Speaking too little yet saying too much. The wrong signals about EU values: X. v Belgian State

Case C-930/19, *X. v Belgian State*, EU:C:2021:657, Judgment of the Court (Grand Chamber) of 2 September 2021

1. Introduction

The judgment in *X. v Belgian State* takes a somewhat equivocal approach to the interests of vulnerable family members in the context of family break-up. To these vulnerable family members it offers an encouraging nod while maintaining a stern face. The encouraging nod is in the reconsideration of the sequence of departure and divorce that justifies retention of residence on the part of a third country national family member under article 13(2) of Directive 2004/38. Softening the approach it had taken in its rulings in *Singh and Others*[1] and in *NA*[2], the Court finds in this case that in situations involving domestic violence a third country national can retain the right of residence in a host Member State when divorce takes place within a reasonable time after departure of the sponsor Union citizen. The stern face is in the upholding of a requirement of financial self-sufficiency for the same third country national. The Court finds that article 13(2) of Directive 2004/38,[3] despite subjecting family members of Union citizens to a requirement in this sense that does not apply to family members of third country nationals in a similar situation under article 15(3) of Directive 2003/86,[4] does not infringe the principle of equality before the law under article 20 of the Charter of Fundamental Rights.[5] In the process of reaching a verdict that thus directly frustrates the interests of victims of domestic violence, the ruling indirectly affects three other areas of EU law concern: family life, the principle of equality, and the condition of the migrant vis-à-vis that of the citizen. Through being either reticent or unnecessarily eloquent, the judgment detracts from each of these. It ultimately sends a confusing signal as to the Court's commitment to EU values and fundamental rights.

2. Factual Background

The reference in *X. v Belgian State* stemmed from the claim of an Algerian national for a residence permit in Belgium following separation from the French national spouse to join whom he had originally moved to Belgium. X. and his spouse had married in Algeria in 2010. X. had then moved to Belgium to join his spouse who resided there in February 2012, shortly before the birth of a daughter in April of that same year. [6] He had subsequently obtained a residence card in Belgium

[1] C-218/14, *Kuldip Singh and Others v. Minister for Justice and Equality*, ECLI:EU:C:2015:476.
[2] C-115/15, *Secretary of State for the Home Department v. NA*, ECLI:EU:C:2016:487.
[3] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L158/77.
[4] Directive 2003/86/EC of 10 September 2003 on the right to family reunification, O.J. 2003, L 251/12.
[5] Charter of Fundamental Rights of the European Union, OJ 2010 C83/02, art. 20.
[6] Judgment, paras 12-13.

as a family member of a Union citizen.[7] In 2015, after almost five years of marriage and two years of cohabitation in Belgium, X. had been forced to leave the matrimonial home because of having been the victim of domestic violence at the hand of his wife. X. found accommodation in Tournai, in Belgium, while his wife and daughter moved to France.[8] As a result of this, the Belgian State in March 2016 revoked X.'s residence permit on the ground that he and his wife no longer lived together and ordered him to leave Belgium.[9] While the relevant governmental decision had been overturned by the *Conseil du Contentieux des Étrangeres*, X.'s right of residence in Belgium was again terminated in December 2017. X.'s request to retain his right of residence as the former spouse of a Union national having been subject to domestic violence was rejected on the ground that X. had not proved to have sufficient resources to support himself.[10] In 2018, X. challenged the relevant decision at the *Conseil du Contentieux des Étrangeres*. It was this court that raised the question at the heart of the judgment.[11] In the same year X. had also filed for, and obtained a pronouncement of divorce.[12]

3. Legal Background

The request for reference raised by the *Conseil du Contentieux des Étrangeres* addressed the compatibility of the legal regime governing X.'s right to reside in Belgium with the principles of equality before the law and of non-discrimination on the basis of nationality under respectively articles 20 and 21 of the Charter of Fundamental Rights.[13] This legal regime resulted from Belgian Law implementing in relevant part the provisions of Directive 2004/38.[14]

Article 13(2) of this directive regulated the retention of the right of residence in a host Member State on the part of third country national family members in case of divorce, annulment of marriage or termination of a registered partnership with the Union citizens from whom they had originally derived that right.[15] Relevant situations included those in which, as was the case for X., the marriage or partnership had lasted at least three years of which one in the host Member State, and those in which domestic violence had taken place. In either case, article 13(2) subjected the retention of the right to reside on the part of a third country national who had not earned a right of permanent residence in the host Member State to his qualifying as a worker or self-employed person, or to his having sufficient resources to support himself as well as comprehensive sickness

[7] Ibid., para 14.
[8] Ibid., para 15.
[9] Ibid., para 16.
[10] Ibid., para 16-17.
[11] Ibid., para 18.
[12] Ibid., para 22.
[13] Ibid., para 21; also see case C-930/19, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, paras 23-25. Charter of Fundamental Rights of the European Union, OJ 2010 C83/02, art. 20 and art.21.
[14] See Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1980121530&table_name=loi (last visited 21 December 2021), Article 42quater, §4, n. 1 and 4.
[15] Case C-930/19, *X. v. Belgian State*, Para 6; Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L158/77, Article 13(2).

insurance.[16] The Belgian implementing provisions reflected the requirement that third country nationals be economically self-sufficient in order to retain a right of residence upon the breaking up of the family relation with the sponsor Union citizen in qualifying circumstances.[17] While article 37 of Directive 2004/38 allowed the Member States to adopt or retain provisions more favorable to third country national family members,[18] the Belgian legislation had not taken advantage of this possibility.

The requirement of financial self-sufficiency distinguished the regime applicable under Belgian national law to third country nationals residing in Belgium on the basis of a family relation with a Union citizen from that applicable to third country nationals residing in Belgium on the basis of a family relation with a third country national. Article 11(2) of the same Law on Access to the territory, residence, establishment and removal of foreign nationals did not subject the latter group's retained right of residence upon family break-up in circumstances involving domestic violence to a requirement of availability of financial resources.[19] Article 11(2) implemented into Belgian law the provision of article 15(3) of Directive 2003/86 on the right to family reunification.[20] This provision provided for the possibility to issue an autonomous residence permit to third country nationals who had first entered the territory of a Member State on the basis of family reunification in conjunction with a series of family events, including divorce and separation. The provision required the Member States to ensure the grant of such an autonomous permit in the case of particularly difficult circumstances. Article 15(4) of the same directive left it to national law to determine the conditions for the grant of the autonomous residence permit, and specified no requirement as to the financial autonomy of the beneficiary.[21]

Hence the question of equality of treatment that the *Conseil du Contentieux des Étrangeres* raised in its reference. It was precisely in the difference between the requirements that Directive 2004/38 and Directive 2003/86 established for the retention of the right of residence on the part of a third country national being, respectively, the spouse of a Union citizen or the spouse of a third country national that the referring court saw a potential threat to equality. Contrary to what one would intuitively expect, the relevant requirements placed third country nationals 'attached' to a Union citizen in a position more precarious than that of third country nationals with no such attachment. The court thus questioned whether such difference in treatment amounted to an infringement of articles 20 and 21 of the Charter of Fundamental Rights on the part of article 13(2) of Directive 2004/38.[22]

4. Opinion of Advocate General Szpunar

[16] Ibid.
[17] Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, Article 42quater, § 4.
[18] Case C-930/19, *X. v. Belgian State*, para 7; Directive 2004/38/EC, Article 37.
[19] Case C-930/19, *X. v. Belgian State*, para 11; Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980, Article 11, §2.
[20] Directive 2003/86/EC, Article 15(3).
[21] Ibid., Article 15(4).
[22] Judgment, para 21.

Advocate General Szpunar devoted a large part of his opinion to consider whether article 13(2) of Directive 2004/38 was applicable to the situation under discussion and whether the referred question was thus admissible. He noted that existing case law would have suggested a negative answer.[23] In *Singh and Others* and in *NA* the Court had indeed ruled that the provision of art. 13(2) could not apply in situations where, as in the case at hand, the spouse of the third country national claiming retention of the right to reside had departed the host Member State prior to commencement of divorce proceedings.[24]

The Advocate General suggested however to reconsider relevant case law on the basis of a distinction between 'simple departure' from the host Member State with no intention of return and no relation to family break-up, and departure for purposes of family break-up. In his view, the former was regulated by article 12 of Directive 2004/38 and led to loss of residence for third country national family members.[25] The latter fell within the scope of art. 13(2) of that directive and did not affect the retention of the right to residence regulated therein.[26]

The opinion built on this distinction to offer clarifications both in respect to the interpretation of article 12 and to the interpretation of article 13(2). In respect to article 12, he suggested that loss of residence could not be an automatic consequence of departure and required an examination of the individual case.[27] In respect to article 13(2), he relied on the distinction to suggest an overruling of both *Singh and Others* and *NA*. Contrary to what had been held in *Singh and Others*, departure for purposes of family break-up did not trigger the loss of the right of residence of third country national family spouses when the conditions of article 13(2), and in particular of article 13(2)(a) were met.[28] And contrary to what had been held in *NA*, where acts of domestic violence predated the departure of the Union citizen spouse, the right to residence of a third country national spouse had to be retained.[29] This was warranted by the wording, context, purpose and origin of article 13(2)(c) of Directive 2004/38, also taking into account developments in EU rules on the protection of victims of crime and in particular of domestic violence.[30] On this basis the Advocate General concluded for the applicability of article 13(2) to the situation at hand and for the admissibility of the request for a preliminary ruling on its validity.

On the merit of the referred question, the Advocate General suggested that article 21 of the Charter of Fundamental Rights was irrelevant to the assessment of the difference in treatment established by article 13(2).[31] That difference in treatment had to be assessed instead within the frame of article 20 of the Charter. The principle of equality before the law under that provision would have been infringed if the difference in treatment under discussion concerned comparable situations. The Advocate General suggested that this was not the case as articles 13(2) of Directive 2004/38 and 15(3) of Directive 2003/86 belonged to two different areas of EU law, expressing different types

[23] Ibid., para 38.
[24] Case C-218/14, *Singh and Others*; case C-115/15, *NA.*
[25] Ibid., para 55.
[26] Ibid., para 57.
[27] Ibid., para 67.
[28] Ibid., paras 74-75; see also paras 78-79; and 48-49.
[29] Ibid., paras 91-92.
[30] Ibid., paras 94-108.
[31] Ibid., paras 112-113.

of competence and informed by different principles and objectives, and they established different systems.[32] Given the incomparability of the situations that they covered – the Advocate General concluded– any doubts as to the validity of article 13(2) of Directive 2004/38 in light of articles 20 and 21 of the Charter were dispelled.[33]

5. Judgment of the Grand Chamber

The Grand Chamber reached the same conclusion as the Advocate General albeit through a narrower take on some of the points raised in the Advocate General's opinion. Following the lead of the Advocate General on this, the Court dismissed the questions raised about its jurisdiction to answer the question referred. The Court's jurisdiction to ensure, through answering questions of validity, that acts of EU institutions were entirely compatible with the Treaties and with the constitutional principles stemming from the Charter borne no exception.[34]

The judgment went on to consider whether the referred question was admissible. It aligned with the opinion of the Advocate General in deciding in the sense of admissibility, however it took a much more restrictive view on the applicability of article 13(2) to the situation at hand. The judgment confirmed the interpretation of that provision that had been adopted in *Singh and Others* for what pertained to cases falling within article 13(2)(a). To the extent that departure of the Union citizen spouse had preceded the commencement of divorce proceedings the right of residence of third country national spouses had lapsed and could not be retained under the terms of the latter provision.[35] However in the cases covered by article 13(2)(c) a different interpretation had to be adopted in order to avoid exposing a spouse who had been the victim of domestic violence to the threat of 'blackmail accompanied by threats of divorce or departure'.[36] The Court thus ruled that, contrary to 'what was held in paragraph 51 of the judgment of 30 June 2016, *NA*' in relevant cases the right to residence of the third country national spouse could be retained even if divorce proceedings had been initiated only after departure of the Union citizen spouse from the host Member State.[37]

The period between departure and commencement of relevant proceedings had to be reasonable, however, which was not the case of a period of three years as in the case at hand.[38] This could have led the Court to decide that article 13(2) was not applicable to the present case and thus the reference was not admissible. The Court instead observed that as national law transposing the provision of article 13(2) did allow a person in the situation considered in the main proceedings to retain their right of residence, the lack of a relation between article 13(2) and the actual facts was not obvious.[39] For this reason the question referred was admissible.[40]

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[32] Ibid., paras 121-143.
[33] Ibid., para 146.
[34] Judgment, para 28.
[35] Ibid., para 41.
[36] Ibid., para 42.
[37] Ibid. para 43.
[38] Ibid., para 43; and 45.
[39] Ibid., para 47.
[40] Ibid., para 47.

On the question of the validity of article 13(2) the Court followed the Advocate General in considering that art. 21 of the Charter was irrelevant to the assessment and in focusing the assessment on article 20 of the Charter. Being satisfied that article 13(2) of Directive 2004/38 and article 15(3) of Directive 2003/86 established different regimes and conditions,[41] the judgment proceeded to consider whether the situations that they governed were comparable. The Grand Chamber recognized that article 13(2)(c) of Directive 2004/38 and article 15(3) of Directive 2003/86 shared in the objective of ensuring protection for family members who were victims of domestic violence.[42] This commonality of objectives needed however to be contextualized in light of the 'subject matter and purpose of the act that made the distinction in question' as well as the 'principles and objectives of the fields to which the act related'.[43]

This led the Court, following the lead of the Advocate General, to enlarge the lens of the comparison. In particular as the first directive belonged to the field of free movement of persons and governed the rights of movement of Union citizens and their family members, while the second belonged to the field of the common immigration policy and governed the right to family reunification of third country nationals, the beneficiaries of their respective provisions had a different status and rights of a different kind. In applying the conditions established in the two directives the Member States also had different degrees of discretion.[44] One would expect that this distinction in the status of the rights-holders and in the discretion of the rights-givers in the context, respectively, of EU free movement and of EU immigration legislation would be relied upon to justify a more protected status of third country nationals who are family members of Union citizens as opposed to third country nationals who have no such link. In this case, however, the Court relied on that very distinction to justify the opposite result. In light of the described broader context of the provisions under consideration, one had to conclude, according to the Court, that third country nationals who were victims of domestic violence at the hand of a Union citizen were in a different, and impliedly less concerning, situation in respect to those who were victims of domestic violence at the hand of a third country national.[45] The Court thus endorsed the conclusion of the Advocate General. No factor affecting the validity of article 13(2) in light of article 20 of the Charter could be identified.[46]

6. Comment – Speaking too little and saying too much

This judgment is at first sight deceptively simple. It addresses a procedural question of admissibility through the analysis of the applicability of the provision at the heart of the referred question to the situation under discussion. And it addresses a substantive question on the validity of the same provision based on an analysis of the comparability between analogous situations regulated under two different directives, Directive 2004/38 and Directive 2003/86. Behind the veil of this apparent simplicity, the ruling bears in significant part on four distinct areas of EU law concern: family life, domestic violence, equality and the status of migrants vis-à-vis that of

[41] Ibid., para 66.
[42] Ibid., para 70.
[43] Ibid., para 58.
[44] Ibid., para 71; 75; 77; 79; and 89.
[45] Ibid., para 90.
[46] Ibid., para 91.

citizens.[47] To none of these the judgment does justice. First, in considering the applicability of article 13(2), the ruling shies away from fully engaging with the family life problems raised by the interaction of notions of departure and divorce within the frame of that provision (6.1). Second, in considering the validity of article 13(2) it too quickly dismisses the question of whether there is a difference in treatment only to get entangled in a problematic assessment of the comparability of the involved situations. This has detrimental effects for both the substance of the principle of equality and the protection of victims of domestic violence (6.2); the questionable turns taken in respect to the assessment of equality ultimately drive the unnecessary emphasis placed on the distinction between the domains of Union citizenship law and of EU immigration law (6.3). In conclusion, it is through this dynamic of under- and over-engagement, that the ruling, other than bringing a defeat for the rights of a set of vulnerable subjects, sends the wrong signals about EU values.

6.1. The applicability of article 13(2)(c): divorce quickly or lose your rights

'Happy families are all alike; every unhappy family is unhappy in its own way.'[48] To add to Tolstoy's famous analysis, one could say that in the third millennium together families are all alike, but every split family is split in its own way. This is the important hint that arises from the Advocate General's sharp analysis of the distinction between simple departure from a host Member State -that may well form part of family life-, and departure for purposes of divorce.[49]

Unfortunately, the Grand Chamber in its judgment does not follow this hint. While it does accept to reconsider the problematic interaction of articles 12 and 13 of Directive 2004/38 that *Singh and Others* and *NA* had jarringly solved, it does so in a limited way. The rationale followed in reconsidering relevant case law is protection of victims of domestic violence rather than protection of the interests of the family and the family members. The Court indeed upholds the ruling in *Singh and Others* according to which a right of residence lost when departure had occurred prior to divorce could no longer be retained under point (a) of article 13(2).[50] In reconsidering instead *NA*, the Court recognizes, only for the situations falling under point (c) of that same provision, that some flexibility must be allowed in the sequence between departure and divorce prior to denying to a third country national spouse the retention of the right of residence.[51]

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[47] On family life, see Charter of Fundamental Rights of the European Union, Article 7; C-456/12, *O. v. Minister voor immigratie, integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.*, ECLI:EU:C:2014:135; C-673/16, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385; On domestic violence, see Directive 2012/29/EC of 14 November 2012 on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, O.J. 2012, L 315/57; on equality, see Charter of Fundamental Rights of the European Union, Chapter III; The Treaty on the Functioning of the European Union, O.J. 2012 C326/47, Article 18; Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L303; also see Howard, "Equality: A Fundamental Right in the European Union?", (2009) International Journal of Discrimination and the Law 1138; on the status of migrants see The Treaty on the Functioning of the European Union, O.J. 2012 C326/47, Article 79.

[48] Tolstoy, *Anna Karenina*, 1878.

[49] Opinion, para 55; 57; and 59-68.

[50] Judgment, para 41.

[51] Ibid., para 43.

Through limiting this corrective intervention to cases involving domestic violence, the Court foregoes two opportunities to protect family life. First, it foregoes the opportunity to embrace, at least for what pertains to protection of family life in the context of free movement, a progressive vision of the dual-earner family. In the context of that vision separation through departure of one of the spouses may well be a step towards the realization of a common family plan, rather than an indication of family failure.[52] Departure of a spouse becomes thus a possible element in the very fruition, as a family, of the right to free movement. And along the lines of what suggested by the Advocate General, it should never lead to loss of residence on the part of any of the involved family members prior to a careful consideration of the individual situation involved.[53]

The second opportunity that the Court foregoes has to do with protecting a more traditional vision of family unity through removing the perverse incentive towards hurried divorce that the sequence between divorce and departure required in *Singh and Others* generates. As a result of that ruling, a third country national may be pushed into a rushed divorce of which they are not convinced just to save their right to residence.[54] The creation of such an incentive seems to contradict the very commitment to protection of the family and its unity that emerges from both legislation and case law on free movement.[55] It also stands in contrast with the approach of domestic family laws that, as the Advocate General points out, often impose periods of reflection or de facto separation prior to the grant of a pronouncement of divorce.[56] Yet the Court ruling in this case confirms the approach of *Singh and Others*. If the message the ruling in *Singh and Others* sent to the third country national spouse was 'divorce immediately, or leave', the Court in the present case softens the command somewhat: divorce quickly, or leave.[57] It remains however equally oblivious to the interests of pondered separation.

The ruling is not oblivious, to be sure, to the interests of vulnerable spouses. The Court, building on the reasoning of the Advocate General, justifies the correction it brings to the ruling in *NA* in terms of protecting the spouse who has been the victim of domestic violence from 'blackmail accompanied by threats of divorce or departure'.[58] Ironically, however, through the next step of the analysis of the validity of article 13(2) in light of the principle of equality, it de facto delivers the same spouse to blackmail through the threat of withdrawal of financial means.

6.2. *The validity of article 13(2): treating likes alike for purposes of retained residence*

The substance of the referred question and the compatibility of article 13(2) of Directive 2004/38 with the principle of equality pose the Court in front of a choice between the provisions of article

[52] Strumia, "Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others", (2016) Common Market Law Review, pp. 1387-1389.
[53] Case C-930/19, *X v Belgian State*, Opinion of Advocate General Szpunar, para 67.
[54] Strumia, "Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others", (2016) Common Market Law Review, pp. 1387.
[55] See Directive 2004/38/EC, Recitals 5 and 6; C-456/12, *O. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B.*, ECLI:EU:C:2014:135.
[56] Case C-930/19, *X. v. Belgian State*, Opinion of Advocate General Szpunar, para 70.
[57] See Strumia, "Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others", (2016) Common Market Law Review.
[58] Judgment, Para 42.

20 and 21 of the Charter. The Court's choice to rely on article 20 only seems consistent with the idea that article 21 is a *lex specialis* in comparison to article 20.[59] While article 20 embodies a general principle of equality before the law, article 21 applies to distinctions made on the basis of particularly insidious characteristics.[60] Nationality is among these, however distinctions between nationals of a Member State and third country nationals have been found not to be covered by article 21.[61] The distinction in this case is between two categories of third country nationals.[62] As those two categories are distinguished precisely by their family link to either a Union citizen or a third country national they are by extension excluded from the scope of article 21. They do fall however under the scope of article 20 that is applicable to a broader range of classifications that the law may create.[63] Article 20 requires that in making any such classifications the law ensure that comparable situations not be treated differently and that different situations not be treated in the same way.[64] Assessing the compliance of article 13(2) with this general principle of equality thus prompts the Court to consider two aspects: whether the provision establishes a difference in treatment; and if so, whether that difference in treatment concerns comparable situations.[65] The court's analysis in respect to each of these two aspects raises some doubts. In respect to the first because it is dismissed too lightly, in respect to the second because, in part as a result of the lighthearted approach to the first aspect, it is developed in a dubious direction.

6.2.1. Whose difference in treatment

After having decided that article 20 of the Charter is the only one relevant to the assessment of validity of article 13(2) of Directive 2004/38, the Court is quickly convinced that the same provision and article 15(3) of Directive 2003/86 'establish different regimes and conditions'.[66] This is based on the observation that the benefit of retaining the right to residence is subject, under the former provision, to a requirement of financial self-sufficiency for any third country national who does not qualify as a worker or self-employed person. The conditions for the fruition of the same benefit under the second provision are rather remitted to determination through national law.[67] Whether the different approach of the two provisions amounts to a difference in treatment

[59] Bell, 'Article 20 - Equality before the Law' in Peers, Hervey and Kenner (eds) *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury, 2nd edition 2021).
[60] Ibid.
[61] Judgment, para 51; Case C-22/08, *Anthanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, ECLI:EU:C:2009:344, para 52.
[62] Judgment, para 52.
[63] Arguably article 20 does not oblige the Union to treat third country nationals of different nationalities in the same way. However it does oblige the Union to treat third country nationals who fall within the scope of EU law according to the principle of equality. See Opinion 1/17, *EU-Canada CET Agreement*, of 30 April 2019, EU:C:2019:341, paras 172-173. The third country nationals covered respectively by article 13(2) of Directive 2004/38 and article 15(3) of Directive 2003/86 do fall within the scope of EU law by virtue of falling within the scope of those two directives respectively. On the fuzzy distinction between Articles 20 and 21 see Martin, *Article 20 CFR*, in Kellerbauer, Klamert and Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP, 2019).
[64] Judgment, para 57; Bell, op. cit., supra note 59; Also C-101/12, *Herbert Schaible v Land Baden-Wurttemberg*, ECLI:EU:C:2013:661.
[65] See C-193/17, *Cresco Investigations GmbH v. Markus Achatzi*, ECLI:EU:C:2019:43, para 38; and 41.
[66] Judgment, para 66.
[67] Judgment, para 61; and 64.

warrants, however, further consideration. Article 13(2) of Directive 2004/38 subjects the retained right of residence that it governs to an explicit condition. Article 37 of the same directive however enables the Member States to adopt or retain provisions more favorable to the persons covered by the directive.[68] Article 15(3) of Directive 2003/86, on the other hand, does not set any explicit condition for the grant of the autonomous residence permit that it requires.[69] The subsequent article 15(4) clarifies that the conditions for the grant of the relevant residence permit are to be established by national law.[70] In other words, the former provision subjects the grant of the residence permit to a condition that can be waived in national law, while the latter subjects the grant of the same residence permit to no explicit condition and leaves the decision to implement any additional conditions to the discretion of national legislatures. Both the observations submitted by the Belgian government and the same Advocate General point to the room that the relevant provisions, from different directions, leave to the decision of national authorities.[71] Neither of the two however distils from this the key question that this raises: if there is unequal treatment, whose unequal treatment is this? The inequality of treatment could only be ascribed to EU law, rather than to national law, if the provision of article 15(3) of Directive 2003/86 were interpreted in the sense that the obligation it imposes on the Member States of 'ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances' precludes their discretion to subject that residence permit to any additional conditions under article 15(4).[72] Under such an interpretation, article 13(2) would effectively both allow and require the Member States to subject the right to residence of a third country national family member to a financial autonomy condition that article 15(3) would preclude. Hence the inequality of treatment. However, the Court itself in the judgment under consideration, following in its line of case law on this, opts for a different interpretation of article 15(3). A combined reading of article 15(3) ad 15(4) leads it to conclude that the EU legislature intended to leave the determination of the conditions for the grant of an autonomous residence permit to the discretion of each Member State even in cases involving domestic violence.[73] It seems thus that in this case the inequality of treatment between third country nationals who are spouses of third country nationals and third country nationals who are spouses of Union citizens depends on a choice of the Belgian legislator in the Law on Access to the territory, residence, establishment and removal of foreign nationals to exercise respectively a retained competence or a retained degree of discretion to different effects.[74] Here, the Belgian legislator had two legislative options to avoid unequal treatment. The first was to amend the provisions implementing article 15(3) of Directive 2003/86 so as to subject the grant of the residence permit provided therein to a financial condition. The second was to waive the financial condition for the grant of a residence permit in the provisions implementing article 13(2) of Directive 2004/38. The Member States are under an obligation to comply with fundamental rights obligations when they are implementing EU law, and when they are acting within the scope of EU

[68] Directive 2004/38/EC, art. 37.
[69] Directive 2003/86/EC, Article 15(3).
[70] Directive 2003/86/EC, Article 15(4).
[71] Opinion, para 27; and 141; Judgment, para 23.
[72] Directive 2003/86, art. 15(30, 15(4).
[73] Judgment, para 87.
[74] Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980.

law.[75] However construing either option as an obligation of the Belgian legislator in order to comply with a EU law principle of equality would raise some difficulties. Arguing that the former option is an obligation for the national legislator would amount to saying that in order to protect equality the legislator has an obligation to exercise its discretion within the scope of EU law to level down the condition of third country nationals. Arguing that the latter option is an obligation under EU law would amount to encroaching upon the retained competence of the Belgian legislator to enact, or not enact more favorable conditions to those established in Directive 2004/38. Of two uncomfortable arguments, the second is still the preferable one. The Court has long held that retained Member States competences must be exercised 'with due regard to EU law'.[76] In the case at hand exercising this due regard needed not take away any Member State autonomy; it would just have required a responsible and EU values-conscious exercise of legislative freedom:[77] given that in respect to third country national family members of third country nationals no condition had been imposed for the retention of the right of residence, this would have suggested taking advantage of the reservation in article 37 of Directive 2004/38 to simply extend the same treatment to third country national family members of EU citizens in implementing the latter directive.

In any case the Court would not have been required to go this far in responding to the question referred. Had the Court followed this line of reasoning, it could have stopped at acknowledging that if there is an inequality of treatment in the case at hand, this is not established by EU law. This would have allowed it to reach, from a different direction, the same conclusion 'that the consideration of the question referred by the national court has disclosed no factor of a kind such as to affect the validity of Article 13(2) of Directive 2004/38, in the light of Article 20 of the Charter'.[78] Through merely putting the ball in the Member States' court, a response in this sense would not have brought the interest of the vulnerable party in the underlying dispute much further. It would however have limited the damage that the subsequent analysis of comparability of situations unnecessarily inflicts to the understanding of equality, of protection of victims of crime, and of the status of third country nationals under EU law.

Who could have more effectively protected the involved vulnerable party through following this line of reasoning would have arguably been the referring court. Had the *Conseil du Contentieux des Étrangeres* focused more centrally on the substance of the inequality of treatment rather than on the EU law-implementing nature of the Belgian provisions at stake and on the procedural requirements to invalidate EU law, it could have referred a much more useful question to the Court.[79] That question would have read somewhat like this 'Should article 20 of the Charter be read as precluding an interpretation of the Belgian Law on Access to the territory, residence, establishment and removal of foreign nationals that results in imposing a financial autonomy

[75] Charter of Fundamental Rights of the European Union, Article 51; also see C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
[76] See e.g. case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, ECLI: EU:C:1995:31, para 21; case C-135/08, *Janko Rottman v Freistaat Bayern*, ECLI:EU:C:2010:104, paras 41 and 45.
[77] See in this sense Azoulai, The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' 4/2 European Journal of Legal Studies (2011) 178-203, 201.
[78] Judgment, para 91.
[79] Case C-930/19, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, paras 21-23.

requirement for the purposes of retaining a right of residence on third country national spouses of Union citizens who have been victims of domestic violence while the same requirement does not apply to the third country national spouse of a third country national in a comparable situation?'. Answering that question would still have entailed an assessment of comparability of situations.[80] But it would have eased the task of setting a comparison that the judgment at hand develops in a troubled direction. The focus of the comparison would indeed have fallen on two provisions within the same national legislative instrument pursuing immigration regulation and control purposes. This would have invited to compare the situations established by those provisions in light of the purpose of the national legislative instrument of which they both formed part rather than – as the Court goes on to do- in light of the distinct objectives of the two EU law directives from which the relevant provisions respectively derive. Cast against the background of the same national legislative purpose – immigration control- the factual commonalities of the situations under exam would arguably have come into sharper relief.

6.2.2. The incomparable inequality of victims of domestic violence

Deciding 'how alike must a likeness be to be a likeness alike'[81] is a much more difficult task than may appear at first sight. As Lord Nicholson observes in a UK case involving the principle of equality, "Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear a different approach is called for."[82] While Lord Nicholson's continues to suggest a test of legitimacy and proportionality of the differentiation under consideration, the Court of Justice's chosen approach relies on an oft repeated formula in its equality case law: 'The requirement that situations must be comparable […] must be assessed in the light of all the elements that characterize them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account.'[83] On this basis, the Court relies on the difference between the subject matter and purpose of Directive 2004/38 and Directive 2003/86 to override the commonality of purposes between the two specific provisions at the heart of the comparison. It is true that article 13(2) of the former and article 15(3) of the latter both aim at protecting family members who are victims of domestic violence.[84] However the relevance of this shared objective to the comparability of the situations that the two provisions respectively govern fades when one considers the distinct legislative exercises of which they form part from a broader angle.

The application of the chosen test for comparability in this case is less than convincing. The subject matter and purpose of the act making the distinction are typically resorted to in the case law when

[80] Compare C-21/10, *Karoly Nagy v. Mezogazdasagi es Videkfejlesztesi Hivatal*, ECLI: EU:C:2011:505, paras 49-51.
[81] Thomsen, "Concept, Principle, And Norm - Equality Before The Law Reconsidered", (2018) Cambridge University Press.
[82] *R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 17, [2006] 1 AC* (Lord Nicholls)
[83] Case C-930/19, *X. v. Belgian State*, para 58; C-127/07, *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Ecologie et du Développement durable and Ministre de l'Economie, des Finances et de L'industrie*, ECLI:EU:C:2008:728, para 26.
[84] Judgment, para. 70.

the suspect distinction is created by a specific legislative act or by one of its provisions.[85] In that context looking at the subject matter and purpose of the act helps frame the assessment of comparability of the different situations created by a legislative distinction from the perspective of the objectives of the relevant legislation. For instance, in *Arcelor*, the Court considered whether the situation of industries in the steel sector and of industries in the plastic and aluminum sector was comparable in light of the objective of Directive 2003/87 of reducing greenhouse gas emissions.[86] The judgment of comparability thus had to turn on the level of emissions respectively produced in those industries.

In the case under discussion, the distinction between the rights of residence of two classes of third country nationals is not made by a single legislative act. It is rather the result of the coexistence of two provisions in two different legislative acts incidentally governing a class of similarly situated third country nationals. Hence, it seems, the assessment of comparability should focus on the subject matter and purpose of those specific provisions within the legislative acts of which they form part. To rephrase the Court's test, the comparability of the situations at hand should be assessed 'in the light of all the elements that characterize them and, in particular, in the light of the subject matter and purpose of the provisions that make the distinction in question, while the principles and objectives of the acts of which they form part must also be taken into account'. Refocusing the test on the provisions would be in keeping with another oft repeated formula in the Court's equality case law: the assessment of comparability has to be carried out 'not in a global and abstract manner, but in a specific and concrete manner in light of the benefit concerned.'[87]

Applying the refocused test suggested above would have required relating the specific purpose of the provisions from whose coexistence the distinction arises and the broader purpose of the legislation in which, respectively, they belong, in order to understand to what extent the one is aligned to the other.[88] As the Court points out, article 13(2) of Directive 2004/38 and article 15(3) of Directive 2003/86 both share in the purpose of protecting family members who have been victims of domestic violence. This specific purpose represents an exception to the broader purpose of both Directive 2004/38 –strengthening the individual right to free movement including through protecting family life- and of Directive 2003/86 - facilitating the integration of third country

[85] See e.g. C-127/07, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de L'Ecologie et du Développement durable and Ministre de L'Economie, des Finances et de L'Industrie*, ECLI:EU:C:2008:728 (Directive 2003/87 distinguishing between industries respectively in the steel, chemical and non-ferrous metal sectors for participation in an allowance trading scheme); also see Opinion 1/17, ECLI:EU:C:2019:341, para 119.
[86] See e.g. C-127/07, *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Ecologie et du Développement durable and Ministre de l'Economie, des Finances et de L'industrie*, ECLI:EU:C:2008:728, paras 29-38. Also see Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, 2003 O.J. L 275/32.
[87] C-193/17, *Cresco Investigations GmbH v. Markus Achatzi*, ECLI:EU:C:2019:43, para 43; C-143/16, *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro*, ECLI:EU:C:2017:566, para 25; C-267/12, *Frederic Hay v. Credit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823, para 33.
[88] Consider e.g. C-267/12, *Frederic Hay v. Credit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, para 34 'the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.'

nationals through making family life possible through reunification-.[89] To the extent the two directives protect family life, they do so from the perspective of the sponsor family member, respectively the migrant Union citizen or the third country national who is already legally resident in a Member State. It is the interests of these two sets of subjects that the directives pursue. By contrast, the two provisions in question shift the attention to the sponsored family member. They protect the interests of the family member whose rights of residence had a derivative character in the context of family break-ups, and particularly in the context of family break-ups involving difficult situations. In doing this they import into the distinct fields and subject matters of the two directives a shared commitment: protection of vulnerable family members, and in particular protection of victims of domestic violence.[90] The comparability of the situation of the third country nationals concerned must be considered within the frame of this shared commitment. Thus, contrary to the approach of the Court that uses the distinction in the broader legislative purpose to qualify the commonality of the specific objective of the two provisions, it is the commonality of the specific objective that should override the differences in the legislative projects of which they form part.

The result otherwise is disregarding the naked equivalence of the factual situations that the two provisions address. It is true, as the Court notes, that the rights of the involved TCNs in the case at hand are ground in different fields of Union law resulting of the exercise of different legislative competences.[91] In one case these are rights derived from those of Union citizens and aimed at protecting a freedom of the Union citizens in the first place. In the other case these are rights conferred directly on third country nationals in the context of the Union competence to establish a common immigration policy.[92] But in getting entangled in unravelling these distinct legislative purposes, the Court loses focus on the fundamental factual equality of the situations at hand: in both cases, the relevant third country nationals are emerging from an abusive relation and their right to reside in a Member State of the EU depends on that very relation. Disregarding this factual equality is not only inconsistent with the same approach of the Court that in several cases on the principle of equality focuses precisely on the factual elements of the situations to be compared.[93] It also betrays the very idea of justice that underlies the principle of equality before the law in its several formulations as part of both domestic and international law and that requires to treat like alike.[94]

The Court's misplaced assessment of equality ultimately delivers the vulnerable parties in the underlying dispute to the very ill that the first part of the judgment wanted to avoid: the risk of blackmail at the hand of a family member. If the first part of the judgment in reconsidering previous

[89] Judgment, paras 81 and 83.
[90] Directive 2004/38/EC of 29 April 2004, recital 15; Directive 2003/86/EC, recital 15.
[91] Judgement, paras 71-80.
[92] Judgement, paras 71-75, 81-83.
[93] See e.g. C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, ECLI:EU:C:2014:350, para 83; also see C-21/10, *Karoly Nagy v. Mezogazdasagi es Videkfejlesztesi Hivatal*, ECLI: EU:C:2011:505, para 49; C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, ECLI:EU:C:2010512, paras 56-57.
[94] Thomsen, "Concept, Principle and Norm - Equality Before The Law Reconsidered", (2018) Cambridge University Press; for examples of provisions, see U.S. Constitution, Amendment XIV; The Universal Declaration of Human Rights, Article 7; The European Convention on Human Rights and Fundamental Freedoms, Article 14; The International Covenant on Civil and Political Rights, Article 26.

case law aimed at preventing third country national family members becoming subject to blackmail through threats of divorce or departure, this second part of the judgment leaves them exposed to blackmail through threats of withdrawal of financial means. The result is a resizing, at least in the context of the objectives pursued by Directive 2004/38, of the commitment to protect victims of crime, and in particular victims of domestic violence. This is in spite of the growing importance of that commitment as part of EU law, as witnessed by the legislative developments to which the Advocate General refers at length in his opinion.[95]

While a future judgment that took that commitment more at heart could reverse this, the extended 'obiter dictum' on the relation between the condition of the citizen and that of the third country national in EU law into which the misplaced focus on legislative purpose at the expense of fact drags the Court risks leaving a lasting legacy.

6.3. *The citizen vis-à-vis the migrant: we won't cross that bridge even if we get there*

In setting the milestones for the realization of an area of freedom, security and justice, and in particular for the establishment of a common immigration policy, the Conclusions of the 1999 European Council at Tampere in Finland suggested that **'**From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law'.[96] In the view of the European Council 'This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. […] It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.'[97] In fulfilment of this proclamation the Council conclusions continued to suggest, among the milestones needed to guarantee the fair treatment of third country nationals, that the legal status of the latter be 'approximated to that of Member States' nationals'.[98]

The case law that interprets the rights of third country nationals that are derived from the status of Union citizenship, a line of case law to which the case at hand arguably belongs, represents an ideal site to fulfil this promise of approximation.[99] Relevant case law is concerned with the rights of several classes of third country nationals linked by family bonds to a Union citizen. The court has clarified that the provisions on Union citizenship per se do not confer rights on third country nationals and that any rights that a third country national derives therefrom have an intrinsic connection to the exercise of free movement on the part of a Union citizen.[100] It is to fulfil the

[95] Opinion, paras 94-108.
[96] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, <https://www.europarl.europa.eu/summits/tam_en.htm> (last visited 21 December 2021), para 1.
[97] Ibid., para 3.
[98] Ibid., para 21. For a recent iteration, also see case C-432/20, *ZK v. Landeshauptmann von Wien*, EU:C:2022:39, para 36.
[99] See e.g. case C-40/11, *Yoshikazu Iida v. Stadt Ulm*, ECLI:EU:C:2012:691, paras 67-68; case C-218/14, *Singh and Others*, para 50; case C-115/15, *NA*, para 41; case C-34/09, *Gerardo Ruiz Zambrano v. Office national de L'emploi (ONEm)*, ECLI:EU:C:2011:124, paras 41-44; case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, ECLI:EU:C:2004:639, para 45; case C-456/12, *O. v. Minister voor immigratie, integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.*, ECLI:EU:C:2014:135, paras 36 and 45.
[100] C-40/11, *Yoshikazu Iida v. Stadt Ulm*, ECLI:EU:C:2012:691, paras 66-67; and 72.

Union citizens' right to free movement that EU law, in certain cases, comes to govern situations involving the rights to entry and stay of third country nationals in a Member State.[101] These are situations that, in principle, fall within the competence of the Member States to manage their borders and regulate immigration. It is precisely in these situations, where citizenship law intersects immigration law, that the rights-based logics of the former have the potential to spill over into the sovereign discretion-driven logics of the latter.[102]

The provisions at the core of the Court's scrutiny in the present case offered an important test ground for this spill-over dynamic and overall for the approximation between third country national condition and citizen condition. These provisions stretch the logics of citizenship to the furthest extent yet into the domain of immigration from third countries. Through the promise of an autonomous right of residence, they upgrade third country nationals from the contingency that characterizes migrant status to the security of residence that rather characterizes citizen status. They thus directly challenge the 'constitutional cleavage at the heart of the European project' that consists of the distinction between the status of Union citizens and that of third country nationals.[103]

The judgment under comment however only confirms the cleavage. The distinction between Union citizen status and third country national status had only tangential relevance in the case at hand. As argued in the previous sections, the referred question could have been answered without engaging this distinction. The Court's answer could have legitimately chosen to leave the question of the relation between EU citizenship and EU immigration law suspended: 'We'll cross that bridge if we get there'. The judgment would have still answered the question in a rights-reluctant manner, but without broader implications. Instead the Court addresses that relation without reticence. The ruling says little new. However the mere emphasis it places on the distinction between the field of Union citizenship and free movement and that of the common immigration policy, between the subject matter of Directive 2004/38 and that of Directive 2003/86, the competence they respectively express, and the discretion they respectively leave to the Member States sends a clear message.[104] Citizenship law and immigration law belong in two worlds apart. If at all, the ruling relies on a reverse spill-over: from the discretion based domain of immigration law to the rights-based domain of citizenship.[105] As the Court concludes 'It is, in particular, a

[101] Ibid., para 72.
[102] See Strumia, "European Citizenship and EU Immigration: a Demoi-Cratic Bridge between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude", 22/4 European Law Journal (2016) 417-447.
[103] See Thym, "Legal Framework for Entry and Border Controls" in Hailbronner and Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 2nd ed. (Bloomsbury, 2016); also see Opinion, para 125.
[104] Judgment, paras 68-89.
[105] The reasoning of the Court in the *ZK* ruling, adopted just a few months after the one under discussion, allows hopes that this reverse spill-over may have been just an aberrant result. In *ZK*, the Court, in interpreting the notion of 'absence' for purposes of loss of a third country national right to permanent residence under Directive 2003/109, noted that the provisions in this respect of Directive 2003/109 on the right to long term residence of third country nationals and those of Directive 2004/38 lent themselves to a 'comparative analysis'. On this basis the same logic underpinning Directive 2004/38, that justified loss of residence when the link to a host Member States had been loosened had to apply to the interpretation of Directive 2003/109. The result was a right-protective interpretation of the latter directive, in the sense that physical presence of a few days per year was sufficient to interrupt the legal effect of absence and to retain the right to permanent residence. Case C-432/20, *ZK v. Landeshauptmann von Wien*, ECLI: EU:C:2022:39.

choice made by the Belgian authorities in connection with the exercise of broad discretion conferred on them by Article 15(4) of Directive 2003/86 which has led to the difference in treatment complained of by the applicant in the main proceedings'.[106] Ultimately, the judgment sets in stone a discomforting message as to the way the Court approaches the relation between the condition of the citizen and that of the migrant: 'we won't cross that bridge even if we get there'.

The deepest wound that this message inflicts is to the cosmopolitan potential of EU law. Cosmopolitanism entails a moral norm of equal concern for all human beings, regardless of citizenship and other affiliations, and an institutional norm of impartiality.[107] The ability of EU law to fulfil these norms depends precisely on the way EU law addresses the cleavage between citizen and migrant condition, and more broadly on how EU law internalizes the perspective of the 'other'. Joseph Weiler was among the first to capture the 'no-othering' ethos of EU law.[108] EU law's commitment to no-othering is also at the basis of cosmopolitan and demoicratic understandings of EU law.[109] Truth to be said this no othering ethos of EU law has always faced a fundamental limit. The limit is precisely the one that the Court recalls in dismissing article 21 of the Charter as irrelevant to its assessment: the principle of non-discrimination on the basis of nationality that lies at the heart of the legal commitment to no-othering does not cover discriminations between Union citizens and third country nationals. This has remained a crucial obstacle in the way of any truly cosmopolitan understanding of EU law.

But Union citizenship has gone some way in overcoming that obstacle. This has been through the simple principle that ultimately underpins the spill-over of rights-content from the domain of citizens' free movement to that of third country nationals' immigration: if we want to truly help the citizen, we need to help the third country national.[110] The question in this judgment offered an opportunity to problematize this principle further. To what extent do we need to help the third country national to help the citizen, and why? Perhaps because the third country national, even in her independent self, is after all but an alter ego of the citizen? Or perhaps because in protecting the fundamental rights of the third country national we protect after all our fundamental rights? EU citizenship law stands for an idea of reflexive recognition between the one and the other, between the citizen on the one hand, and the migrant or third country national on the other hand.[111] It is this idea that, if explored and interpreted further, could help problematize the carving out of third country nationals from the scope of article 21 of the Charter. The Court however in this ruling, rather than advancing this ethos of recognition, sits in denial: the third country national is not the citizen. Not only, it appears to turn the principle on its very head: the domain of citizenship

[106] Ibid., para 89.
[107] Cabrera, "Introduction", in Cabrera, *Institutional Cosmopolitanism*, 1st edn. (OUP, 2018), pp. 3-9; also see Pogge, "Cosmopolitanism and Sovereignty", (1992) Ethics 103, pp. 48-49.
[108] See Weiler, "In Defence of the Status Quo: Europe's Constitutional Sonderweg", in Weiler and Wind, *European Constitutionalism Beyond the State*, 1st edn. (Cambridge University Press, 2003), pp. 19-20.
[109] See Bellamy, *A Republican Europe of States-Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019), at 163; Nicolaïdis, 'Mutual Recognition: Promise and Denial from Sapiens to Brexit' 70/1 Current Legal Problems (2017), at 36.
[110] See e.g. Iida, paras 67-68.
[111] Strumia 'The State and the Citizen-as-Migrant : How Free Movement Changes the Social Contract', EUI RSC, 2021/79, Global Governance Programme-454, GLOBALCIT - https://hdl.handle.net/1814/73020

is distinct from that of migration. Thus in that domain, we only need to worry about the third country national to the extent this helps the condition of the citizen.

7. Conclusion

The ruling in X. v Belgium represents a defeat for both the vulnerable and for EU values. A class of vulnerable individuals comes out defeated from the very rule that the judgment sets. Through upholding a requirement of financial autonomy for the grant of an autonomous residence permit, the ruling takes a reluctant approach to the protection of vulnerable family members and in particular of victims of domestic violence.

The defeat for EU values depends on the broader message that the judgment conveys. Beyond the prescriptions that it sets, and as part of setting these prescriptions, law makes statements.[112] In interpreting the establishment clause and the equal protection clause of the US Constitution, for instance, the US Supreme Court has considered how law endorses and stigmatizes through the behaviours it supports and the classifications that it makes.[113] If legal rulings thus harbor implied statements, the statement here is a discomforting one. The ruling speaks too little to the concerns underpinning the question raised by the referring court, family life and the protection of victims of domestic violence. Yet it says more than was needed to answer the question to the detriment of both the substance of the principle of equality and the condition of the migrant vis-à-vis that of the citizen.

Through this combination of reticence and overreach the ruling sends an equivocal message as to the commitment of EU law to its most prized values: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[114] In unnecessarily suggesting that a us vs. them dynamic qualifies the commitment to some of these values, the ruling ultimately weakens their substance.

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[112] See Sustein, "On the expressive function of law", (1996) Pennsylvania Law Review 2021.
[113] See e.g. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Justice O'Connor concurring).
*TBC.
[114] TEU, art.2.