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NEW ASPECTS IN THE FAMILY REUNIFICATION PROCEDURE IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

I. Family reunification right in the EU law

One of the more contested aspects of European Union (EU) citizenship is the right of static EU citizens to be accompanied by third country national (“TCN”) family members in their own Member State. In this paper, I will attempt to introduce these special aspects of the family reunification law with the help of the case-law of the Court of Justice of the European Union.

The right to family reunification is an essential part of EU law. As the Directive on Family Reunification itself puts it: “Family reunification is a necessary way of making family life possible. It helps to facilitate the integration of third country nationals in the Member State.”¹

Family reunification could grant the acquirement of a residency right of a third country national into a Member State of the European Union, based on the fact that he or she maintains a family relationship with a European citizen.²

The different options for family reunification depending upon whether a person manages to find a link with the scope of application of EU law.

The European Union has developed a legislation system concerning residence family rights of third country national EU family members.

Directive 2003/86/EC on the right to family reunification 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 State. However the Family Reunification Directive does not apply to family members of EU citizens. They can invoke the more favourable rules of Directive 2004/38.

¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003. 0012–0018.

² KROEZE, Hester: The Difference between European Citizens and European Citizens. A Constitutional Equilibrium of Citizenship Concepts. An analysis of reverse discrimination in the field of family reunification law and its connection with the constitutional equilibrium of multiple citizenship concepts in the European Union. 2014. http://www.inclusionexclusion.eu/site/wp-content/uploads/2014/11/DUBR14_P_KroezeHester.pdf (01.11.2018.) 5.

Directive 2004/38/EC on the right of free movement of EU citizens and their family members covers EU citizens residing in another Member State wishing to live with a third country national family member.

Directive 2004/38 (the citizens' rights Directive) extends the right of entry and residence accorded to the EU citizen to family members who are not nationals of a Member State, accompanying or joining the EU citizen in the host Member State.³ Nevertheless as a general rule, the Directive only confers a right of residence to TCNs, and so family reunification right, if their EU citizen family member made use of their freedom of movement.⁴

Therefore, those nationals who residing in their EU Member State of origin wishing to live with a third country national family member – the so-called *static citizens* – fall outside the scope of the Directive with regard to this right. The legislation applying to this category is still national, these family reunification cases ruled by their national citizenship status. So the *static citizens* are being disadvantaged in comparison with *mobile citizens*.⁵

Static citizens can only rely on their EU citizenship rights, including a right of residence for their third country family members, when they fall within the scope of application of EU law. If their situation has no link with EU law, they are subject to the often more restrictive national rules of the Member States.⁶

This situation generates difference in treatment between the family of EU citizens who have not exercised their right to free movement and have stayed in the country of their nationality and those who have exercised their right to free movement. National law in some circumstances regulates the family reunification of its own nationals more restrictively than EU law.⁷

The debate has been particularly focused on the role played by the Court of Justice of the European Union (Court) 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.

However, the Court stressed that 'EU citizenship is intended to be a fundamental status of nationals of the Member States.'⁸ So, the rights attaching to the status of citizen of the EU may be relied upon, even in the absence of a cross-border element, against any national measure causing the deprivation of those rights.

The Court started 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 and used these cases in family reunification to determine the conditions of family joining in cases of static citizens.

³ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L 158/77. Article 3(1).

⁴ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L 158/77. Article 1.

⁵ KROEZE, 2014. 8.

⁶ VAN ELSUWEGE, Peter – KOCHENOV, Dimitry: On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law*, 13 (2011) 4.

⁷ Proposal of a Council Directive on Family Reunification, COM (1999) 638 final, 14.

⁸ C-184/99 Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies – Louvain la Neuve [2001] ECR I-6193. 6193., C-135/08 Janko Rottmann v Freistaat Bayern [2010] ECR, para.43.

The relevant case-law of the Court⁹ reinforces the right of the EU citizens, especially for family reunification, and extent it to third country national family member too but only in special circumstances. In the same time the Court improved the legal position of third country nationals with the help of the EU law and so automatically harmonised the immigration law of the Member States.

The main question is where the limit of national authority in immigration law are and in the decision about family reunification claims.

II. Case-law on family reunification of static EU citizens and their TCNs family member

II.1. The Zambrano-doctrine

The famous *Zambrano case*¹⁰ was in this line the first one which granted a family reunification right to third country nationals in purely/wholly internal situation, where the family member EU citizen never crossed the borders of State of origin.

In that case, Belgium had denied a right of residence to a Colombian father of two Belgian minors. The Court held that, by not giving the father of a Belgian children a derived residence right, Belgium will oblige the children to leave the territory of the EU as a whole, and therefore deprive the children of *the genuine enjoyment of the substance of the rights* conferred by the EU citizenship status.¹¹ This would mean that the children, as EU citizens, would no longer be able to make use of their rights in the EU.¹²

According to the Court's decision in a situation like this the EU citizens could invoke Article 20 Treaty on the Functioning of the European Union (TFEU) against their Member State of nationality, even if they had never previously made use of their free movement rights and enforce the EU citizen's rights. As stated in the decision, Article 20 TFEU precludes national measures that have the effect of depriving citizens of EU citizenship rights, including the right to family reunification.¹³

As other crucial consequence the Court in his decision made clear that a third country national had a derived right to reside with his EU citizen children.¹⁴

With this decision the Court created the so-called *Zambrano-doctrine* and redefined the scope of application of EU law, extending its reach to an otherwise "purely internal situation".¹⁵

⁹ Case C-200/02 Kunjian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004] ECR I-9925., Case C-148/02, Garcia Avello v Belgian State [2003] ECR I-11613.

¹⁰ C-34/09 Ruiz Zambrano v Office national de l'emploi (ONEM) [2011] ECR I-0000.

¹¹ C-34/09 Zambrano case, para. 45.

¹² C-34/09 Zambrano case, para. 44. HAAG, Maria: Case C-133/15 Chávez-Vilchez and Others – Taking EU Children's Rights Seriously. *The European Law Blog*, 30.05.2017. [http://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/\(30.10.2018.\)](http://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/(30.10.2018.))

¹³ C-34/09 Zambrano case, para. 42.

¹⁴ C-34/09 Zambrano case, para. 34.

¹⁵ MURPHY, Ciara: At the Periphery of EU Citizenship: C-356/11 O, S and L. *The European Law Blog*, 11.01.2013. [http://europeanlawblog.eu/2013/01/11/at-the-periphery-of-eu-citizenship-c-35611-o-s-and-l/\(30.10.2018.\)](http://europeanlawblog.eu/2013/01/11/at-the-periphery-of-eu-citizenship-c-35611-o-s-and-l/(30.10.2018.))

After *Ruiz Zambrano*, several important questions arose. The Court did not clarify how, in the absence of a cross-border element, Articles 20 TFEU interact. The Court did not specify under which circumstances a national measure may have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the EU or when does a national measure produce a ‘*deprivation effect*’?¹⁶

The Court managed to clarify its position in the following cases, especially in *McCarthy* and *Dereci* case.

II.2. The restricted Zambrano-doctrine

In *McCarthy case*¹⁷ Mrs McCarthy was a national both the UK and Ireland, however she had never used the EU free movement right. She married to a TCN man. Mrs McCarthy and her husband applied for a residence permit under EU law as, respectively, an EU citizen and the spouse of a EU citizen. The Secretary of State refused their applications on the ground that Mrs McCarthy was not ‘a qualified person’ (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of ‘a qualified person’.¹⁸

The Court found the situation purely internal as she never exercised a right of free movement, and for this reason refused the application of EU law.¹⁹

The Court stated that no element of the situation indicated that the national measure had the effect of depriving Mrs. McCarthy of the genuine enjoyment of the substance of the rights or restricting her right to move and reside freely within the territory of the Member States.²⁰

So the Court in *McCarthy case* on one side, confirmed the *Zambrano-doctrine* by applying it but, at the same time, curtailed it by finding that Mrs. McCarthy was not dependent on her Jamaican husband like the *Zambrano* children were on their parents.²¹ It seems that the relationship between the genuine enjoyment substance of citizenship rights and the residence family rights of third country national family members did not apply because of the lack of dependency.

The Court held that the refusal to grant a UK residence permit to the TCN husband of a EU citizen woman did not deprive her of the substance of her EU citizenship rights.²²

¹⁶ LENAERTS, Koen: EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach. *International Comparative Jurisprudence*, 1 (2015) 1, 1–10., 3. <https://www.sciencedirect.com/science/article/pii/S2351667415000062> (31.10.2018.)

¹⁷ C-434/09 Shirley McCarthy v Secretary of State for the Home Department [2011] ECR I-03375.

¹⁸ C-434/09 McCarthy case, para. 17.

¹⁹ C-434/09 McCarthy case, para. 46.

²⁰ C-434/09 McCarthy case, para. 49.

²¹ BERNERI, Chiara: The movement and residence rights of third country national family members of EU citizens: a historical and jurisprudential approach. (Unpublished Doctoral thesis, City, University of London) <http://openaccess.city.ac.uk/18070/>, 119.

²² C-434/09 McCarthy case, para. 49., MURPHY, 2013.

Accordingly, Mrs. McCarthy's inability to have proper family life in the UK, curiously, was not viewed by the Court as a substance of her EU citizenship rights.²³

The second case that had an impact on *Zambrano-doctrine* was the *Dereci case*.²⁴

Dereci case concerned 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. All of the applications were rejected on the basis that the situation was purely internal. Nevertheless the referring court sought a preliminary ruling from the Court in order to clarify the scope of *Zambrano-doctrine*.

The Court found that the children were not dependent on Mr. Dereci, a Turkish national, for subsistence and could stay with their Austrian mother in Austria.²⁵ So, the father's expulsion would not force them to follow him to Turkey.²⁶

Furthermore the Court suggests that the EU law, and especially the Article 20 TFEU is not applicable, because the situation was purely internal.²⁷

Moreover according to the Court in *Dereci case*, the *Zambrano-doctrine* grants protection only even if the family was being severed and consequently exposed to emotional and financial difficulties, or even if the whole family, including the EU citizen children, would have to leave the EU if they wanted to stay together.²⁸

The Court held that „the fact that it might be desirable, for economic or family reasons, to keep the family together was not sufficient (...)” for to give residence permit.²⁹

For this reason the *Dereci case* was subject to a lot of criticism with regard to excluding the right to family life from the genuine enjoyment. Advocate general Mengozzi stated that an EU 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.³⁰

So as well as advocate general stated, the Court ruled that only the family reunification right could not bring the case under the EU law, the rights which enjoyment is deprived in case of rejection of residence permit do not include the right to respect of family life.³¹

However this decision questions the development of the idea of EU citizenship as the fundamental status of the nationals of the Member States.³²

Unlike the McCarthy case, the Court in *Dereci case* did not try to specify the content of the genuine enjoyment of the substance of the citizenship rights test. Despite the lack of specification of the rights that amount to the substance of EU citizenship, the Court in *Dereci case* made clear when a national measure should be considered violating substantive EU citizenship rights.³³

²³ VAN ELSUWEGE, Peter – KOCHENOV, Dimitry: On the Limits of Judicial Intervention. EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law*,13 (2011) 446.

²⁴ C-256/11 Dereci, Heiml, Kokollari, Maduik and Stevic v Bundesministerium für Inneres [2011] ECR I-0000

²⁵ C-256/11 Dereci case, para.6.

²⁶ C-256/11 Dereci case, para. 40., HAAG, 2017.

²⁷ C-256/11 Dereci case, para.61.

²⁸ C-256/11 Dereci case, para.68.

²⁹ C-256/11 Dereci case, para.68.

³⁰ Opinion of Advocate General Mengozzi, Case C-256/11, Dereci v. Bundesministerium für Inneres,2013 E.C.R. I□ny, para. 50.

³¹ C-256/11 Dereci case, para.72.

³² SHAW, Jo: Has the European Court of Justice challenged Member State Sovereignty in Nationality Law?“, EU working papers, 2011/62, 39.

³³ BERNERI, 2014. 124.

The Court underlined that a national measure has to be considered violating the substance of EU citizenship rights the EU citizen has to leave not just the territory of the Member State but of the EU as a whole.³⁴

To conclude, after the *Zambrano case* the Court followed a strict approach of *Zambrano-doctrine*, they emphasized that cross-border movement remained a pre-requisite³⁵. In the *Zambrano case* the Court stated that citizenship in itself could be a sufficient connecting factor to EU law irrespective of the existence of a movement between the Member States, but in these cases the Court restated again that citizenship law only applies in a cross-border context.³⁶ So, it restricted the scope of the doctrine by finding if there is no movement in EU level the case remain out of the scope of Article 20 of TFEU.³⁷

So, the Court ensures a residence right to third country national family member only in special and exceptional circumstances in family reunification cases.

What are these special circumstances? In the reasoning of the Court there is no clarity and consistency.

II.3. *Zambrano-doctrine* in light of the child's best interest

*Joined O, S & L case*³⁸ involved, once again, static EU citizens and their third country national family members.

The cases concerned two TCN women residing in Finland. Both women were first married to Finnish nationals with whom they had Finnish children, but then divorced and remarried with TCNs with whom they had TCN children.

TCN husbands 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. So, were refused the right to reside in Finland.³⁹

Here, the main issue was whether EU citizenship provisions preclude a Member State from refusing to grant a TCN a residence permit on the basis of family reunification, where that TCN wishes to reside with his TCN wife and his TCN child, and where the TCN wife resides lawfully in the Member States and is the mother of an EU citizen child from a previous marriage.⁴⁰

So, the Court was asked whether a TCN step-parent could derive a right of residence from the EU citizenship of his step-child.⁴¹

³⁴ C-256/11 Dereci case, para. 66.

³⁵ MURPHY, 2013.

³⁶ VAN ELSUWEGE-KOCHENOV, 2011. 446.

³⁷ HAAG, 2017.

³⁸ C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L [2012] E.C.R. I-000 (Joined O, S & L case)

³⁹ Joined O, S & L case, paras 18–22.

⁴⁰ GOLDNER LANG, Iris: Extending the Scope of EU Law to Internal Situations. "In the Child's Best Interests We Swear, but not a step further. *EU Immigration and Asylum Law and Policy*, 29.06.2018. <http://eumigrationlawblog.eu/extending-the-scope-of-eu-law-to-internal-situations-in-the-childs-best-interests-we-swear-but-not-a-step-further> (31.10.2018.)

⁴¹ Joined O, S & L case, para.33.

The Court started recalling what was already stated in the previous pronouncements of *Zambrano*, *McCarthy* and *Dereci case*.

The Court stated that the simple fact that an EU citizen never made use of his/her right of free movement does not necessarily mean that the case is a purely internal situation.⁴² EU citizens can rely on the citizenship rights even against their state of nationality, if the national measure has the effect of denying the genuine enjoyment of the substance of citizenship rights.⁴³ It occurs when the national measure forces the EU 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 whole⁴⁴ because there is a *dependency relationship* between the TCN and a EU citizen.

Court underlined that this *dependency relationship* can force the EU citizen to leave the territory of the EU as a whole. So the national court should also take into account whether the third country national step-fathers are on whom the EU children are “*legally, financially or emotionally dependent*.”⁴⁵

Moreover the Court finally concluded that Article 20 TFEU does not preclude Member States from refusing to grant a residence permit to a TCN who resides with his legally resident TCN spouse, who is the mother of an EU citizen child from her previous marriage, if there is no violation of *the child’s best interests*.⁴⁶

According to the Court the *principle of the child’s best interest*⁴⁷ is to be entailed in the notion of dependency, if it exists, the national measures could deprive the EU citizen of the enjoyment of citizenship rights.⁴⁸

Nevertheless in the case is there was no (legal, financial or emotional) dependency between Finnish children and their TCN stepfathers,⁴⁹ so refusing to grant a residence permit to a TCN does not entail, for the minor EU citizen concerned, the denial of the genuine enjoyment of the substance of his/her EU citizenship rights.⁵⁰ Consequently the non-existence of dependency between EU citizen children and their TCN stepfathers places the situation outside the scope of Article 20 TFEU.⁵¹

In the previous cases, the Court did not offer a precise explanation of the meaning of this dependency. In the Joined O, S & L case the Court described the idea of dependency as legal, financial or emotional.⁵² If it exists, it takes the situation under the EU law, into the scope of the Article 20 TFEU. So, after this case, we could conclude that according to the Court the key element is the dependency.

⁴² Joined O, S & L case, para. 43.

⁴³ Joined O, S & L case, paras. 44–45.

⁴⁴ Joined O, S & L case, paras. 47.

⁴⁵ Joined O, S & L case, paras. 56.

⁴⁶ Joined O, S & L case, para. 22.

⁴⁷ The principle of the child’s best interest as an international children’s rights has been codified in Article 24(2) of the Charter of Fundamental Rights of the European Union. This right are mentioned in Directive 2003/86/EC on the right to family reunification too.

⁴⁸ Joined O, S & L case, para. 52.

⁴⁹ Joined O, S & L case, para. 56.

⁵⁰ Joined O, S & L case, para. 58.

⁵¹ Joined O, S & L case, para. 57.

⁵² Joined O, S & L case, para. 56.

In the following cases the Court tried to determine the criteriums of dependency, especially in relation of minors.

II.4. *Zambrano-doctrine* reloaded

In *Rendon Marín*⁵³ and *CS* case⁵⁴ the Court analysed again a clearly internal situation in light of the family reunification right of TCN's.

Both cases considered the effect of a criminal record of a TCN parent on his or her derived residence right under Article 20 TFEU.

The cases concerned the question whether Article 20 TFEU precludes a Member State from expelling from its territory a TCN, due to his/her criminal record, where the TCN was the parent and the primary carer of an EU citizen child.

The *CS* case concerned a Moroccan national, who resided in the UK together with her British national son. In 2012, she was convicted of a criminal offence and given a prison sentence of 12 months. Following her conviction her application for asylum was denied.⁵⁵

The facts in *Rendón Marín* case were very similar to the ones in *CS* and essentially raise the same question. *Rendón Marín* concerned a Colombian national father, who lived in Spain together with his Spanish national son and his Polish national daughter. His application for a residence permit was rejected due to his criminal record.⁵⁶

The Court was asked under which circumstances the expulsion of a TCN caretaker of a EU citizen could be permitted under EU law. So, whether a TCN parent of a EU citizen has a derived right of residence in the home Member State under Article 20 TFEU or this right can be limited on grounds of public policy or public security.⁵⁷

In both *CS* and *Rendón Marín* cases, the Court found that the applicants' circumstances fell within the scope of EU law. For this reason, using the *Zambrano-doctrine* on the situations in *Rendon Marín* and *CS* is justifiable.

In the cases there was a *relationship of dependency* between the TCN and the EU citizen children, unlike *O, S & L* case.⁵⁸ Consequently, by refusing the right of residence to Mr. Rendon Marín and to Ms. CS their EU citizen children would most likely have to leave the EU and would therefore be deprived of the genuine enjoyment of the substance of their EU citizenship rights.

So, the Court reassert in his decision that Article 20 TFEU "precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens"⁵⁹ The refusal to grant residence to the applicants third-country national, to whose sole care those children have

⁵³ C-165/14 *Rendón Marín v Administración del Estado*, [2016] E.C.R. I-000.

⁵⁴ C-304/14 *Secretary of State for the Home Department v CS*, [2016] E.C.R. I-000.

⁵⁵ C-304/14 *CS* case, paras. 12–16.

⁵⁶ C-165/14 *Rendón Marín* case, paras. 14–18.

⁵⁷ C-304/14 *CS* case, para. 20.

⁵⁸ HAAG, Maria: *CS and Rendón Marín. Union Citizens and their Third-Country National Parents – A Resurgence of the Ruiz Zambrano Ruling*. *The European Law Blog*, 27.09.2016. <http://eulawanalysis.blogspot.com/2016/09/cs-and-rendon-Marín-union-citizens-and.html> (31.10.2018.)

⁵⁹ C-165/14 *Rendón Marín* case, para. 26.

been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that citizenship rights, in particular the right of residence.⁶⁰

This means that

*“a right of residence must be granted to a third-country national who is a family member of [a minor EU citizen] since the effectiveness of citizenship of the EU would otherwise be undermined, if, as a consequence of refusal of such a right that citizen would be obliged in practice to leave the territory of the European Union as whole”*⁶¹

So, Rendón Marín and CS thus had a derived right of residence under Article 20 TFEU in their children’s home Member State.

Nevertheless, the Court held that, as a general rule, such a derived residence right can be derogated for reasons of public policy or public security, but the decision needs to take account of *the right to family life and the child’s best interest*.⁶²

The *concept of public policy* must be interpreted strictly,⁶³ the refusing decision could found only on “the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security”.⁶⁴ However a decision cannot be made “automatically on the basis solely of the criminal record of the person concerned.”⁶⁵

*“The assessment must take into account the personal conduct of the individual concerned, the length and legality of his residency on the territory of the Member State, the nature and gravity of the offence committed, the extent to which the person is currently a danger to society, the age of any children at issue and their state of health, as well as their economic and family situation.”*⁶⁶

The Court certainly does not exclude the possibility that “in exceptional circumstances”⁶⁷ a criminal and dangerous parent who poses a threat to a Member State’s public policy or public security could be deported. Even if this means that his or her EU citizen children are forced to leave EU territory and thus deprived of the genuine enjoyment of their EU citizenship rights. Nevertheless, the Court advice a very strict test before such a decision can be taken.⁶⁸

II.5. The criteriums of dependency-the *Chavez-Vilchez case*

In the next case the Court analysed the *Zambrano-protection* in a situation where one of the parents was a third country national and the other parent an EU citizen and tried to clear the notion of dependency.

⁶⁰ C-165/14 Rendón Marín case, para. 78.

⁶¹ C-304/14 CS case, para. 29., C-165/14 Rendón Marín case, para. 74.

⁶² C-304/14 CS case, paras. 48–49.

⁶³ C-304/14 CS case, para. 37., C-165/14 Rendón Marín case, para. 91.

⁶⁴ C-304/14 CS case, para. 40., C-165/14 Rendón Marín case, para. 92.

⁶⁵ C-304/14 CS case, para. 41.

⁶⁶ C-304/14 CS case, para. 42.

⁶⁷ C-304/14 CS case, para. 50.

⁶⁸ HAAG, 2016.

In *Chavez-Vilchez case*⁶⁹ the case concerned TCN mothers of one or more Dutch children whose fathers were also Dutch. All the children lived mainly or exclusively with their mothers and the EU citizen children had never exercised their free movement rights, so, the situations were purely internal.

In all cases the application of child benefits was denied on the basis that the mother did not have lawful resident status. The Dutch court referred a preliminary ruling to the Court in order to ascertain whether the applicants could derive a right of residence under EU law. If that were the case, the Dutch court held, the applicants, as foreign nationals legally residing in the Netherlands, would have the same access to social assistance as Dutch nationals.⁷⁰

It was also novelty that this is the first case that has come before the Court on the issue of Article 20 TFEU and the rights to social benefits. Interesting question whether the Court will ensure other citizenship right to TCN family member due the family reunification right in the future.

In light of *Zambrano-doctrine* the real question in the case was that could the TCN mothers acquire the right of residence based on Article 20 TFEU, if the Dutch national fathers might, in fact, be able to care for the children too.⁷¹

The right of residence in the EU of an EU citizen child can be violated even if the child is theoretically not forced to leave the EU due to the fact that one parent is entitled to stay, but still because of the relationship to other TCN parent.

Whether or not the child would have to leave the EU with the TCN parent, depends on who *the primary caretaker* of the child is and whether there is in fact a *relationship of dependency* between the child and the TCN.

It is also a relevant consideration that the other parent is an EU citizen who is willing and able to assume the care for the child but is not sufficient to determine whether dependency exists.⁷²

In this respect the Court should consider the child's legal, financial and/or emotional dependency on the parent according to the previous cases.⁷³ This is a relevant factor, but the Court found in *Chavez-Vilchez case*, that should be considered other individual element too, as the right to *respect for family life* and the *best interests of the child*.

Relevant circumstances are "*the age of the child, the child's physical and emotional development, [...] his [or her] emotional ties [to both parents], and the risks which separation from the [TCN parent] might entail for the child's equilibrium.*"⁷⁴

These are the criteriums of dependency, which must take into account to decide whether a derived right of residence exists. If between the TCN parent and the EU citizen child such a „*relationship of dependency*” exists the child would be compelled to leave the EU if the TCN parent was refused the right of residence.⁷⁵ In other words, if depriving the TCN parent of the right of residence would be against the child's best interests, due to the child's dependency on the TCN parent. Consequently, the TCN parent has a derived right

⁶⁹ C-133/15 *Chavez-Vilchez and Others* [2017] 3 CMLR 35. 296–297.

⁷⁰ C-133/15 *Chavez-Vilchez case*, paras. 20–32.

⁷¹ C-133/15 *Chavez-Vilchez case*, para. 39.

⁷² C-133/15 *Chavez-Vilchez case*, para. 71.

⁷³ C-133/15 *Chavez-Vilchez case*, para. 59.

⁷⁴ C-133/15 *Chavez-Vilchez case*, para. 72.

⁷⁵ C-133/15 *Chavez-Vilchez case*, para. 72.

of residence in the EU, based on the Article 20 TFEU. *Chávez-Vilchez case* confirms that the protection under Article 20 TFEU is safeguarding the best interests of the EU child.⁷⁶

With this decision the Court clarified how to determine whether the case is in the scope of the *Zambrano-protection*.⁷⁷

The Court explicitly cleared that the key element of this is the dependency, and the extent of the dependency.

So, the notion of dependency and the principle of the child's best interests add anything new to the *Zambrano-doctrine*.⁷⁸

II.6. The *K.A. and others case* – The renewed *Zambrano-doctrine*

The most recent in this line of cases is *K.A. and others case*.⁷⁹ The case concerns seven TCNs who have been subject to orders to leave Belgium. Having received the orders to leave and entry bans, all seven TCNs applied for residence permits for the purpose of family reunification with Belgian nationals who had never exercised their free movement rights. According to Belgian administrative practice, if a TCN was issued with a valid and final ban on entry of at least three years, his/her subsequent application for family reunification with an EU citizen would not be examined at all.⁸⁰

Firstly, the Court recalls that Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of citizenship rights.⁸¹

However this overriding nature of the *Zambrano-protection* exists only if there is a *relationship of dependency* between the EU citizen and his TCN family member. If there exists a *relationship of dependency* between the TCN and the EU citizen of such a nature that it would lead to the EU citizen being compelled to leave the territory of the European Union, the refusal to grant a right of residence to a TCN can undermine the effectiveness of the EU citizen.⁸²

Up to this point of the judgment the Court reassert his finding in connection of the criteriums of dependency⁸³, but moreover takes a revolutionary statement too.

Court in his decision draws a clear line between situations involving minor and adult EU citizens by determination of dependency.⁸⁴

According to the Court, in cases where the EU citizen is an *adult*, who could live independent apart from the members of their family, dependency exists only in exceptional circumstances, where the separation of the EU citizen and the TCN family member is not possible.⁸⁵

⁷⁶ HAAG, 2017.

⁷⁷ GOLDNER LANG, 2018.

⁷⁸ KLAASSEN, Mark: The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter: *European Journal of Migration and Law*, 19 (2017) 2. 191–218.

⁷⁹ C-82/16 KA and others v Belgium Judgment of 8 May 2018 (Unreported).

⁸⁰ C-82/16 K.A and others case, para. 40.

⁸¹ C-82/16 K.A and others case, para. 49.

⁸² PROGIN-THEUERKAUF, Sarah: K.A and others – The Zambrano Story Continues. *The European Law Blog*, 22.05.2018. <https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues> (30.10.2018.)

⁸³ C-133/15 Chavez-Vilchez case, para. 72.

⁸⁴ C-82/16 K.A. and others case, para. 76.

⁸⁵ C-82/16 K.A. and others case, para. 76.

Even though the Court does not give examples, this could be the situations where an adult EU citizen, – for reasons of a physical or psychological nature, – could not live without the adult TCN family member.⁸⁶

When the EU citizen is a *minor*, it is important to determine in each case which parent is the primary carer and whether there is a *relationship of dependency* between the child and the TCN parent.⁸⁷ Competent authorities must take into account the right to *respect for family life* and the *best interests of the child*.⁸⁸

The Court repeats its statement of *Chavez-Vilchez case*, that the relationship of dependency “*must be based on consideration, in the best interest of the child, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the TCN parent might entail for that child’s equilibrium.*”⁸⁹

Where separation is possible, but not desirable, as it is contrary to the best interests of the child, due to the child’s dependency on the TCN parent.⁹⁰

So if the dependency in a determined extent exists it could justify a derived right of residence under Article 20 of TFEU.⁹¹

The effectiveness of Union citizenship would be compromised if an application for residence for the purposes of family reunification were to be automatically rejected where such a relationship of dependency between a EU citizen and a third-country national family member came into being. Therefore, Member States authorities cannot refuse to examine an application for family reunification solely on the ground that the TCN is subject of an entry ban. It is their duty to examine the application and to assess whether there is a relationship of dependency of such a nature.⁹²

We could conclude that *K.A. and others case* is an important advancement in family reunification cases. The Court determined in his judgment the extend of the application of Article 20 TFEU in internal situations.⁹³

The criteriums of dependency, determined by the Court, enables the application of *Zambrano-protection* to another group of internal situations where a minor EU citizen would, in practice, have to leave the EU territory in order to stay together with his/her parent on whom he/she is emotionally dependent. However, the criterion of dependency gets a different reading in the context of adult EU citizens and minors.⁹⁴

3. Conclusion

After the ground-breaking decision in *Zambrano case*, the Court restricted the so-called *Zambrano-protection* in several subsequent decisions on this issue.

⁸⁶ GOLDNER LANG, 2018.

⁸⁷ C-82/16 K.A. and others case, para. 71.

⁸⁸ C-82/16 K.A. and others case, para. 71.

⁸⁹ C-82/16 K.A. and others case, para. 76.

⁹⁰ C-82/16 K.A. and others case paras. 72 and 76.

⁹¹ C-82/16 K.A. and others case, para. 52.

⁹² C-82/16 K.A. and others case, para. 62.

⁹³ GOLDNER LANG, 2018.

⁹⁴ GOLDNER LANG, 2018.

The hope that *Zambrano case* had created a EU citizenship beyond free movement, which protecting fundamental rights (especially family reunification rights), was quickly pronounced dead.

In the current political climate in Europe it is not surprising that to ensure equal treatment for all EU citizens and the harmonisation of family reunification rules is not on the agenda. As long as the Member States do not take their responsibility in this field, the Court is obliged to work with the imperfect *Zambrano-doctrine* with all its consequences of legal uncertainty.

Since 2016, however, a number of decisions have revived this case-law and proven that the protection under Article 20 TFEU right is quite powerful.⁹⁵

EU citizens could invoke Article 20 TFEU against their Member State of nationality, even if they had never previously made use of their free movement rights.⁹⁶ Member States were precluded from denying a residence right to TCN carers of national minors.

So, the Court extending the scope of application of EU citizenship rules to certain purely internal situations too, and unavoidably implies a further harmonisation of national immigration law.

However these cases made it very clear too that protection under Article 20 TFEU is only applicable to a very small number of people in “very specific situations”.⁹⁷ Only if there exists a *relationship of dependency* between the TCN and the EU citizen of such a nature, fall the case into the scope of *Zambrano-doctrine*.

It must be assessed on a case-by-case basis whether there is a *relationship of dependency* with the EU citizen, which may compel the EU citizen to leave the territory of the EU to accompany the TCN and therefore deprive him or her of the famous “genuine enjoyment of the substance of rights conferred by the status as EU citizen”.⁹⁸

It is important to determine in each case which parent is the primary carer and whether the criteriums of dependency between the child and the TCN parent exist.⁹⁹ Competent authorities must take into account the right to respect for family life in conjunction with the obligation to take into consideration the best interests of the child.¹⁰⁰

In these judgments after *Zambrano case* the Court made an attempt to enhance the EU citizenship status and extend the EU law on third country nationals too, but with restriction in order to protect the national sovereignty of Member States in field of immigration.¹⁰¹

So a majority of static EU residents remains subject to the case by case approach after *Zambrano-doctrine* too.¹⁰² The different options for family reunification depending upon whether a person manages to find a link with the scope of application of EU law and, in particular, the legal uncertainty about the exact limits of the Court’s ‘cross-border’ and ‘genuine enjoyment’ tests, which reinforce the instability of *Zambrano-protection*.

⁹⁵ HAAG, 2017.

⁹⁶ HAAG, 2017.

⁹⁷ Rendón Marín case, para. 74; CS case, para. 29., HAAG, 2016.

⁹⁸ GYENEY Laura: The Right of Residence of Third Country Spouses who Became Victims of Domestic Violence in the Scope of Application of the Free Movement Directive – Legal Analysis of the NA Case. *Pécs Journal of International and European Law*, 2018/1.5.

⁹⁹ C-133/15 K.A. and others case, para. 71.

¹⁰⁰ C-133/15 K.A. and others case, para. 71.

¹⁰¹ LENAERTS, 2015. 3.

¹⁰² KROEZE, 2014. 13.

But keeping the family together – even though this is still not an acceptable reason by itself – is in the child’s best interests, then it would be a valid reason for a derived right of residence of a TCN family member based on Article 20 TFEU. The protection under Article 20 TFEU and the genuine enjoyment rule could ensure family reunification rights to the third country parents of EU citizens in a purely member state situation and so other citizenship rights in the European Union too.

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