *Zambrano* judgment, para. 43.
[140] Peers, Berneri, *supra* note 138, 173.

fall within the concept of a beneficiary,[141] took the occasion to remind that there are "specific situations in which […] a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status".[142] Nevertheless, the Court found that in the main proceedings there were no relevant elements, apart from the intention of Mr. Ymeraga to live with the family, to support the view that a refusal to grant the right of residence to the third country national family members may have the effect of denying the genuine enjoyment of the substance of citizens' rights.[143] Moreover, not even the Charter of Fundamental Rights of the European Union could be applied in order to give protection to the third country national family members because the situation of the applicants in the main proceedings was not governed by European Union law.[144]

Like in *O and S*, the Court found that protection of the third country national family members could not be granted because the situation neither fell within the free movement scenario nor within the *Zambrano* test. Whereas in *O and S* the Court offered a detailed account of all the elements to be taken into proper consideration by the national referring court in order to make the final assessment, in *Ymeraga* the Court decided to make its own assessment without delegating anything to the referring court. However, the criteria used by the Court to reach this conclusion seems a little nebulous because they lack of a clear analysis of the factors that potentially prevented Mr. Ymeraga from leaving the territory of the Union despite the fact that the family reunification did not occur. However, although the reasoning of this case is focused on pointing out the circumstances that do not make the situation fall within the *Zambrano* exception, it is not banal. As pointed out before in *Dereci*, the Court still decided to preserve the *Zambrano* exception. This choice is not necessarily dictated by reverence towards precedent decisions but perhaps suggests that the Court, among the numerous constraints, is still watering the seed of EU citizenship, while waiting for better times to apply the concept fully. To conclude, it can be argued that also in *Ymeraga* the Court's reasoning was shaped around Member States' concerns over immigration and the idea

[141] *Ymeraga* judgment, paras. 24-27.
[142] *Ibid.*, para 37.
[143] *Ibid.*, para 39.
[144] *Ibid.*, para 42.

of protecting the concept of EU citizenship as a source of independent third country national family rights. It is reasonable to assume that the fact that the applicants were adults and not economically dependent on the EU sponsor pushed the Court to opt again for a strict decision as far as the protection of these country national family members was concerned.

6. An exception: *Iida*[145]

As hinted in the introduction, unlike the previous cases this judgment concerns moving EU citizens and the request to grant a third country national a right of residence in their state of origin. Despite the peculiarity of the circumstances that cannot be assimilated to any other of the cases seen before, it is worth spending some time on the analysis of this case because the Court, although it still adopted a strict approach towards third country national family members, decided to utilize and develop the *Zambrano* test. As a matter of fact it will be shown that despite the peculiar circumstances, in this case also the Court acted with regard to Member States' concerns over third country national immigration and on the idea of developing the concept of EU citizenship as a source of self-stemming rights.

Mr. Iida had initially been granted a residence permit in Germany in connection with a family reunion (marriage to a German citizen from which a child of Japanese, American and German nationality was born). After their marital separation, he was instead given a residence permit in Germany because of his employment there. However, since the subsequent extension of the permit was discretionary, Mr. Iida decided to apply for a residence card as a family member of an EU citizen on the basis of Directive 2004/38/EC. The German authorities refused his application, and following his challenge to that decision, the German administrative court referred to the CJEU several questions that were summarised in the following one: "Does European Union law give a parent who has parental responsibility and is a third-country national, for the purpose of maintaining regular personal relations and direct parental contact, a right to remain in the Member State of origin of his child who is a Union citizen, to be documented by a "residence card of a family member of a Union citizen", if the child moves from there to another Member State in exercise of the right of freedom of movement?"[146]

In order to answer this question A.G. Trstenjak started questioning whether Mr.

[145] Case 40/11, *Yoshikazu Iida v. Stadt Ulm*, not yet reported.
[146] *Iida* judgment, para. 33.

Iida's residence right could be derived from Directive 2004/38/EC. He found that neither according to its literal interpretation nor according to a schematic or teleological interpretation of the Directive it was possible to derive the right of residence of Mr. Iida from this piece of legislation. In fact, first of all, no provisions encompassed in it classify the applicant as a beneficiary of freedom of movement and residence rights.[147] Moreover, the scheme of Directive 2004/38/EC did not give any scope for extending the right of residence to situations in which the members of the family of a Union citizen who are third-country nationals wish to remain in the Member State of origin of the Union citizen after the latter himself has moved to another Member State.[148] Finally the advocate general, rejected a teleological interpretation in accordance to human rights principles because it was established that Directive 2004/38/EC did not cover the circumstances of the case and "the application of a legal act in a manner consistent to fundamental rights cannot be raised outside the scope of that legal act."[149]After having assessed that Mr. Iida could find no protection in secondary legislation the advocate general considered whether the applicant could derive his derivative right of residence from Artt. 20 and 21 TFEU. The advocate general, after having referred to previous case law,[150] found that also the principles developed by the Court in these cases on the applicability of Artt. 20 and 21 TFEU could not be applied to the facts of the main proceeding because Mr. Iida's daughter had already exercised her right of freedom of movement and the right to reside in the territory of the Union was not under threat.[151] Finally, given that also primary law seemed not to be of any use, the advocate general wondered whether, perhaps, protection could be given to Mr. Iida in compliance with human rights. The advocate general found that, in accordance with Art. 51(1) of the Charter of Human Rights of the EU, there is enough connection with the implementation of Union law when the refusal of a resident permit constitutes even a small restriction on the right of free movement of the Union minor citizen.[152] However, whether this restriction had occurred or not, was a matter for the national Court to verify.[153]

The Court immediately noted that Mr. Iida could in principle, regardless his family situation, be granted the status of long term resident in Germany through the

[147] *Iida* opinion, paras. 32-38.
[148] *Ibid.*, paras. 41-49.
[149] *Ibid.*, para. 54.
[150] *Ibid.*, paras. 62-63.
[151] *Ibid.*, para. 65.
[152] *Ibid.*, para. 73.
[153] *Ibid.*, para. 75.

application of Directive 2003/109/EC concerning the status of third country nationals who are long term residents.[154] However, given that Mr. Iida had withdrawn his application for an EU long-term residence permit, he could not currently be granted the right to reside in Germany on the basis of that directive.[155]

After having ruled out the application of Directive 2003/109/EC, the CJEU followed the steps of the advocate general and focused on the possibility of applying Directive 2004/38/EC. To this end, the Court considered that Mr. Iida could not fall within the category of "beneficiaries"[156] of the Directive, without finding it necessary to explore whether or not the Directive could be object of a teleological interpretation.[157] According to the Directive, being granted the right of residence as a family member in the ascending line of an EU citizen presupposes that the potential beneficiary of the right of residence is dependent on the EU citizen.[158] Mr. Iida however did not satisfy the condition of dependency as it was his daughter who was dependent on him.[159] On the other side Mr. Iida could not be considered a beneficiary of the directive as a family member of his spouse, given that he did not satisfy the condition of the Directive of having accompanied her to the Member State other than that of which she was a national.

After having exhausted all the possibilities of applying secondary law provisions to the circumstances at stake the CJEU, like the advocate general, explored whether Mr. Iida could be granted protection by means of Art. 20 and 21 TFEU. The Court stated that any rights conferred by the Treaty provisions on EU citizenship to third country

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[154] *Iida* judgment, para. 45.
[155] The Court did not comment on whether he would still be able to apply for that status, although at para. 75 of the judgment it appears to assume that he can.
[156] The Court specified that he could not be a beneficiary with regard to the principal right of his daughter because the family member in the ascending line allowed to join the European citizen must be dependent. On the other hand, he could not be considered a beneficiary with regards to his wife either because Art. 3 (1) Directive 2004/38/EC requires family members of a Union citizen moving or residing in another Member State to accompany him.
[157] *Iida* judgment, paras. 52-55. On the other hand A.G.Trstenjak, despite reaching the same conclusion, questioned whether Mr. Iida's residence right could be derived from Directive 2004/38/EC. She found that neither according to a literal interpretation nor according to a schematic or teleological interpretation of the Directive it was possible to derive the right of residence of Mr. Iida from this legislation. First of all, no provisions classify the applicant as a beneficiary of freedom of movement and residence rights (*Iida* opinion, paras. 32-38). Moreover, the scheme of Directive 2004/38/EC does not give any scope for extending the right of residence to situations in which the members of the family of a Union citizen who are third-country nationals wish to remain in the Member State of origin of the Union citizen after the latter himself has moved to another Member State (*Iida* opinion, paras. 41-49). Finally, the advocate general excluded the idea of applying a teleological interpretation in accordance with human rights since it was established that Directive 2004/38/EC did not cover at all the circumstances of the case and "the application of a legal act in a manner consistent to fundamental rights cannot be raised outside the scope of that legal act" (*Iida* opinion, para. 54).
[158] *Iida* judgment, para. 54.
[159] *Ibid.*, paras. 55-56.

nationals "are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen."[160] It quoted the previous *Chen*, *Eind* and *Dereci* judgments,[161] and pointed out that the common factor that characterized the situations in these judgments was an "intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals (third country nationals) in the Member State of residence of that citizen, in order not to interfere with that freedom".[162] Given the circumstances at stake, i.e. Mr. Iida was not seeking the right to reside in the new Member State of his daughter and wife, he had always resided in Germany in accordance with national law (without his status impeding his wife and daughter from moving to another Member State) and his national permit was renewable (and he could "in principle" obtain EU long-term resident status),[163] the Court found that there were no valid arguments to support the view that Mrs. Iida and her daughter were denied the genuine enjoyment of the substance of the rights deriving from their status as EU citizens or were impeded in the exercise of their right to move and reside freely within the territory of the Member States.[164] The CJEU furthermore reiterated that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law, applying this principle equally to a purely hypothetical prospect of such rights being obstructed.[165]

Finally, the Court stated that Mr. Iida could not rely on the protection granted by the Charter of Fundamental Rights of the European Union. According to Art. 51(1) of the Charter, it applies to Member States only when they are implementing EU law.[166] Since Mr. Iida did not satisfy the conditions of Directive 2004/38/EC and had not applied for a right of residence as a long-term resident within the meaning of Directive 2003/109/EC, his situation showed no connection with EU law, so the Charter could not apply. It is worth noting that the solution adopted by the Court is in deep contrast with the approach endorsed by the advocate general. According to the latter, Art. 51(1) of the Charter of Fundamental Human Rights of the EU could, in fact, apply. This is because it was suggested that there is enough connection with EU law when the refusal of a

[160] *Ibid.*, para. 67.
[161] *Ibid.*, paras. 69-71.
[162] *Ibid.*, para. 72.
[163] *Ibid.*, paras. 73-75.
[164] *Ibid.*, para. 76.
[165] *Iida* judgment, para. 77.
[166] *Ibid.*, para. 78. Obviously, outside the scope of EU law, Member States are still obliged to comply with the human rights standards of the European Convention on Human Rights and are subject to the jurisdiction of the ECtHR.

resident permit constitutes even a small restriction on the right of free movement (ex Art. 21 TFEU) of the Union minor citizen.[167]

The *Iida* case, as all the previous ones, is again a case that seems to be shaped around a desire to take into account Member States' immigration complaints and develop further the concept of EU citizenship as a source independent family rights. The attention to Member States' concerns over immigration is evident, in particular, from the reasoning endorsed by the CJEU. *Iida* displays clearly the Court's reluctance to accord residence rights to third country national family members through the application of the concept of EU citizenship. Indeed, the Court did not just rule out the application of Directive 2004/38/EC because Mr. Iida did not belong to the group of beneficiaries of the right of residence in the host Member State as family member, but also the application of Art. 20 TFEU. With regard to the application of the Treaty concept of EU citizenship, as seen, the Court labeled the cases of *Chen*, *Eind* and *Dereci*, in relation to its explanation of the *Zambrano* test, as sort of exceptions to situations that would have normally fallen within the competence of the Member States[168] and concluded that, in the circumstances at hand, these exceptions could not be applied.[169] In particular, the fact that the claimant's wife and daughter had decided to move from Germany to Austria without him, together with the fact that he was not looking for a permit to reside in the same Member State to which they had moved and that he potentially could have been already granted the right to reside in Germany pursuant to Directive 2003/109/EC, were considered factors which ruled out a possible impediment to the genuine enjoyment of the substance of the rights associated with their status of Union citizens.

Despite the outcome and the Court's reasoning, as well as the previous *O and S*, the Court continued to put flesh on the bones of the newly born *Zambrano* test. If in *Dereci* the *Zambrano* test was clarified by stating that a violation of the substance of citizenship rights occurs when the EU citizen is forced to leave the territory of the Union as a whole, in *Iida* the Court seems to have managed to indicate more clearly what the substantive rights accruing to the status of EU citizenship consist of. Indeed, in *Iida* the Court enriched the meaning of the *Zambrano* test by finding a *fil rouge*

[167] *Iida* opinion, paras. 73-75.
[168] Once again it is worth recalling *Iida* judgment, rec. 72 "The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, […] they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom".
[169] *Iida* judgment, para. 76.

between the case at hand and some previous pronouncements of the Court. As briefly mentioned the Court, in order show that the right of residence of Mr. Iida could not be derived by Artt. 20 and 21 TFEU, quoted some of its previous judgments. In particular, the Court referred to the cases of *Chen, Eind* and *Dereci* and found that the common element that united these very different situations was the intrinsic connection with the freedom of movement of the Union citizen. Through this statement, which surprisingly addressed also the *Dereci* case although, in the circumstances of that case, the EU citizens concerned did not move from their Member State of origin, the Court implicitly linked the test of the enjoyment of the substance of citizenship rights to the right of free movement.

Translated in more simple terms, through this statement the Court seems to suggest that when the national measure denying the right of residence to a third country national family member forces the EU citizen to leave the territory of the Union, the substantive right accruing to his/her status that is being violated is the right of free movement. It could be argued that referring to *Dereci* as intrinsically connected to *Chen* and *Eind* through the element of free movement is a wrong reading of the Court of its own case law, since *Dereci* had nothing to do with the exercise of this right. However, it should be remembered that already in *McCarthy* the Court seemed to imply that one of the core substantive rights encompassed within the concept of EU citizenship was the right of free movement and residence.[170] The precedent of *McCarthy* therefore makes this interpretation less likely to be a mistake and more likely to be intentional.[171]

[170] See *McCarthy* judgment, para. 48: "As a national of at least one Member State, a person such as Mrs. McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States".

[171] Peers, and Berneri, *supra* note 138, 171. The authors pointed out that this statement seemed to be blurred by the Court in recital 76, which seemed to add the violation of free movement and residence rights to the *Zambrano* test. They argued that, despite the layer of confusion, if it was really in intention of the CJEU to connect the right of free movement and residence with the test of the genuine enjoyment of the substance of citizenship rights, it is preferable to do it by adding the violation of free movement and residence rights as an alternative test to the *Zambrano* one, instead of characterising free movement as the core substantive EU citizenship right. In this way the core substantive rights accruing to the status of EU citizenship would not just be limited simply to free movement rights but could, in the future, be extended even to the fundamental right to family life and to human rights more generally. Moreover, by adding a free movement alternative test to the enjoyment of the substance of citizenship rights, third country nationals could surely find a better ground of protection. If the alternative test is applied so that the Court had also to assess whether the denial of the right of residence to the third country national family member would hinder the right of free movement and residence of the Union citizen within Member States, it is more likely that the third country national EU family member would see his/her right of residence protected because, practically speaking, he/she would have another, perhaps easier, alternative to fulfill rather than only having to prove that the national measure would force the EU citizen to leave the territory of the Union as a whole. In other words, having an alternative free movement test will make it possible that, when the high threshold posed by the *Zambrano* test is not reached, the lower threshold (consisting of verifying whether the national measure has obstructed the right of free

Characterizing the core substance of EU citizenship rights with the right of free movement, potentially, could be applied in the future as a way to lower the high threshold posed by the interpretation of the *Zambrano* test offered by *Dereci* and, perhaps, will be able to encompass within the protection granted by Art. 20 TFEU not just situations in which the EU sponsor should be forced to leave the territory of the Union but also more common situations in which his/her right of free movement could be obstructed.

In light of the analysis proposed we can conclude that the Member States' concerns over immigration issues seem, once again, to have driven the reasoning and determined the outcome of the case. However, on the other side, the Court also focused its reasoning of the concept of EU citizenship by adding free movement as a substantive right that characterizes the status of EU citizenship. This approach might be able to bring, in the future, a more generous protection to EU sponsors and their third country national partners.

7. Conclusions

After the oil crisis of the 1970s, the Member States' concerns over their borders did not just clash with the enhancement of free movement but also with the development of the application of the EU citizenship concept as a source of independent rights. The Court has recently been involved in several judgments debating the right of EU static citizens to live in their state of origin with their third country national family member according to EU law as opposed to Member States' sovereignty over immigration. As it is evident from the above analysis, the reasoning of the Court at times has lacked clarity. To this end, for example, it is difficult to understand why *McCarthy* refers to free movement as a substantive EU citizenship right whereas *Dereci* does not mention this feature at all and, finally, in *Iida* free movement is mentioned again. It is also difficult to understand why *Dereci* is mentioned in *Iida* as a free movement case, considering that the right of free movement was not involved. Moreover, it is not easy to understand the reasons that moved the Court to refer to international principles in order to confirm that Mrs. McCarthy had a right to live in the UK, despite the presence of her third country national husband, whereas this reference was not adopted for Mr. Zambrano's children.

The inconsistencies that can be found in the case law however should not be

movement) can apply and the circumstances can fall within the scope of EU law.

considered the last word on the Court's activity. As shown above, also in this line of cases it seems evident how the Court was driven by the aim of finding solutions that would meet Member States' concerns over immigration and would, at the same time, favour the development of the concept of EU citizenship as a source of independent family residence rights. In *Zambrano*, for example, the Court did not utilize Art. 21 TFEU to cover situations in which the EU citizen never exercised his/her right of free movement, as A.G. Sharpston originally suggested but, instead, preferred to rely on Art. 20 TFEU, basically creating an exception to circumstances that otherwise should have been governed by Member States national legislation. Indeed, this choice did not turn the status of European citizenship as an absolute source of residence rights for third country national family members and the Member States' sovereignty over immigration remains protected in all the situations that do not clearly fall within the exception. At the same time, *Zambrano* managed to fit within the previous EU citizenship case law as a natural continuation of the process of creating a concept of European citizenship as a source of self-standing rights. Also the *McCarthy*'s reasoning can be seen as a compromise between Member States' immigration concerns and the development of the concept of EU citizenship. With regards to the concerns over immigration, the Court in *McCarthy* ended up referring to the old theory on internal and external situations and confirmed *Zambrano* as an exception. On the other side, with regard to the development of the concept of EU citizenship as a source of self-standing rights, the Court tried to put flesh on the bones of the concept of substance of citizenship rights by identifying the substance of the EU citizenship rights with the right of free movement. Moreover, also in *Dereci* on one side the Court took into account the Member States' claims by limiting the *Zambrano* principles. The deprivation of the genuine enjoyment of the substance of citizenship rights is triggered when a Union citizen has to leave the territory of the Union as a whole and not just a single Member State. On the other side however the Court, despite the outcome of the judgment, reiterated the idea of protecting the substance of citizens' rights stemming from the status of EU citizenship and that citizens can rely on the rights pertaining to that status against the Member States by Art. 20 TFEU.[172] Furthermore, in the *O and S* case, the restrictive approach toward residence rights of third country nationals was nevertheless accompanied by an open description of the concept of blood relationship and dependence that potentially in the future could extend the application of *Zambrano* to a broader category of third

[172] *Dereci* judgment, paras. 62-63.

country national family members. Finally, also *Iida*'s strict reasoning seems likely grounded on the Member States' immigration concerns with regard to their competence in assessing the right of entry of third country nationals, as it can be noticed by the fact that the Court labeled the cases of *Chen*, *Eind* and *Dereci* as sort of exceptions to situations that would have normally fallen within the competence of the Member States. However, on the other side, it has been seen that the Court was also focused on the development of the concept of EU citizenship. As a matter of fact, as before in *McCarthy*, in *Iida* the Court attempted to define the substance of EU citizenship rights by referring to free movement as a substantive EU citizenship right to be protected.

Overall, unlike the cases on free movement analyzed in the previous chapter, it seems that after *Zambrano* the Court has preferred to propose solutions that would swing the pendulum in favour of Member States' concerns over immigration rather than allowing third country national family members to reside through the application of the concept of EU citizenship. Considering these cases in more detail, it seems that the Court, as opposed to the market access approach adopted in the free movement cases (reference to deterrence/eliminating obstacles to the exercise of the right of free movement), in the static EU citizens stream of judgments preferred to opt for a much higher threshold. In fact, as things now stand, the Court finds the fulfillment of the *Zambrano* principles only in case of forced departure from the territory of the Union which, according to the current interpretation granted by the Court, seems to occur just in circumstances of absolute dependency of the EU citizen on the third country national due to their young age. This approach is peculiar and unique to the specific application of EU citizenship rights. On the one hand its potential application is not just curtailed to circumstances involving EU static citizens, but it is also clearly opposed to the approach endorsed at international law level by the ECtHR. Indeed, the latter opted for the application of the so called "elsewhere theory" according to which, in order to demonstrate an interference with Art. 8 ECHR, families must show that they will not be able to enjoy family life elsewhere[173] rather than according an independent right to live in one of the signatory states. On the other hand the *Zambrano* principles, if fulfilled, are capable to grant third country nationals further rights in addition to the right of residence, if necessary in order to prevent the forced departure from the EU. Indeed, for

[173] See for example ECHR judgment of 19 February 1996, No 23218/94, *Gul v. Switzerland*; ECHR judgment of 28 November 1996, No. 21702/93, *Ahmut v. The Netherlands*; App. No. 23938/93, October 23, 1995, *Sorabjee v. United Kingdom*, unpublished; ECHR judgment of 13 May 2003, No. 53102/99 *Chandra v. The Netherlands*.

instance, the Court stated that the Member State is prevented from denying a work permit to a third country national family member, in so far as such decision deprives the EU citizen of the genuine enjoyment of the substance of the rights attached to the status of European Union citizenship.

The great potential of *Zambrano*, which granted residence rights to third country national family members without the exercise of the right of free movement by an EU sponsor, was immediately realized by the academic world and, for some time, many wondered whether *Zambrano* marked the end of the wholly internal rule and the beginning of a full EU competence over issues concerning EU citizens, regardless of them being moving or non-moving citizens. However, these hopes were soon dashed by the following pronouncements of the CJEU. With *McCarthy* the Court restricted the application of the *Zambrano* test to situations in which either the right of free movement or the genuine substance of the citizenship rights were in jeopardy. The circumstances of the case, although debatable, were not considered to fulfill the condition of the test. The second curtailment of *Zambrano* happened in *Dereci*. In this case the Court finally made clear that the genuine enjoyment of the substance of citizenship rights was violated by a national measure where the application of the measure triggers the departure of the EU citizen from the territory of the Union. The curtailment endorsed in *Dereci* was, more recently, bolstered by the *O and S* case too. Finally, also in *Iida* the Court adopted a strict application of the *Zambrano* test, as interpreted by *Dereci*, also in a case concerning non-static EU citizens. Lingering on the reasons why the Court suddenly decided to drastically change route straight after the release of *Zambrano* would amount to speculation. However, perhaps it is not unlikely that the numerous complaints and interventions of some Member States pushed the Court to revisit its position and curtail the applicability of the *Zambrano* principles as much as possible.

One might wonder why such a different approach from the free movement jurisprudential stream has been adopted. Some elements from the analysis proposed above seem to suggest that while initially (in *Zambrano*) the Court regarded EU law "as mature enough for mutation, growth and plasticity […]"[174] the strong Member States

[174] Kochenov, and Plender, *supra* note 94, 393. The authors suggested that the general approach of the Court over the concept of EU citizenship is fundamentally wrong. In their reconstruction the authors started to look at the pre Maastricht era and at its proto citizenship cases (see the already mentioned *Cowan*, *Calfa*, *Konstantinidis*) and noted that economic free movement rights constituted an important driving factor behind the action of the Court and behind the approach of the Union more in general. Nevertheless, they argued that the introduction of the concept of EU citizenship into the Maastricht Treaty was not just a simple codification of pre-existing practice but it was more the creation of something absolutely new that, somehow, the Court was not able to interpret. To this extent they pointed

opposition[175]may have pushed it to take a step back.[176] Nevertheless, as hinted before, regardless of the solutions endorsed, the Court has disseminated in the rulings some elements of openness in favour of more liberal interpretations of the concept of EU citizenship as a source of the self-stemming right of residence for third country nationals in the future. Therefore, the strict approach towards family reunification between EU static citizens and third country nationals could be just temporary since the Court has allowed itself room for future broader interpretations in new fact scenarios.

To conclude, throughout this chapter the aim has been to show that the decisions of the Court on static EU citizens can be better understood in the light of their historical background. As in the previous chapter, the judgments in this field can be seen as compromises between Member States' concerns over their immigration sovereignty and the EU interest of developing a concept of EU citizenship as the fundamental status of Member States' nationals and as a source of independent family residence rights separate from the exercise of free movement. Hence, the discrepancies between the various judgments can be better understood in the light of the Court's effort to balance these contrasting interests. These judgments, unlike the free movement cases, display a stricter overall approach of the Court towards third country national family members of EU static citizens is predominant. However, these cases present various and important elements that play in favour of future more liberal solutions.

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out that neither in the preamble nor in the articles of the treaties dealing with European citizenship there is a reference to economic activity or cross border movement. For this reason the Court's interpretation of EU citizenship that is based simply on the internal market logic omits to accept the changes that occurred between a freedom based on the market to a freedom based on European citizenship. Consequentially, such a view is disrespectful of the real division of competences stemming from the Treaty text according to which "EU citizenship alongside a handful of other fundamental concepts, unquestionably belongs to the realm of EU law, as opposed to the national law of the Member States". See Kochenov, and Plender, *supra* note 94, 373-393. See also Joseph H.H. Weiler, "Europa: 'Nous coalisons des Etats, nous n'unissons pas des hommes"' in *La Sostenibilità della democrazia nel XXI secolo,* eds. Marta Cartabia, and Andrea Simoncini, (Bologna: Il Mulino Publishers, 2009), at 82.

[175] Many Member States opposed the *Zambrano* interpretation and pushed for a strict post *Zambrano* jurisprudential approach. In *Zambrano* eight Member States intervened, in *McCarthy* five, in *Dereci* eight, in *O and S* six, in *Ymeraga* six and finally in *Iida* eight.

[176] Clifford J. Carrubba, Matthew Gabel, "Do Governments Sway European Court of Justice Decision-making?: Evidence from Government Court Briefs", IFIR Working Paper Series, 2005, paper no. 6, available at <http://www.ifigr.org/workshop/fall05/gabel-workshop.pdf>. In this paper the authors elaborated an empirical test of Member State influence on CJEU decisions over the time span of three years and demonstrated that the Court does take into account the concerns and the views of Member States in order to ponder its decisions.

Chapter 5: CJEU and ECtHR: a comparison

1. Introduction

So far I have looked at the development of the phenomenon of family reunification between EU citizens and third country nationals. I pointed out how, after the signing of the Treaty of Rome, the main concern of the EU became the development of the Common Market and, in particular, of the idea of free movement of workers. This aim was pursued through the drafting of generous secondary free movement legislation, such as Council Regulation 15/1961/EEC, 38/1964/EEC and 1612/1968/EEC, which granted EU workers specific rights among which also the right to family reunification was included. However, after the oil crisis, the socio-economic background underpinning the activity of the Union mutated. As seen, Member States began to endorse strict immigration policies towards illegal and legal immigration of third country nationals. The Member States' stricter approach towards immigrants, accompanied by the continuing EU interest in the promotion of free movement of EU persons and the development of the concept of EU citizenship as a source of self-stemming rights, characterized the background upon which the CJEU built its case law. In the analysis offered, it was pointed out how the reasoning of the Court was shaped by the interplay of these trends. The reconstruction of the historical background underpinning the CJEU's jurisprudence helped to show how several contradictions of the case law were simply an attempt of the Court to build a compromise between Member States and free movement or EU citizenship concerns.

The purpose of this final substantive chapter is to show that the CJEU's approach is stronger, in terms of family's protection, than the one that potentially could be offered by Art. 8 ECHR in the same circumstances. In order to make this point this chapter will be divided into five parts. After this brief introduction, in part 2 I will recall how the Court today protects third country national family member residence rights. Part 3 will be dedicated to the ECtHR and to how Art. 8 ECHR is applied in family reunification cases. Part 4 will be dedicated to the comparison between the CJEU and the ECtHR approach in order to highlight the stronger protection granted to family units by the CJEU. Finally, part 5 will be dedicated to the conclusions.

2. Family protection granted by the CJEU

In order to understand the sort of protection that the Court has granted to family reunification cases between EU citizens and third country nationals it is important to recall the approach undertaken both in cases involving free moving and static EU citizens.

As far as free movement cases are concerned, in all the case law apart from *MRAX*, in which the Court adopted a literal interpretation of family reunification, the Court took into account both free movement and Member States' concerns over immigration by interpreting family reunification as ancillary to the right of free movement. This attempt is particularly evident in *Singh* when for the first time in a free movement-family reunification case the market access model, according to which the national rules posing obstacles to the market are always unlawful, was applied. As seen, the Court stated that family residence rights had to be granted when they would have avoided obstacles to the exercise of the right of free movement of the EU sponsor. The utilization of the market access rule through the application of the ancillary relationship between family reunification and free movement continued in the post-*Singh* jurisprudence. In *Carpenter* the same test as *Singh* was applied, although with regard to the freedom to provide services abroad rather than free movement. Consistent to *Singh*, the Court pictured family residence rights as ancillary to the enhancement to the freedom to provide services, and for this reason, Mrs. Carpenter was granted the right of residence within the UK territory. In *Akrich* as well the same ancillary relationship between free movement and family reunification provisions was applied although, unlike the previous cases, the solution proposed by the Court upheld the Member States' immigration concerns rather than the right of free movement. Finally, in *Eind* and *Metock* the *Singh* test was applied too. In *Eind*, the application of the *Singh* logic to those facts ended up granting a broader protection to third country national residence rights since the denial to family reunification was considered to be obstructive to free movement even in cases in which the relation with the third country national was not determinant on the first original decision to move of the EU sponsor. In *Metock*, the application of the ancillary relationship between free movement and family reunification granted the right to reside to third country nationals despite the fact that they never resided within the EU before and despite the family relationship with the EU sponsor started after the latter decided to move to the host Member State.

As far as cases involving EU static citizens are concerned, it seems that the Court tried to find a compromise between the idea of enhancing the concept of EU

citizenship as a source of independent family rights and Member States' concerns over immigration by referring to the idea of dependency applied to the enjoyment of the substance of citizens' rights test. Dependency consists in the fact that the EU citizen should be "dependent" on the third country national family member in order to be allowed to reside in the host Member States otherwise the latter will find this right denied. The idea of dependency finds its roots in the already mentioned *Baumbast* case. In the specific circumstances of R., in which R. was an American mother of children with French nationality who were enrolled in a UK school, R. was granted the right to remain in the EU, although she was divorced from the EU father, as primary carer of the children because if she was refused the right to remain in the host Member State during the period of her children's education that would have deprived "those children of a right which is granted to them by the Community legislature."[1] The same approach was repeated in *Ibrahim* and *Texeira* and also in the recent *Alarpe*[2] case, in which the Court stated that even reaching the age of adulthood does not have a direct effect on the rights of residence of the third country national family member carer of the EU sponsor if the latter is still in need of financial and emotional support from the third country national carer.[3] Dependency has been explored also with regard to extended family members. In the *Rahman*[4] case the Court pointed out that it is up to the competent authority to take into account the various factors that may be relevant in order to identify whether the appellants can be allowed entry and residence within the EU such as to "the extent of economic or physical dependence".[5]

As far as cases concerning EU static citizens it can be noted how the idea of dependency was first translated into *Chen* in which, as seen, Mrs. Chen was granted the right of residence as carer of her daughter because otherwise the latter's right of residence would have been deprived of any useful effect.[6] In *Zambrano*, the fact the EU citizens were minor and economically dependent on their father granted the latter the right to reside in Belgium despite the EU children always having resided in Belgium and never exercised their right of free movement. The concept of dependence was also

[1] Case 413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002], para. 71.
[2] Case 529/11 *Alarpe and Tijani v. Secretary of State for the Home Department* [2013] not yet reported.
[3] *Ibid.*, paras. 24-30.
[4] Case 83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others* [2012] not yet reported.
[5] *Ibid.*, para. 23.
[6] Case 200/02 *Zhu and Chen v. Secretary of State for the Home Department* [2004] ECR I-09925, para. 45. The Court went on to refer to *Baumbast* by stating that the "enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence".

applied in the post *Zambrano* cases, although in order to reach the opposite outcome of restricting the right of third country nationals to reside within the host Member State. In *McCarthy*, although not openly mentioned, it seems that the fact the she was an adult and not dependent on the husband (she was entitled to state benefits) triggered the decision of the Court of denying the right to stay in the UK. The Court opted for a similar solution in *Dereci*, since there was no risk that the citizens concerned would have been deprived of their means of subsistence and, therefore, forced to leave the territory of the Union with their third country national family members.[7] Also in *Iida* the Court found that, looking at the circumstances at stake, "it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr. Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States".[8] Although no specific reference to dependence is expressly made, it is evident that the fact that Mrs. Iida and her daughter made a move from Germany to Austria autonomously and lived there with no economic problems shows that the latter could easily enjoy the substance of citizens' rights despite the necessary presence of Mr. Iida. Finally, the *O and S* case explicitly mentioned and specified the concept of dependency. In both the situations of S and L the Court seemed to suggest to the national referring court that both the respective third country national partners were not entitled to gain residence in Finland. Indeed, the CJEU openly underlined that the national court should take into account the fact that the third country national step-fathers are not the ones on whom the EU children are "legally, financially or emotionally dependent", since it is precisely the dependency relationship that can force the EU citizen to leave the territory of the Union as a whole.[9]

From this brief summary it seems that in cases concerning free movement and EU static citizens the Court relied respectively on two tests: a) ancillary relationship between free movement and family reunification rights to avoid barriers to free movement and b) the concept of dependency- in order to evaluate whether or not the third country national EU family member could be granted the derivative right of residence in the host Member State. This approach is completely consistent with scope of EU law and with the CJEU's jurisdiction. As a matter of fact, as opposed to the

[7] Case 256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] not yet reported, para. 32.
[8] Case 40/11 *Yoshikazu Iida v. Stadt Ulm*, not yet reported., para. 76.
[9] Joined Cases 356/11 and 357/11 *O and S v. Maahanmuuttovirasto* [2012] not yet reported, paras. 56-57.

ECtHR, the CJEU is not a human right guardian *per se* but it has simply to deal with any issue related to the interpretation and application of EU law or national law deriving from EU law.[10] The approach of the CJEU on family residence rights is therefore very different from the approach that the Court of Human Rights could potentially give on the same issue.

In order to deepen the understanding of the kind of protection granted by the CJEU to third country national EU family members, in the next part I will describe how the ECtHR grants protection to families composed of EU citizens and third country nationals at risk of not living together in the same state. This analysis will be able to highlight the differences and the peculiarities of the CJEU's approach on the protection of family residence rights.

3. The Court of Strasbourg and Art. 8 ECHR

On the 4th of November 1950 Art. 8 ECHR was formally born after complex negotiations within the Council of Europe.[11] Art. 8(1) ECHR guarantees the respect for private and family life. In turn, Art. 8(2) ECHR allows interference with the right of family life on a number of grounds such as public safety, national security, economic welfare of the country and prevention of criminality. The article states: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country,

[10] The mandate of the Court is also to sort out conflicts among institutions. See Patricia R. Waagstein, "Human Rights Protection in Europe", Spring 2010, accessed June 2013, available at <http://spice.stanford.edu/docs/human_rights_protection_in_europe_between_strasbourg_and_luxembourg/>. On the relationship between the CJEU and Human Rights see, among many, Jospeph H.H. Weiler, "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities", *Washington Law Review* 61, (1986); Armin Von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of European Union", *Common Market Law Review* 37, no. 6 (2000); Andrew T. Williams, "Human Rights and the European Court of Justice: Past and Present Tendencies", Warwick School of Law Research Paper No. 2011/06, accessed December 2012, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803138>; Elisabeth F. Defeis, "Human Rights and the European Court of Justice: an Appraisal", *Fordham International Law Journal* 31, no. 5 (2007).

[11] This article was introduced together with Art. 12 ECHR (right to marry) and Art. 2 of the Protocol to the Convention (right of education). Inspired by the provisions of the Universal Declaration of Human Rights, some of the drafters of the European Convention (including France) proposed that the Convention should have offered protection against any interference with family life. They drafted guarantees which included the natural rights deriving from marriage, paternity and those pertaining to the family. Some objections were raised against the inclusion of those family rights. The UK in particular objected that these rights were not essential for the functioning of the democratic institutions. On the position of the UK on the drafting of the Convention see Alfred W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford: Oxford University Press, 2001).

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The first paragraph of Art. 8 ECHR declares the rights to be protected. The second one instead lists a number of exceptional circumstances that can justify the interference with those rights. Art. 8 ECHR, therefore, is a right that can be inserted in the group of qualified rights, which means that the state interference with the rights set out by this article is permissible just under specific conditions.

When the Court of Strasbourg is called to face a case regarding the breaching of Art. 8 ECHR, the applicant is required to go through a four stages inquiry.[12] Firstly the ECtHR will ask whether or not the right of private and family life has been violated by the state. In case of a positive answer, the ECtHR will ask whether the action of the state violating Art. 8 ECHR could be justified because in pursuit of one of the legitimate objectives arising from section 2: national security, public safety or economic well-being of the country, prevention of disorder or crime, protection of health or morals, protection of the rights and freedoms of others. Thirdly, again in case of a positive answer, the ECtHR will consider whether this restriction is prescribed by law. Finally, if the interference is considered to be prescribed by law, the ECtHR moves to deciding whether or not the taken measure is necessary in a democratic society.

The last stage is the most controversial part of the ECtHR's scrutiny as it deals with merits of the case, namely what restraints can a state legally and legitimately impose upon its citizens. As a matter of fact the Court of Strasbourg often finds itself uneasy in dealing with this requirement and, at the same time, to make sure that it respects the doctrine of the margin of appreciation, according to which the signatory states are allowed to have a margin of discretion in the way they implement the Convention and to take into account their own particular national circumstances and conditions.[13] Due to the risk of interfering with the margin of discretion left to the

[12] For clear explanation see Ian Loveland, *Constitutional Law, Administrative Law and Human Rights*, (Oxford: Oxford University Press, 2009), 597-600.

[13] The literature on the margin of appreciation is vast. An accurate list of authors is given by Yutaka Arai Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, (Cambridge: Intersentia editions, 2001), see footnote 1 page 1. With regard to the case law, the first one that engaged properly with the principle of the margin of appreciation is ECHR judgment of 7 December 1976, No. 5493/72 *Handyside v. United Kingdom*. In this case the ECtHR justified the margin of appreciation doctrine stating: "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or a penalty intended to meet them".

signatory states,[14] the ECtHR generally believes that the measure is strictly necessary in a democratic society only when meets a pressing social need [15] and the interference is proportionate to the legitimate aim pursued by the state.[16] Particularly, with regard to this second requirement, the Court of Strasbourg has always held that the principle of proportionality consists in evaluating the right of an individual *vis a vis* the general public interest of the society.[17] This means that the ECtHR has to strike a fair balance between these two countervailing values.

This four-stage test was applied by the ECtHR in cases involving family reunifications issues as well. The engagement of the ECtHR in immigration and family life issues is quite recent given that, for many years and in line with well-established principles of International Law, these problems were seen to be a matter of domestic law.[18] More recently however, the Court of Strasbourg established its case law with regard to immigration control and the right to family life disciplined by Art. 8 ECHR. In these years mainly two categories of cases emerged: the first involving the expulsion of integrated migrants on grounds of violation of public order or public security and the second concerning the decision to expel or to refuse to admit third country nationals with strong family ties in the signatory state for the economic interests of the signatory state.[19] I will focus on this second group of cases because they encompass similar

[14] The idea of margin of appreciation varies in accordance to the situation and the nature of the right at stake. For a deeper understanding of the issue see Francis G. Jacobs, Robin C. A. White, and Clare Ovey, *The European Convention on Human Rights*, (Oxford: Oxford University Press, 2010), 325-332.
[15] On the concept of pressing social needs see *Handyside* judgment, para.50.
[16] On proportionality see Takahashi, *supra* note 13, 11. On this point see also Hugo Storey, "The Right to Family Life and Immigration Case Law at Strasbourg", *International and Comparative Law Quarterly* 39, no. 2 (1990), 330.
[17] Takahashi, *supra* note 13, 12.
[18] Even though Strasbourg did not want to deal with migration, nevertheless, in September 1963 the Fourth Protocol was added to the ECHR. This protocol guarantees the fundamental right of free movement within the territory of the state (and not among different states) and the freedom to leave the country (see Art 2(1),(2)). For a deeper understanding see Henry G. Shermers, "Human Rights and Free Movement of Persons: the Role of the European Commission and Court of Human Rights" in *Free Movement of Persons in Europe, Legal Problems and Experiences*, eds. Henry G. Shermers, Cees Flinterman, Alfred E. Kellermann, Joan C. van Haersolte, Gert-Win A. van de Meent, (Leiden: Martinus Nijhoff Publishers, 1993). The reason why the Court initially did not act on immigration issues that much is because the Council of Europe (CoE) has always been willing to respect the absolute independence of every single signatory state to control its own borders and, consequently, the entry, the exit and the expulsion of foreigners. See Daniel Thym, "Respect for Private and Family Life under Art. 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay", *International and Comparative Law Quarterly* 57, no. 1 (2008).
[19] Nicola Roger, "Immigration and the European Convention on Human Rights: are new principles emerging?", *European Human Rights Law Review* 53, no. 1 (2003), 55. For a complete account of the cases see Steve Peers, "Family Reunion and Community Law", in *Europe's Area of Freedom, Security and Justice*, ed. Neil Walker, (Oxford: Oxford University Press, 2005), 145-149. See also Betty de Hart, "Love Thy Neighbour: Family Reunification and the Rights of Insiders", *European Journal of Migration and Law*, 2009, 235.

situations to the ones that could occur in front of the CJEU on the issue of family reunification between EU citizens and third country nationals.

In the older cases it can be found that the margin of appreciation left to the Member states was quite high. This meant that the Court of Strasbourg did not interfere with the activity and the decisions of the signatory states. In many early cases, the four stages inquiry stopped at the first step with the ECtHR finding that there was no violation of Art. 8 ECHR. A clear example is *Abdullazis, Cabales and Blkandali v. The United Kingdom*[20], which was also the first case that dealt with immigration and family reunification issues. The applicants, three lawfully and permanently settled residents of the UK, sought to challenge the Government's refusal to permit their husbands to join or remain with them on the basis of the 1980 immigration rules in force at the time. The Court of Strasbourg stopped the complaints of the applicants at the first step of the four stage test by stating that there was not a real violation of Art.8 ECHR because the duty imposed by this article did not imply the imposition on the signatory states to accept non national relatives in their territory, given the fact that the applicants did not show that there were obstacles in establishing their family elsewhere.[21] Similarly, in *Gul v. Switzerland,*[22] the fact that a Turkish father had attained a residence permit on humanitarian grounds in Switzerland was not enough to persuade the ECtHR that there were obstacles to him and his wife to return to Turkey in order to enjoy the right to family life there with their 12-year-old son. The Court of Strasbourg stated in fact that there was not a violation of Art. 8 ECHR since this case concerned immigration and, therefore, it could not be considered to impose a general obligation on the state to respect the choice of third country national married couples to reside and live in its territory.[23] The refusal to grant the son permission to join them in Switzerland was thus not an interference with family life. The same reasoning can be found in *Ahmut v. The Netherlands.*[24] Also in this case the ECtHR followed the reasoning bolstered in *Gul* and stressed as well that, when immigration issues are at stake, Art. 8 ECHR cannot be considered to oblige the state to authorize the decision of the migrants to settle within

[20] ECHR judgment of 28 May 1985, No 9214/80, 9473/81, 9474/81, *Abdulaziz, Cabales and Balkandali v. The United Kingdom.*
[21] See *Abdulaziz*, para. 68. Nevertheless the Court found anyway a violation of Art. 8 ECHR in conjunction with Art. 14 ECHR, on the basis of discrimination on the grounds of sex, given that the legislation in the UK was more favorable for men that wished to exercise their family reunification rights than for women. For a deeper analysis of the elsewhere theory see Roger, *supra* note 19, 57-61. See also Storey, supra note 16, 328. For a more recent account see Peers, *supra* note 19, 143-197.
[22] ECHR judgment of 19 February 1996, No 23218/94, *Gul v. Switzerland.*
[23] *Gul* judgment, para. 38.
[24] ECHR judgment of 28 November 1996, No. 21702/93, *Ahmut v. The Netherlands*.

its territory. Once it considered the circumstances of the case, the ECtHR underlined that there were no difficulties for the applicant to keep on nurturing the relationship with his son from the Netherlands. Alternatively the applicant could still go back to Morocco in order to re-establish his life there with his son. The fact of having also Moroccan nationality could facilitate either frequent trips to visit his son in Morocco or the option of going back to Morocco for good.[25] For all these reasons the Court of Strasbourg, also in this case, found no breach of Art. 8 ECHR. In *Sorabjee v. United Kingdom*[26] the Commission declared as "manifestly ill-founded" an application made on the basis that the removal of a mother to Kenya would constitute a breach of the family life rights of her child who was a British citizen since the Commission considered that there were no " insurmountable obstacles" to the mother and child living in Kenya since the child was of "an adaptable age". Finally, in *Chandra and Others v. The Netherlands*,[27] the Court of Strasbourg found once again that the Netherlands did not fail to strike a fair balance between the applicants' interests and the state's interests in controlling immigration, given that the circumstances of the case showed that Mrs. Chandra's children were looked after in Indonesia and, if wanted, the mother could still go back there to rebuild her family.

If in the early cases the margin of appreciation left to the Member States was high, more recently it seems that the ECtHR, especially in cases involving children, decided to enter more within the margin of appreciation of the signatory states. The Court of Strasbourg began to find that in the circumstances at stake there was either a positive obligation of the state to avoid violation of Art. 8 ECHR or a negative obligation of the state to refrain from intervening in the individual's autonomy.[28] In the majority of these cases the ECtHR's assessment found its grounds in the proportionality test: the Court of Strasbourg decided the cases by assessing whether or not the state managed to strike a fair balance between its interests and the right of the individual to respect for his/her family rights. In *Sen v. the Netherlands*[29] for example the ECtHR looked at the positive obligations on the signatory state to permit a child to enter in its

[25] *Ibid.*, paras. 68- 72.
[26] App. No.23938/93, October 23, 1995, unpublished.
[27] ECHR judgment of 13 May 2003, No. 53102/99 *Chandra v. the Netherlands*.
[28] It is an established principle of the Court of Strasbourg that Art. 8 entails not only negative duties of non interference on the part of the Member States but also positive obligations to provide services, facilities or any other step to ensure effective protection of the rights guaranteed in this provision. Questions of positive obligations have arisen particularly from issues relating to Art. 8 ECHR. The Court of Strasbourg would have to examine both the conditions on which and the extent to which positive steps are required to achieve a fair balance between the public end and individual person's rights under Art. 8. See on this point Takahashi, *supra* note 13, 85.
[29] ECHR judgment of 21 December 2001, No. 31465/96, *Sen v. the Netherlands*.

territory to join his family who left him in the country of origin. [30] The Court of Strasbourg, in evaluating whether or not the refusal to grant the child to enter within its territory was proportionate, found that the Netherlands failed to strike a fair balance between the applicants' interests and the state interest in controlling immigration and, therefore, stated that the Netherlands had the positive obligation to authorize the applicant's daughter to live with her parents, as it was a major obstacle for the rest of the family to return to Turkey. In *Rodrigues da Silva/Hoogkamer v. the Netherlands*[31] the Court of Strasbourg found that the Netherlands was under a duty to allow Mrs. Rodrigues da Silva to reside within its territory even though the state never authorized her legal stay within its territory.[32] The case took its grounds from the application submitted by Ms. Rodriguez da Silva, a Brazilian national, and her daughter, a Dutch national, to the Court of Strasbourg. The applicants claimed that the refusal of the Deputy Minister of Justice to grant Ms. Rodriguez a resident permit was in breach of Art.8 ECHR because it could lead to the daughter being separated from her mother. The Court of Strasbourg, in contrast to what the Regional Court of the Hague stated before, found that Ms. Rodrigues da Silva's expulsion would have had far-reaching consequences on her family life with her young daughter and that it was clearly in the latter's best interests for her mother to stay in the Netherlands. The Court of Strasbourg therefore considered that the economic well-being of the country did not outweigh the applicants' rights under Article 8 ECHR, despite the fact that the first applicant was residing illegally in the Netherlands since she entered and even when the daughter was born.[33] More recently, in *Nunez v. Norway,*[34] the ECtHR concluded that a two years re entry ban would amount to a violation of family reunification because the authority's measure, given the circumstances of the case, failed to strike a proportionate balance

[30] *Ibid.*, see para. 40: "Contrairement à ce qu'elle a considéré dans l'affaire Ahmut, la Cour estime qu'il existe toutefois dans la présente affaire un obstacle majeur au retour de la famille Şen en Turquie. Titulaires l'un d'un permis d'établissement et l'autre d'un permis de séjour du fait de son mariage avec une personne autorisée à s'établir aux Pays-Bas, les deux premiers requérants ont établi leur vie de couple aux Pays-Bas, où ils séjournent légalement depuis de nombreuses années (voir a contrario, arrêt Gül précité, pp. 175-176, § 41) et où un second enfant est né en 1990, puis un troisième en 1994. Ces deux enfants ont toujours vécu aux Pays-Bas, dans l'environnement culturel de ce pays et y sont scolarisés (voir arrêt Berrehab précité, p. 8, § 7 et p. 16, § 29). Ils n'ont de ce fait que peu ou pas de liens autres que la nationalité avec leur pays d'origine (voir notamment, arrêt Mehemi c. France du 26 septembre 1997, Recueil 1997-VI, p. 1971, § 36) et il existait donc dans leur chef des obstacles à un transfert de la vie familiale en Turquie (voir a contrario, les arrêts Gül, p. 176, § 42, et Ahmut, p. 2033, § 69) […]".

[31] ECHR judgment of 31 January 2006, Application No. 50435/99, *Rodrigues da Silva/Hoogkamer v. the Netherlands*.

[32] Thym, *supra* note 18, 87.

[33] See *Rodriguez da Silva v. The Netherlands*, paras. 38 and 44.

[34] ECHR judgment of 28 June 2011, Application No. 55597/09, *Nunez v. Norway*.

between the interests of the single individual to be with her children and the interest of the Community to see its immigration rules respected.[35]

To conclude, looking at the first cases on the issue of family reunification, it seems that the Court of Strasbourg preferred not to enter into the merits of the case and decided to solve the situation by stating that a violation of Art. 8 ECHR did not occur because the parties did not show that there were obstacles to install their families elsewhere. In other words, as Elswuwege commented, the Court of Strasbourg was of the view that "if it is possible for the family to live together elsewhere, it is likely that no interference with the right to respect for family life will be found."[36] Later on however, especially in cases involving children, the Court of Strasbourg became more sensitive to the needs of the families. For this reason, it recurred to the use of the proportionality test in order to justify that the family protection outweighed the state's rights of having its immigration controlled. Respect to Art. 8 ECHR was guaranteed either by a positive action of the state (the state had an obligation to admit the migrant family member) or via a negative action of the state (the state simply had to avoid issuing a deportation order). As Roger underlined then, the Court of Strasbourg moved from a situation in which it engaged timidly with migration issues, putting the heavy burden on the applicants to prove that their family life could not have been settled elsewhere, to a situation in which it even recognizes positive obligations on the actions of the contracting state to comply with Art. 8 ECHR.[37]

4. CJEU's protection to third country national EU family members

In this part the approach endorsed by the ECtHR will be compared to the one adopted by the CJEU in order to better understand the peculiarities of the latter. However, in order to deal with this comparison properly, it is important to bear in mind that, as things stand at the moment, the jurisdiction of the ECtHR in terms of *ratione personae* is broader than the CJEU's one. In particular, the ECtHR can look at all cases involving every citizen of the signatory states of the Human Rights Convention, regardless the fact of whether they moved or did not move to other signatory states, and also non-citizens as long as the issue at stake occurred in the territory of one of the signatory states. Instead, the CJEU is at the moment considered to have jurisdiction

[35] *Ibid.*, from para. 78 onwards.
[36] Peter Van Elsuwege, and Dimitry Kochenov, "On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights", *European Journal of Migration and Law* 13, no. 4 (2011), 464.
[37] See Roger, *supra* note 19, 63.

solely over cases of EU citizens that exercised their right of movement or of EU citizens that did not exercise their right of movement but whose substance of EU citizenship rights would be at risk of being threatened because the denial of family reunification could force them to leave the territory of the Union as a whole. For this reason, the comments that I propose should simply be taken as a way to highlight the peculiarities of the CJEU's approach, being aware that the two courts belong to two different jurisdictions and fulfill two different aims.

As seen in the previous part, the ECtHR initially seemed very much conscious of not interfering within the margin of appreciation of the Member States. However, more recently, the Court seemed more open to use the proportionality test, especially in cases concerning children. Through the application of the proportionality test the Court accords a family the right to live together in the signatory state when it can be proven that the interests of the family outweighed the interests of the signatory state over immigration. As suggested proportionality, by its very nature of being a balancing test of two or more opposite interests, is very much connected to the idea of state's discretion. As a matter of fact "it is often observed that the principle of proportionality is context sensitive in nature. The intensity of judicial review conducted on the basis of the principle of proportionality varies in fact depending on a range of variables […]"[38] among which we can find the circumstances of the case in terms of balance of public and private interests at stake in any given dispute or the values protected by each state.[39] Therefore, when protection of family reunification is pursued under Art. 8 ECHR, this potential right will have to be balanced with the legitimate aims pursued by the state.

With regard to the jurisprudence of the CJEU instead, as seen before, the Court has been dealing both with cases concerning cross border movement and cases involving EU static citizens. In cases concerning cross border movement, the Court interpreted family reunification as ancillary to free movement. In *Metock*, the case that

[38] Michael Dougan, "The constitutional dimension of the case law on Union citizenship", *European Law Review* 31, no. 5 (2006), 624. The literature on the principle of proportionality as applied by the ECtHR is vast. Among all see Jeremy McBride, "Proportionality and the European Convention on Human Rights", in *The principle of proportionality in the laws of Europe*, eds. Evelyn Ellis, (Oxford: Hart Publishing, 1999); Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights*, (Leiden: Martinus Nijhoff Publishers, 2009); Pieter van Dijk, Godefridus J.H. van Hoof, *Theory and practice of the European Convention on Human Rights*, (The Hague: Kluwer Law International, 1998).

[39] With regard to the application of the principle of proportionality it is worth underlying that the diversity of values embraced by Member States makes it hardly conceivable for the Court of Strasbourg to establish a common meaning for the notions of morals and public interest. The idea however is that the Court is not trying to promote a uniform standard over Europe. Margin of appreciation must in fact be understood as "an essential constitutional device designed to preserve the fundamental prerequisite democracy and pluralism". See Takahashi, *supra* note 13, 249.

sorted out the long jurisprudential debate on whether third country nationals could be allowed first entry in the EU Member State in accordance with EU law, the Court decided that the applicants were allowed to reunify with their third country national family members in Ireland, even though they were not previously lawfully resident within the territory of the European Union, because "the refusal of the host Member state to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State […]."[40] As it was noted, the Court adopted the approach introduced by *Singh* on the ancillary relationship between free movement and third country national family reunification but gave to it a new reading. After *Metock* the denial of family reunification does not simply hinder the right of a EU national from moving from a state to the other but also the right to reside in the host Member State. Connecting the ancillary relationship between EU free movement and third country national residence rights not just to the idea of moving but also to the idea of residing extends the protection granted to third country national EU family members. One in fact could argue that the denial of family reunification rights would not interfere in the decision of the EU citizen to move, especially if the move happened temporarily before the decision to reunify with the third country national. It is instead more difficult to argue that the denial of family reunification would not interfere with the decision of the EU citizen to reside in the host Member State at any time, even if this denial happened after the EU citizen had been residing in the host Member State for some time. If family reunification is denied by the host Member State this implies surely that the moving citizen will have to think about moving again in order to be able to be with his family and, consequentially, his/her right of residence in the host Member State will be obstructed by this potential refusal. For this reason, after *Metock*, it does not matter anymore when and how the family came into being and when the refusal to family reunification occurred. Indeed, the *Metock* interpretation of the ancillary relationship between free movement of EU citizens and residence family rights makes the acceptance of a third country national EU family member within the territory of the host Member State almost[41] certain.

[40] Case 127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, para. 64.

[41] It is necessary to point out that family reunification rights granted by Directive 2004/38/EC are subject to some limitations. In fact, according to Arts 7(1) and 14(2), economically inactive migrant Union citizens who wish to reside in the host state for more than three months are still obliged to fulfill the basic requirements of having sufficient resources and sickness insurance, and their right of residence subsists

With regard to cases concerning non-moving EU citizens, as mentioned before, the Court used the idea of dependency in order to evaluate whether the enjoyment of the substance of citizenship rights could not have been pursued without granting the right of residence to the third country national family member. In *Zambrano*, the Court stated that Art. 20 TfEU, "which precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union"[42] had to be applied in the circumstances at stake because the refusal of granting the right of residence to a parent of dependent EU minor children would have forced the latter to follow the parents and, therefore, to leave the territory of the Union. Although the Court retained that in the post-*Zambrano* judgments the conditions for the application of the test were not met, it is worth noting that this test, when the Court considers that the relationship between the EU citizen and the third country national fulfills the criterion of dependence of the former upon the latter, can potentially grant family rights with no limitations. As a matter of fact, given that the ancillary right of third country national family members derives directly from the EU citizenship treaty articles, this right will not be subjected to the requirements that the EU citizen has to fulfill in order his/her right of residence to be granted in case Directive 2004/38/EC is applied such as either being workers or self employed or being self sufficient and having a comprehensive sickness insurance.[43] This is evident in the *Zambrano* case in which Mr. Zambrano was given not just the right of residence but even a working permit in order to grant his children, EU citizens, the enjoyment of the substance of their EU citizenship rights despite them being not self sufficient.[44] Moreover, as seen previously, the recent *O and S* case has specified the notion of dependence by extending it to cases of legal, financial and emotional dependence. As mentioned before, if the Court in the future does open the application of the *Zambrano* test to more circumstances it might be possible that family reunification

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only for as long as they continue to meet those conditions. The effects of these rights have been however neutralized by the so-called *Baumbast* rule. In the *Baumbast* case in fact, the Court acknowledged the presence of these limitations but, at the same time, stated that limitations and conditions imposed upon the exercise of the right of free movement under Art. 18 had to be applied in compliance with the principle of proportionality (rec. 91). The same reasoning was proposed also in *Chen* at para. 32. However, it is worth noting that the application of this principle in the EU cases is different from the application that was suggested by the ECHR. In the *Baumbast* scenario proportionality is used simply to lighten the strict application of Directive 2004/38/EC and not to take into account other compelling interests of the Member State.

[42] Case 34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEm) [2011] ECR I-1177, para. 42.

[43] Art. 7(1) (a)(b)(c) Directive 2004/38/EC.

[44] *Zambrano* judgment, para. 44.

will be granted also to those third country nationals that do not necessarily belong to the household of the EU sponsor such as step-parents, legal guardians or even friends.

In the light of these considerations it is now easier to understand the peculiarities of the CJEU's approach in comparison to the ECtHR's one. With regard to EU moving citizens the CJEU, as seen by recalling the analysis of the *Metock* case, has practically endorsed an approach that grants third country national family members the right of residence in the host Member State as long as the border is crossed by the EU sponsor. Moreover, with regard to EU non-moving citizens the CJEU seems to allow family reunification by applying the enjoyment of the substance of citizenship rights test each time the requisite of dependency between the EU sponsor and the third country national is fulfilled. The post-*Zambrano* case law has shown how the Court does not seem to consider that the dependency criterion can be fulfilled easily but there are some hints that suggest the possibility of future more liberal interpretations.

Both these approaches seem to grant a sort of unlimited right of residence to the third country national EU family members, once proven that the denial of this right would either hinder the exercise of free movement or the genuine enjoyment of the substance of EU citizenship rights.[45] Under the ECtHR instead, protection to the family unity would be granted in accordance to the principle of proportionality and, therefore, only in case when the interests of the family to preserve their unity would outweigh the interests of the state such as public safety, national security, economic welfare of the country or prevention of criminality. Therefore while the CJEU, once found that denying the right of residence to the third country national would either hinder the right of free movement of the sponsor or push him/her to leave the territory of the EU, automatically protects the right to stay of the third country national family member, the protection granted by the ECtHR in the same circumstances would be subject to the

[45] It is worth noting that EU citizens and their family members are technically still subjected to the public policy, security and health restrictions provided at Artt. 27-29 of Directive 2004/38/EC. Nevertheless, consolidated case law has shown how the threshold to apply these restrictions is particularly high, owing in particular to the application of the proportionality principle and the idea that the measures should be based exclusively on the personal conduct of the individual concerned. For a broad overview see Paul Craig, and Grainne de Burca, *EU law: text, cases and materials*, (Oxford: Oxford University Press, 2011), 755-759. It is also worth noting that the principle of proportionality has been utilized by the CJEU as well in some relevant cases such as *Carpenter* (para. 42) and *Rottman* (paras. 55, 58, 59). However, as A.G. Sharpston pointed out in her opinion in the *Zambrano* case, the Court seems to have developed its own line of reasoning rather than relying completely on the Strasbourg case law. On this point see *Zambrano* opinion, paras 56-60.

application of a balancing exercise between the individual and Member States' interests.[46]

It is worth noting that the reason of the different approaches adopted is rooted in the structural difference of aims pursued by the two courts. On one side the CJEU aims to preserve a consistent and fair application of EU law by the Member States. The right of free movement and the rights deriving from the status of EU citizenship, values at the heart of European integration, are two aims that the Court tries to take into account and, when appropriate, to protect in the circumstances brought to its attention. On the other side the ECtHR does not have any free movement or EU citizenship right to protect but simply the evaluation on whether or not the national measure is in breach of Art. 8 ECHR. There is obligation on Strasbourg in finding a violation of Art. 8 ECHR and in granting the right to reside of the applicant in the territory of the signatory state because, as already mentioned, the elsewhere approach applies. For these reasons it seems that the CJEU is more naturally prone to adopt nearly absolute standards of protection for EU citizens and third country nationals when free movement or EU citizenship issues are at stake while the ECtHR is more free to apply a balancing exercise between private and public interests. In the *Zambrano* case A.G. Sharpston suggested to the national court to assess the right of Mr. Zambrano to reside in Belgium in accordance to the proportionality test and suggested that it would have been disproportionate to deny him such a right.[47] The Court refused uphold this approach. Without speculating on the reasons that might have pushed the Court not to consider the application of proportionality to the circumstances at stake, it can be noted that even if the Court in the

[46] It is worth noting that also the CJEU, in *Carpenter*, referred to Art. 8 ECHR and to the principle of proportionality. However, although the Court claimed the application of the principle of proportionality, it is important to underline that the proportionality applied by the CJEU is different from the one applied by the ECtHR. This should not surprise because, as Scheeck well points out, individual ECHR articles have been mentioned and reinterpreted by the CJEU since 1975 (See Laurent Scheeck, "The Relationship between the European Courts and integration through human rights", *Heidenberg Journal of International Law* 65, no. 4 (2005), 850-52. On this point see also Elspeth Guild, and Guillame Lesieur eds., *The European Court of Justice on the European Convention on Human Rights: who said what, when?*, (Leiden: Martinus Nijhoff Publishers, 1998.). Specifically in this case, as explained in Chapter 3, one can see how the CJEU did not conform to the application of the proportionality principle proposed by the ECtHR (balancing out individual's and Member States' interests) but simply stated that the expulsion of Mrs. Carpenter would have been disproportionate and contrary to Art. 8 ECHR without explaining on which grounds. On the application of the principle of proportionality by EU law see Grainne De Burca, "The principle of proportionality and its application in EC law", *Yearbook of European Law* 13, no. 1 (1993); of the same author "Proportionality and Subsidiarity as general principle of law", in *General principles of European Community law*, eds. Ulf Bernits and Joakim Nergelius, (The Hague: Kluwer Law International, 2000); Francis Jacobs, "Recent developments in the principle of proportionality in European Community law", in *The principle of proportionality in the laws of Europe*, eds. Evelyn Ellis, (Oxford: Hart Publishing, 1999); Tor-Inge Harbo, "The Function of the Proportionality Principle in EU Law", *European Law Journal* 16, no. 2 (2010)

[47] Opinion *Zambrano*, paras. 109-122.

future will decide to utilize proportionality in EU-third country national family reunification cases a high standard of protection will still be granted to these families. A national measure would stand against the application of EU law on family reunification cases simply when the third country national can be considered a threat to public order or public safety or he/she becomes an unreasonable burden on the public finances.[48]

In this part we have seen how the approach granted by the CJEU provides a sort of family status rights for those EU citizens who fall within the scope of application either of the secondary legislation on free movement or of the concept of EU citizenship.[49] Paradoxically, although the Court of Strasbourg is the body deputed to the protection of Human Rights, it is the CJEU that seems to preserve family unity better.[50]

5. Conclusions

In this chapter I looked more closely at the CJEU's jurisprudence on family reunification in order to show how the Court has managed to offer family status rights in order to grant protection to families composed by EU citizens and third country nationals. Using the jurisprudence of the Court of Strasbourg as a comparison, I pointed out that, unlike Strasbourg which refers to the principle of proportionality, the CJEU prefers to recur to family status rights in cases in which the exercise of the right of free movement or the genuine exercise of the substance of EU citizenship rights is hindered. This analysis has shown that the CJEU seems to pursue a policy of protection of EU citizens and their families.

[48] On the criteria accruing to the application of the proportionality test see Opinion *Zambrano*, paras. 116-118. With regard to the issue of being a threat to public order or public safety in *Carpenter* the fact that she had not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety, although she was an illegal immigrant, was treated as not being an insuperable obstacle to her subsequent claim to rights under EU law. With regard to the issue of becoming an insourmountable burden on public finance see the comment on *Baumbast* case, footnote 42.
[49] Van Elsuwege, and Kochenov, *supra* note 36, 464.
[50] *Ibid.*, 465.

Conclusions

In this thesis I have aimed to shed some light on the intricate issue of family reunification between EU citizens and third country nationals under EU law. In order to do so I have placed the CJEU jurisprudence in the broader history of EU law. Starting from the post World War II era until today, I have presented a detailed analysis of the historical, legislative and jurisprudential changes that have characterized these years and I have showed how these trends influenced the case law on family reunification between EU citizens and third country nationals. To summarize, these are the findings that that I have extrapolated from this analysis:

1) The first provisions included in the first free movement legislation (Council Regulation 15/1961/EEC, 38/1964/EEC, 1612/1968/EEC) were created bearing in mind the need to enhance the movement of the Italian workers towards the northern European Member States in order to fulfill their lack of manpower and achieve the completion of the Common Market project. In a period in which immigration was not seen as a negative I showed how these provisions were drafted as secondary rights to be granted also to third country national family members once their Community relative/sponsor crossed the border.

2) After the oil crisis the Member States begun to adopt much stricter immigration policies towards illegal and legal immigration of third country nationals. On the other hand, the EU has continued to pursue the enhancement of the right to free movement of EU workers (through the jurisprudential activity of the CJEU and, subsequently, through new legislation that extended the category of beneficiaries of the right of free movement from workers to students and people not engaged in an economic activity) and worked towards the introduction of the concept of EU citizenship. The development of free movement and EU citizenship as opposed to the Member States' concerns versus third country nationals was the background upon which the first CJEU's cases were built. Starting from this backdrop, I showed how the reasoning of the Court, both in free movement and in EU static citizens cases, tried to take into account Member States' immigration concerns and, respectively, free movement and the development of the concept of EU citizenship as a source of independent EU family residence rights. Looking at the case law of the Court through this lens I pointed out how the inconsistencies of the CJEU's reasoning cannot be considered the fruit of some random decisions of some European judges but, more likely, a meticulous attempt to satisfy the various interests at stake.

3) Overall, as things stand today, family reunification of third country EU family members has been built as a status right. Using the jurisprudence of the Court of Strasbourg as a comparison I pointed out that, unlike Strasbourg which refers to the principle of proportionality, the CJEU built the concept of EU citizenship as a status right granting residence to third country national EU family members in cases in which the exercise of the right of free movement or the genuine exercise of the substance of EU citizenship rights is hindered. Through this final analysis I have shown that the CJEU is pursuing a general policy of protection of EU citizens and their families.

From the findings that I have gathered it is possible to understand the value of this research. By looking at the phenomenon of family reunification between EU citizens and third country nationals from a historical perspective I have been able to include all relevant pieces of legislation and case law in my analysis - from *Singh* until *Iida*. Therefore, recurring to a historical approach has managed to give a sense of continuity to the long debated discourse on family reunification between EU citizens and third country nationals that, perhaps, another method would not have allowed. This is unlike the many previous doctrinal pieces that offer their view on family reunification between EU citizen and third country nationals basing their findings on the analysis of just some pieces of legislation or some law cases. Moreover, with particular regard to the legislation, this historical approach has also managed to point out that, for the first time, the first provisions on family reunification were not simply a white canvas upon which the Court could build up its reasoning but the fruit of precise political choices determined by historical needs of the time in which the legislation was drafted. However, most importantly, the historical approach has allowed me to put the case law into context. Most of the previous literature has focused its assessment on the comparison between the various most relevant CJEU's cases and on highlighting the inconsistencies between their reasoning or their solutions. The historical analysis that I have used, instead, goes beyond simply finding out what is incoherent in the CJEU's judicial approach, but rather suggests the deeper reasons why these inconsistencies exist. To conclude, the original contribution of this research is very much linked to the historical method that has been adopted to analyse the phenomenon of family reunification. This approach has not just favoured a more complete analysis of the phenomenon of family reunification between EU citizens and third country nationals, but has shed light on the deeper motivations that might have pushed the Court to make the judgments it has.

Finally, at the end of this work, it is worth mentioning a very last consideration. As highlighted earlier the Court has remarkably managed to guarantee, under certain circumstances, a quasi-unlimited right of family reunification to EU citizens. Nevertheless, as things stand now, the Court still endorses a strict approach when challenged on most cases concerning the granting of the right to reside to third country national family members of EU static citizens. As a matter of fact as seen, although the Court has shown signals of possibly more liberal solutions in the future, at the moment its position seems quite austere. This approach clashes with the already adopted open approach embraced in cases concerning third country national family members and EU free moving citizens and triggers the well known reverse discrimination issues that have been mentioned in earlier chapters. Why this discrepancy? In the light of this analysis, it is suggested that the Court's hesitations are provoked by the pressures of some Member States that see the issue of third country national immigration as being simply a matter of national law when no cross border movement is involved. Today among the more reluctant Member States to accept a concept of EU citizenship to be applied in situations when movement is not involved there are still those that, after the oil crises, pushed for the sealing of their borders against third country nationals; in particular Germany, the Netherlands, the UK and Belgium.[1] The negative attitude of these Member States toward an idea of EU citizenship that would protect also EU static citizens still seems to be driven by the fear of immigration.

Without the ambition of giving definitive judgments, since Member State's concerns over third country nationals seems to be the reason for the delay in taking further steps toward a more holistic application of the concept of EU citizenship, it is worth wondering whether these concerns are reasonably grounded. Data shows[2], as it was already pointed out in the introduction, that the phenomenon of family reunification between EU citizens and third country nationals is not a trivial issue in the EU as it affects the life of many people. However, whether the numbers are high enough to justify the austere approach against third country national family members and, consequently, a restrictive interpretation of the enjoyment of the substance of EU citizenship rights test, is disputable. Perhaps steps should be taken to help Member States to become less worried about third country nationals and more concerned about families. Only then EU citizenship will start to "unquestionably belong(s) to the realm

[1] To these states one should also add Denmark, Greece, Ireland, Austria and Poland that were often listed among the intervening states in the post *Zambrano* cases.
[2] See appendix, at 168.

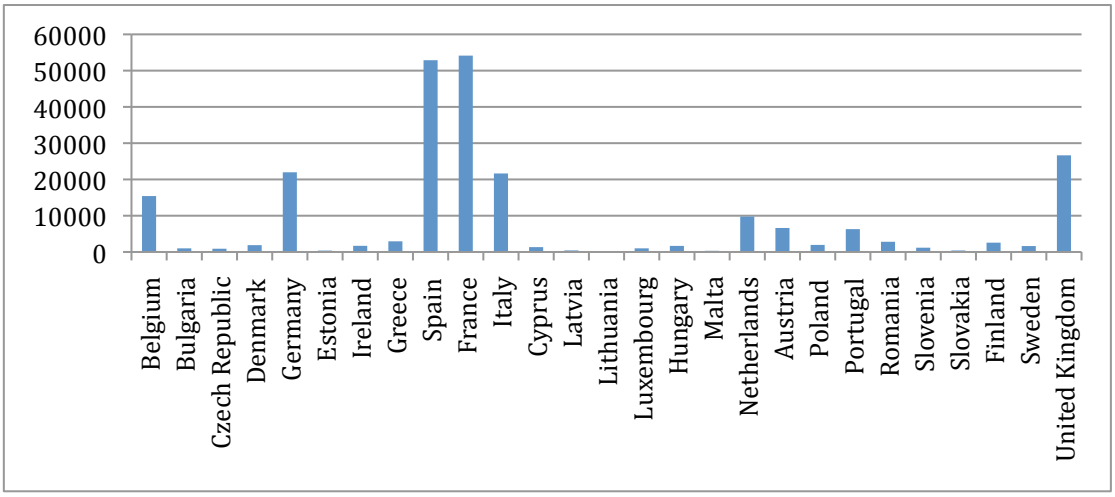
of EU law" [3] and *Zambrano* will stop being treated as an exception to wholly internal situations but as the general rule to be applied to all cases involving EU static citizens and third country nationals.

[3] Dimitry Kochenov, and Richard Plender, "EU Citizenship: from an incipient form to an incipient substance? The discovery of the treaty text", *European Law Review* 37, no. 4 (2012), 393.

Appendix

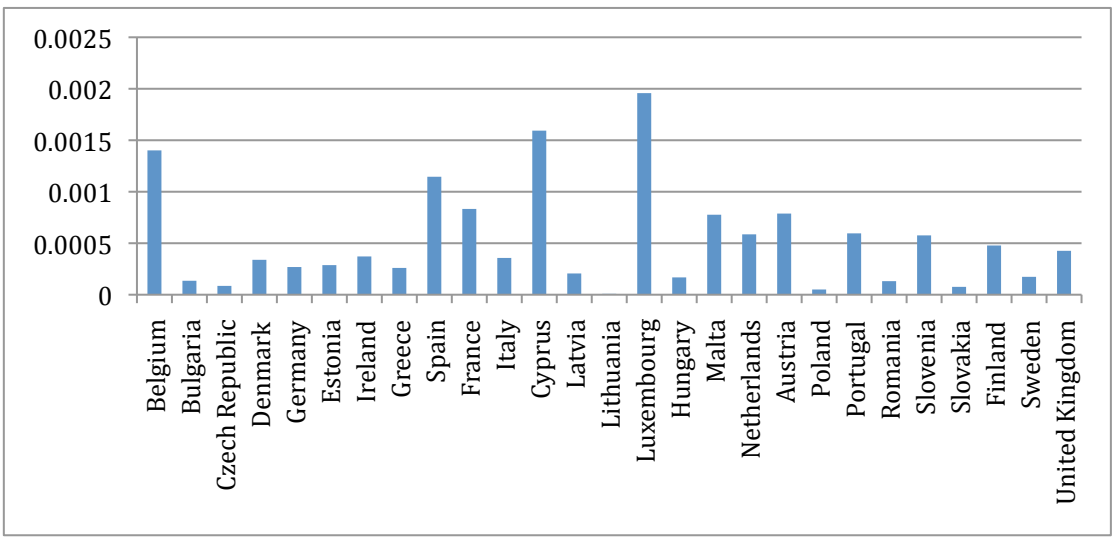
Charts 1 and 2 below show the numbers of family reunification permits issued to third country nationals EU family members in the 27 Member States and the number of family reunification permits per capita.

Chart 1: Family Reunification Permits TCNs EU family members: 2011



Source: Eurostat (2013)

Chart 2: Family Reunification Permits TCNs EU family members/Population: 2011



Source: Eurostat (2013)

In Chart 1 it can be seen that France and Spain are the countries granting more family reunification permits (more than 50,000 a year), followed by the UK (nearly 30,000), Italy and Germany (around 22,000), Belgium (around 15,000) and the Netherlands (10,000). From the second chart we can also see that some of the states that have low absolute numbers of family reunifications, such as Austria, Ireland, Malta, the Netherlands, Portugal, Slovenia and Finland, actually have quite high numbers given their population.

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