Conditional Citizenship of the Union?

Family migration for EU citizens and the outdated notion of “internal affairs”

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In the middle of the forum of Messana a Roman citizen, O judges, was beaten with rods; while in the mean time no groan was heard, no other expression was heard from that wretched man, amid all his pain, and between the sound of the blows, except these words, "I am a citizen of Rome." He fancied that by this one statement of his citizenship be could ward off all blows, and remove all torture from his person.

Marcus Tullius Cicero (106 B.C. – 43 B.C.)
Transl. Charles Duke Yonge (1812 – 1891)

Foreword

This master's thesis has been written with interest and a growing enthusiasm. Indeed, having completed it, I feel I would only like to go deeper into everything still, answering the questions which, by necessity, I have had to leave unanswered here. Most importantly, the writing of this thesis has prompted me to start thinking about citizenship in a more general and abstract manner. What is it? What does it mean to us and what *should* any kind of citizenship mean to people before properly calling itself citizenship?

With Euro-skepticism growing in many Western-European countries, it becomes increasingly less obvious and less proper to forgive the Union its incompleteness because of it being perpetually in progress. Yes, the European Union is still in progress, and that fact is not likely to alter anytime soon. On the other hand, as the political weight is gradually replaced to the centralized institutions of the Union (financial constraints, perhaps economic affairs), it is no more than logical that the subjects of EU law would like to see something in return. To be able to go on holiday to France without a visa is one thing, but a Union aspiring to integrate the politics and the economies of its member states must for good reasons give more than that, especially when it either mockingly or aspiringly calls its subjects *citizens*.

Still, in spite of all such general remarks, this work is strictly legal in nature, and I have not tried to write a philosophical piece on citizenship or European integration as such. I have spent my time, rather, looking into the detailed texts of various legal documents, some of which drafted in incomplete or wholly unclear terms. I have emptied gallons of Groningen University's excellent coffee while poking around the Court of Justice's reports dating back to the 1960's and 1970's. Also, while already working with Everaert Immigration Lawyers, I have fiercely debated many topical cases with colleagues enthusiastically joining the discussion. European Union law, in sum, never lets go. The reader is therefore warned well in advance of its binding nature.

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Arend van Rosmalen

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Introduction – Citizenship and the doctrine of the "wholly internal situation"

What does it mean to be a citizen of Europe? This question, which is of interest to some five hundred million individuals, still remains notoriously difficult to answer, as citizenship of the European Union has often been defined and redefined and, consequently, no clear definition exists for it. It could potentially mean very much to many, but it could also merely be symbolism without actual substance. When examining the legal nature and the political or sociological impact of EU citizenship closely – which is, in part, the aim of this work – the question may very well arise in the end whether, in fact, it even is *citizenship* at all. For what is citizenship really? Surely, the present work does not intend to answer a question as broad as that, although it is important to keep in mind that, whatever citizenship is, it can only be something we ourselves define and give meaning. EU citizenship, accordingly, is only what the European society makes it, although philosophies on citizenship generally may obviously help in guiding this process. In particular, there are two schools of theory in contemporary thinking on citizenship, which may be of some help.[1] On the one hand, republican thinkers emphasize citizens' taking part in public office, resulting in a *democratic* and distinctly *political* meaning of citizenship Liberal theory, on the other hand, emphasizes *protection under the law* as an asset fundamentally defining citizenship, thereby approaching the status from a *legal* angle instead. The two distinctive theories, in the end, need not really oppose each other as, indeed, citizenship may well be *experienced* only fully if it combines a political sense of belonging to a certain society with a degree of legal protection assuring individuals "their" society really respects them as its members. To be a citizen, whatever that is, should after all in any case imply a feeling of inclusion.

The question of defining citizenship and, in particular, the ephemeral citizenship of the European Union thus forms an undeniable part of this work; yet, its aim is explicitly legal rather than philosophical and, to the questions it ultimately intends to address, the quality of EU citizenship in a sense may be said to be only incidental. The present work, namely, aims to address the status of EU citizenship particularly insofar as that status has gradually become a guiding notion in defining EU citizens' rights to live a family life in Europe (i.e. residence rights for family members), which is a question no philosopher would probably care to address. To a philosopher's eye, a legal question such as citizens' access to particular fundamental rights (including family life) will be only ancillary to the broader and more fundamental definition of the substance of their citizenship as such. To the lawyer, however, the order of importance is rather reversed; from a legal perspective one simply inquires into what is possible, what is not possible and what may perhaps be made possible in a foreseeable way. Admittedly, in doing so one cannot simply ignore all philosophical attention to EU citizenship, but the quality of that citizenship need only be addressed insofar as legal consequences might flow from it. If all agree that EU citizenship should mean little, the scope and substance of any rights appertaining to it may accordingly be expected to be small; yet, should citizenship be held in some esteem, perhaps even aspiring to become a status

[1] See, e.g. T.H. Marshall, *Citizenship and social class*. Cambridge: Cambridge University Press 1950; B. Ackerman, "Neo-federalism?" *in*: J. Elster & R. Slagstad, *Constitutionalism and democracy*, Cambridge: Cambridge University Press 1988 p. 153 – 194; M. Walzer, "Citizenship", *in*: T. Ball, J. Farr & R.L. Hanson, *Political innovation and conceptual change*, Cambridge: Cambridge University Press 1989 p. 211 – 220; J. Pocock, "The ideal of citizenship since classical times", *in*: R. Beiner, *Theorizing citizenship*, Albany: State University of New York Press 1995 p. 29 – 53; J. Habermas, *The inclusion of the other*, Cambridge: MIT Press 1998

fundamental to the citizens' sense of inclusion – or even identity, then the legal rights appertaining to that status must surely be construed more extensively as well. Citizenship, as said, is what we make it.

So how does the quality of EU citizenship impact on EU citizens' access to claim residence rights for their family members in the European Union? This work addresses that question in three different chapters, because the development of EU law more or less requires it to do so. There is no single European regulation or unequivocal constitutional basis granting clear-cut qualifications under which family reunification for EU citizens is allowed.[2] In fact, the citizens of the European Union paradoxically already held some important rights as to family reunification long before they actually became *citizens*. From 1969 onwards, when the transitional period regarding the old EEC Treaty came to an end, the nationals of what used to be the member states of the European Economic Community have continuously been entitled to travel abroad for economic purposes, and also to be accompanied by certain of their family members while doing so. As a consequence, the application of EU law to the family rights of EU nationals has in the past depended heavily on the particular member state in which those citizens resided, or in which they worked, or in which they, in fact, did anything for which the Economic Community had been established.

This logic may be explained with reference to the prominent *Morson and Jhanjan* judgment, which the Court of Justice delivered on the 27th of October 1982.[3] The facts were as follows. Mrs. Morson and Mrs. Jhanjan, who were both nationals of Surinam, had applied to the Dutch immigration authorities for a residence permit allowing them to reside in the Netherlands with their Dutch daughter and son respectively.[4] Mrs. Morson and Mrs. Jhanjan argued that EEC Regulation 1612/68 granted residence rights to certain members of a worker's family, including dependent relatives in the ascending line, when that worker was a national of one member state and was employed within the territory of another member state.[5] Although Regulation 1612/68, thus, was evidently not applicable to the case of Mrs. Morson and Mrs. Jhanjan – their children were employed in the same state of which they were nationals – the mothers relied on the general prohibition of discrimination (on the ground of nationality) in order to make it applicable to them.[6]

The Court refused this, giving a clear and quite reasonable argument. It held, firstly, that the various provisions on which the applicants sought to rely "[could] be invoked only where the case in question [came] within the area to which Community law [applied], which in this case [was] that concerned with freedom of movement of workers within the Community".[7] Secondly, it held that this conclusion emerged not only from the wording of the relevant articles, but also accorded with their purpose, which was "to assist in the abolition of all obstacles to the establishment of a common market in which the nationals of the member states [could] move freely within the territory of those states in order to pursue their economic activities".[8] Because of this reasoning, the Treaty provisions on freedom of movement for workers and the rules adopted to implement them could not be applied to cases

[2] For third-country nationals legally resident in the European Union, such criteria have been laid down in Directive 2003/86, but an equivalent for EU citizens exists only in part in Directive 2004/38. The aim of the latter directive, however, as will be expediently explained, is importantly different from that of the former.

[3] ECJ Joined cases 35/82 and 36/82, *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherlands*, [27-10-1982] ECR 1982 p. 03723

[4] Ibid. par. 2

[5] Ibid. par. 4

[6] Ibid.

[7] Ibid. par. 16

[8] Ibid.

which had no factor linking them with any of the situations governed by Community law.[9] In other words: while EU workers crossing borders have been protected under EU law – including special access to residence rights for family members – since the end of the transitional period, the same cannot be said to be the case for EU citizens simply residing in their homes in Europe. Their situations are "wholly internal" to the sphere of only a single member state.

For a body of law which had been put in place merely in order to stimulate free trade and open borders as regards factors of production, the outcome of *Morson and Jhanjan* was indeed reasonable enough; yet, can that same logic be retained even now, while the European Union has grown almost to maturity and even – pretentiously or prophetically – calls its members *citizens*? It cannot be denied the European Union is much more today than its predecessor the European Economic Community used to be in 1982. Europe now pays with a single currency, difficult as that may have turned out to be. Heads of government proclaim that "a political union" or at least far-reaching monetary centralization would be required in order for the EU to be able to continue facing the pressures of globalization. Europe directs us more and more, not only in matters of trade, but indeed in matters governing our every-day lives. Does it then still make sense to define citizens' access to certain rights with reference to intra-Community trade? It seems neither republican nor liberal theorists have ever seriously examined such an approach towards citizenship, but perhaps the European Union will prove to be able to enlighten our philosophical minds.

In the meantime, the present work hopes to comprise a substantial if not exhaustive research as to when EU citizens are able, under EU law, to claim residence rights for their family members. As the law now stands, the distinction between home and host states remains of importance for this, although exceptions – and quite important ones, too – have over the years been made. Chapter 1 addresses the most important instrument of secondary EU law – which is Directive 2004/38, also addressed in this work as the Citizenship Directive. The second chapter then proceeds to examine what questions relating to residence rights for family members have been answered on the basis of primary free-movement law. Thirdly, the final chapter then proceeds to address what weight the notion of EU *citizenship*, introduced in 1993, has been able to put in the balance. It will be seen how continued emphasis on cross-border movement, combined with the inevitable growth of both the substance and the scope of EU law, would attain results neither logical nor helpful for a broad understanding of EU citizenship. The doctrine of the "wholly internal situation", in other words, proves not to be reconcilable with the Union's stated objective of making Europe's citizens feel European. Therefore, this work concludes the days of that doctrine, voiced in *Morson and Jhanjan*, are indeed numbered, as the Court of Justice will in the end favour the interests of the EU over the interests of its individual member states.

[9] Ibid.

Chapter 1 – Family migration derived from Directive 2004/38

Introduction

It is safe to say that the "four freedoms" form the epicenter of European Union law. Indeed, while the EU legislator has over the years broadened its field of impact on the national domain considerably, there is no achievement which at present is so complete – or so nearing completion – as the body comprising primary law, supporting secondary law, and extensive jurisprudence by the Court of Justice, all aimed essentially at the abolition of internal frontiers. Workers have benefited since the very beginnings of European integration from the fundamental freedom to move, to reside and to work freely on the other member states' territories; their family members have naturally been entitled to accompany them there. The same is true for service providers and the self-employed; while their freedom of movement has originally been granted on economic reasons – the "cross-border mobility of the factors of production"; their families had to be allowed migration rights as well, since individual people generally do not leave behind their families for something as abstract as an overall economic advantage. Workers are still humans, in other words. It is against this background that the first two chapters of this work trace what possibilities of family reunification the EU law on classic "free movement" may grant individual families as development stands today.

As a starting point it would perhaps seem logical to start with the EU treaties themselves and then proceed with the relevant secondary legislation afterwards; yet, in practice, the most important directive in this field – Directive 2004/38 – serves as a tool by which most cases are already properly resolved, so that the primary law effectively functions only as a source of law of second resort. For this reason, this first chapter rather addresses what family migration rights can be derived from Directive 2004/38 (also addressed as the Citizenship Directive), while the second chapter addresses what remaining rights may be directly derived from the free-movement provisions of the Treaty on the Functioning of the European Union. Of course, it must be readily admitted the two sources of law interact widely and that therefore it is not possible to describe either what effects the Citizenship Directive has without reference to the Court of Justice's jurisprudence on the primary law on free movement and vice versa; yet, for a good understanding it is tried to keep these two instruments apart as much as possible.

Although Directive 2004/38 undeniably codifies what was firstly developed under the Treaty's (economically inspired) provisions on the free movement of workers, the freedom to provide and receive services and the freedom of establishment for undertakings and the self-employed, its heading, its preambles and its stated aims do not mention either workers, service providers or self-employed – in other words: economically productive – persons; the directive rather addresses citizens of the Union. One might expect, therefore, that the directive would better be addressed together with the Court's case-law on citizenship of the Union rather than with the jurisprudence on classic free-movement; indeed, it must be admitted this would very well have been possible. The directive, however, although it generally – and at the time perhaps even ambitiously – addresses all Union citizens in equal measure, nevertheless forms the contemporary instrument which has codified foremost the older free-movement law, of which citizenship at present still only forms an extension. As it is thus not possible to start explaining the EU's migration rights with the provisions on EU citizenship without having first discussed the extensive free-movement law, and sinc

Directive 2004/38 does form the instrument by which most issues will in fact be resolved, it is expedient to start there.
As with many EU directives, Directive 2004/38 has an explicitly limited scope of application; it grants certain travelling and residence rights, but only to the beneficiaries it proclaims itself. Thus, this chapter first goes into the question who actually may benefit from the provisions of the Citizenship Directive. In this regard, it will be established the directive primarily addresses EU citizens moving to or residing in another member state, so that third country nationals may only benefit indirectly, namely through a family connection to an EU citizen having moved or residing abroad. Third country nationals wishing to unite with third country nationals are not covered by Directive 2004/38, nor are third country nationals wishing to unite with an EU citizen who has not moved to and is not residing in another member state; the former category is covered by Directive 2003/107, which is the subject of Chapter 3, while the latter may presently only derive family reunification rights from national law and, in very particular circumstances, from the primary law on EU citizenship.
Having established that particular persons are beneficiaries in the sense of the Citizenship Directive, the next step taken in this chapter is to ascertain what residence rights this directive grants and under what conditions. Three stages are discerned here: a short period of unconditional residence (up to three months), a medium-term residence rights (up to five years) which is explicitly conditional, and a long-term, permanent right of residence (from five years onward) which, in order to grant legal certainty to those concerned, finally loses its conditional character.

1.1 The beneficiaries

The Citizenship Directive's central aim is certainly not to award rights of family reunification or to declare under which circumstances citizens of the European Union are to be entitled to the fundamental right to live as a family; rather, in order for Union citizens to be able to exercise their right to move and reside within the territory of all the member states under objective conditions of freedom and dignity, as the preamble puts it, they should be able to do so in the company of their family members.[10] The Directive's origins in free movement law are shining through clearly: the right of a family life which can be derived from it is considered to be only ancillary to the greater good of free movement – albeit reference is made to freedom and dignity. It is generally a good thing to keep this in mind when looking at the conditions Directive 2004/38 imposes on rights of family reunification.
Article 3 of the Citizenship Directive names its two categories of beneficiaries: the citizen of the Union on the one hand, when moving to or residing in a member state other than that of which he is a national, and on the other hand his family members as defined in article 2 when they accompany or join him.[11] It is immediately clear that these two categories are granted a fundamentally different status on two accounts. In the first place, the family members can only be a beneficiary of the directive if their EU citizen relatives are themselves beneficiaries in the first place – that is if they move to or reside in a member state other than that of which they are a national. Secondly, any residence rights the Citizenship Directive grants to family members of EU citizens are bound up with the place of residence of those EU citizens – family members, after all, have to keep accompanying the EU citizen and cannot travel across Europe independently. In family reunification claims, the latter condition will almost never be a problem – the unification of the family being the whole purpose of such actions – but the

[10] Recital 5 of the preamble to Directive 2004/38
[11] See: H. Oosterom-Staples, "Toelating en verblijf van EU-burgers en hun familieleden volgens de verblijfsrichtlijn (1)", *Migrantenrecht*, vol. 22 (2007), iss. 3 p. 89

first condition, of the EU citizen himself being a beneficiary, may on the other hand impose some difficulty, particularly if his family members are third country nationals.

1.1.1 The EU citizen

EU citizenship comes with the nationality of at least one member state.[12] Thus, it is the case that the EU itself does not in principle decide who its citizens actually are – the member states do this according to their nationality laws. Returning to article 3 of the Citizenship Directive, it is of interest to see how it differentiates along the fact of a particular member state having granted its nationality – and thereby the citizenship of the Union. The Directive, after all, is of benefit only to the EU citizen who "moves to or resides in a member state *other than that of which he is a national*". Of course, this differentiation, strictly speaking, is of no concern to the EU citizen himself, who is, after all, obviously entitled to reside on the territory of any state whose nationality he holds. Considering, however, how the rights of family members are dependent on the EU citizen himself being a beneficiary of the Directive, it becomes interesting to see what consequences the condition of movement or residence abroad entails.

Multiple EU nationalities

In the first place, there is an apparent ambiguity in the wordings of article 3, which could be read to mean two things. Article 3, namely, states the Citizenship Directive applies to EU citizens who "move to or reside in a member state *other than the one of which they are a national*". The implied presumption that EU citizens have only one "state of which they are a national", although perhaps valid as a general rule, nevertheless provides for important exceptions. Should a person holding two EU nationalities be deemed a beneficiary of Directive 2004/38 on both their territories, simply because he or she resides in a member state "other than one of which he or she is (also) a national" or should such a person not be deemed a beneficiary in either state for the simple fact he or she resides in a member state of nationality and thereby not in an "other" member state? And how about travelling between one's two (or three) member states of nationality; do the apparently equal alternatives of "moving to" and "residing in" a particular state's territory trigger the directive's applicability in equal measure, or would an express "move" (as opposed to mere "residence") in fact be required for this?

Addressing the second question first, an important ruling was given by the Court of Justice in *Zhu and Chen*, even though admittedly this ruling concerned the Citizenship Directive's predecessor, Directive 90/364.[13] This currently obsolete directive, in its article 1, provided that, under certain conditions, the member states should grant "the right of residence" to "nationals of member states who [did] not enjoy this right under other provisions of Community law and to members of their families (…)".[14] Although, strictly speaking, the alternative requirements of "moving to" or "residing in" the territory of "another member state" have thus been newly introduced with the adoption of the present Citizenship Directive, nevertheless, the idea that family members could be accepted under its predecessor also in an EU citizen's home state, simply because of being tied to a "national of a member

[12] Art. 18 TFEU

[13] ECJ Case C200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925

[14] Art. 1 of Directive 90/364

state", has never been expressed in jurisprudence.[15] It is thus safe to presume that the Court of Justice, in its ruling in *Zhu and Chen*, departed from a premise which is at least similar to that which Directive 2004/38 imposes as to its applicability, namely that the residence rights which family members of EU citizens derive from both the primary and secondary law of the Union, must somehow be coupled with their EU relatives' right to move or to reside abroad.
What were the facts? A Chinese couple who were confronted with birth control regulations in the People's Republic of China when expecting their second child, decided to travel to Belfast in Northern Ireland in order that the child would be born there.[16] As A-G Tizzano remarked, "the choice of the place of birth was no accident" since, under specific conditions, "anyone born within the territory of the island of Ireland, even outside the political boundaries of Ireland (Éire), acquire[d] Irish nationality".[17] According to Tizzano, it was specifically because of this particular feature of Irish law, brought to the couple's attention by their lawyers, that Mr. and Mrs. Chen had decided to arrange for their second child to be born in Belfast; they explicitly intended to take advantage of the child's EU nationality in order to ensure that she and her mother would be able to establish themselves in the United Kingdom.[18]
To make a long story short, it worked.[19] What is interesting, however, particularly with regard to the applicability of Directive 2004/38, is that the child explicitly had not *moved* to another member state; the A-G's opinion and the Court's ruling do emphasize that the father, being a Chinese businessman, did travel "frequently" to "various member states", but this father was no EU citizen. The child, as the only EU citizen being the spindle in the whole design, had been born in the UK and had remained there.[20] The fact that, thus, the parents, as "dependent" family members (the reversion of the dependency relationship is a wholly different discussion), could indeed derive residence rights from the mere *residence* of their child on the territory of a member state "other than the one of which it was a national", can certainly be said to tell us something about the equality of the Citizenship Directive's conditions of either "moving" or "residing" on particular states' territories.
In its more recent ruling in *McCarthy*, the Court of Justice elaborated further on this point.[21] It all began on the 15th of November 2002, when Mrs. Shirley McCarthy, a woman of dual Irish and English nationality, married "a Jamaican national who [lacked] leave to remain in the United Kingdom" under domestic immigration law.[22] The fact of her husband lacking leave to remain presumably was of some importance for further developments, since Mrs. McCarthy would probably not have applied to the British authorities for a residence permit as an EU citizen – her residence in the United Kingdom was after all quite secure – were it not that, in her view, her Irish nationality provided herself on the one hand with the right to obtain an EU residence permit in her own country, while on the other providing her Jamaican husband with the opportunity to remain with her in the UK.

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[15] ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925 par. 26; It is perhaps also useful to point at Directive 90/364's preamble, which states that "national provisions on the right of nationals of the member states to reside in a member state other than their own must be harmonized to ensure such freedom of movement".
[16] Opinion of A-G Tizzano in ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [18-05-2004] ECR 2004 p. I-09925 par. 7 – 13
[17] Ibid. par. 13
[18] Ibid.
[19] ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925 par. 47
[20] Opinion of A-G Tizzano in ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [18-05-2004] ECR 2004 p. I-09925 par. 12 – 15
[21] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Departmen*t, [05-05-2011] (not yet published in the Reports)
[22] Ibid. par. 15

The similarities with *Zhu and Chen* are plain; Mrs. McCarthy, just as the baby in *Zhu and Chen*, had after all been born in the United Kingdom and had always resided there. Just as the child, moreover, Mrs. Shirley McCarthy was an Irish national, although in her case not because she herself had been born on the isle of Ireland, but because her mother had.[23] In two respects, however, the cases also differed quite importantly: on the one hand, Mrs. McCarthy was not *only* Irish, but held an English nationality as well.[24] Secondly, whereas the family in *Zhu and Chen* clearly had sufficient resources to be self-reliant, Mrs. McCarthy, according to the judgment, "never argued that she [was] or [had] been a worker, self-employed person or self-sufficient person", and was in receipt of state benefits.[25] As will be indicated below, the latter conditions are generally relevant for deriving the right of residence sought from Directive 2004/38.[26] Still, it was not the lack of employment or resources which lead the Court to its final decision, but the *dual* nationality of Mrs. McCarthy.

The Court held that "according to Article 3(1) of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' (emphasis in original) than that of which they are a national are beneficiaries of that directive".[27] Furthermore, since Directive 2004/38 concerns the *conditions* governing the exercise of the primary right to *move and reside* on the territory of the member states, and since the right to reside in one's own state of nationality *cannot*, according to international law, be made conditional at all, the directive clearly cannot be applied to a Union citizen who resides in a member state of which he or she is a national.[28] Thirdly, the Court remarked it was "apparent from Directive 2004/38, taken as a whole", that the residence to which it refers is "linked to the exercise of the freedom of movement for persons". The case, after importantly having been assessed under primary law as well, then had to be dismissed.

What do these three arguments explain? First, the Court emphasized the word "other" as enshrined in Directive 2004/38's article 3, implicitly making the statement that Mrs. McCarthy did not reside in a member state "other" than "that of which she was a national". As already said, this is ambiguous and the Court could have decided this point differently just as well, stating that Mrs. McCarthy was Irish and that the United Kingdom was not Ireland. The second statement, apparently a rather formalistic defense of the first, is obviously valid in a logical sense, but completely neglects the fact that Mrs. McCarthy only sought to secure her husband's rather than her own residence in the UK, and prompts the question whether the national court should next have referred his case to the Court as well, so that it could try again. The third statement, finally, indicating that "Directive 2004/38, taken as a whole", refers only to residence which is linked to the exercise of the freedom of movement, overlooks the fact that the baby in *Zhu and Chen* had not made use of that freedom of *movement* either; in her case, mere *residence* in the United Kingdom had been enough. The Court thus appears to try to tell us that mere *residence* in a member state of which an EU citizen is *no* national is enough in itself to trigger the application of secondary EU law, while an apparently similar residence in the member state of one's *second* nationality is not so

[23] Opinion of A-G Kokott in ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [25-11-2010] (not yet published in the reports), par. 11

[24] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Departmen*t, [05-05-2011] (not yet published in the Reports), par. 14

[25] Ibid.

[26] It is also interesting to note that, according to the judgment, the Secretary of State initially had not refused either Mrs. McCarthy's or her husband's application on the ground that they were not beneficiaries of Directive 2004/38; Mrs McCarthy rather was not deemed 'a qualified person' (*essentially, a worker, self-employed person or self-sufficient person*) and her husband accordingly was not the spouse of 'a qualified person" either; see: Ibid. par. 17

[27] Ibid. par. 32

[28] Ibid. par. 29 – 34

similar at all; such residence, namely, should be coupled with a previous exercise of free movement, in other words: a *move*. The logic in all this is of course plainly visible.
Dutch jurisprudence, as might have been expected, follows the logic as spelled out by the Court of Justice. The Council of State, in various rulings, has explored the multiple nationalities issue in some more detail than the Court of Justice has.[29] In 2008, that is, after *Zhu and Chen* but before *McCarthy*, it held that the Venezolan spouse of a dual Dutch and Spanish citizen could apply for a document showing legal residence as a family member of an EU citizen; it need not be explained the District Court residing in Almelo, whose decision the Council of State affirmed, had explicitly relied on the Court's ruling in *Zhu and Chen*.[30] Indeed, given the circumstances the mere *residence* in a member state other than Spain would, under *Zhu and Chen* alone, appear to suffice for becoming eligible to reside under Directive 2004/38. As already explained, the Court of Justice intervened with its *McCarthy* ruling, which clearly impacted on Dutch jurisprudence as well. On the 28th of October 2011, the Council of State decided what status had to be granted to the partner of someone who had been born in the Netherlands with only the Spanish nationality and who subsequently had acquired Dutch citizenship through naturalization, without ever *moving* to a second member state.[31] The choice to acquire a second nationality, as the Court's ruling in *McCarthy* already foreshadowed, turned out to be unlucky; although acknowledging the situation of both partners was not "wholly internal" in the sense that there were "ties to EU law", the Council of State evidently could not have decided this issue under Directive 2004/38, at least not without deliberately going against *McCarthy*.[32] It is that ruling, not its Dutch perception, which has yielded this outcome, making the scope of application of Directive 2004/38 into a truly mercurial thing.
Not a week later, on the 2nd of November 2011, the Council of State decided the case of a dual Dutch and Portuguese citizen's spouse; in this case, however, the EU citizen had importantly *moved* to the Netherlands before acquiring Dutch citizenship.[33] The Council of State decided this *move*, as opposed to mere *residence*, made the situation of the spouses crucially different from the facts of *McCarthy*.[34] Moreover, it held that, according to the Court of Justice's own jurisprudence, the acquisition of a host state's nationality should not detract from rights already established by EU law.[35] A valid point, of course, but would it not have been equally valid for the spouse of someone who was born a Spanish citizen in the Netherlands and who subsequently acquired Dutch citizenship without ever having set foot in Spain? Before naturalization such a spouse evidently must be qualified as a beneficiary of Directive 2004/38. So what happens afterwards? Do the rights of residence of the spouse and his or her children simply disappear because the family never *moved* to Spain? Or do they remain valid because naturalization cannot detract from rights already granted?
On the 20th of November 2012, the Council of State decided a case the facts of which, again, were slightly different.[36] Here, a Dutch woman had married an Italian national, with whom

[29] Council of State, Case no. 200800488/1, [18-07-2008], *LJN* BD8585; Council of State, Case no. 201012858/1/V2, [28-10-2011], *LJN* BU3406; Council of State, Case no. 201011940/1/V1, [02-11-2011], *LJN* BU3411; Council of State, Case no. 201105940/1/V4, [20-11-2012], *LJN* BY4031
[30] Council of State, Case no. 200800488/1, [18-07-2008], *LJN* BD8585, par. 2.4
[31] Council of State, Case no. 201012858/1/V2, [28-10-2011], *LJN* BU3406
[32] Ibid. par. 2.4.2
[33] Council of State, Case no. 201011940/1/V1, [02-11-2011], *LJN* BU3411; repeated in: Council of State, Case no. 201105940/1/V4, [20-11-2012], *LJN* BY4031; Council of State, Case no. 201108991/1/V1, [12-12-2012], *LJN* BY5575
[34] Council of State, Case no. 201011940/1/V1, [02-11-2011], *LJN* BU3411, par. 2.4.2
[35] Ibid. see also: ECJ Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003], ECR 2003 p. I-11613
[36] Council of State, Case no. 201105940/1/V4, [20-11-2012], *LJN* BY4031

she went to live in Italy from 1974 until 2006.[37] Her marriage had granted her Italian citizenship besides her Dutch nationality. When, after her divorce, in 2006 she returned to the Netherlands, she met an Egyptian national and started a serious relationship with him, The question arose whether Directive 2004/38 applied. Unlike the Spanish national having acquired Dutch nationality through naturalization, the Dutch citizen in this case clearly had *never* resided in a member state of which she was *no* national and had therefore, according to the Dutch Minister at least, never acquired a right to reside under EU law – and, more importantly, her new partner therefore could not benefit from the Citizenship Directive.[38] The Council of State refused this reasoning, stating that the Dutch national in the case had "made use of her right of free movement", so that "given her Italian nationality, she must, in the Netherlands, be regarded as a beneficiary in the sense of article 3, par. 1 of the directive".[39]
On a strict reading, this decision would not have been necessary, since the Minister's point of view was clearly in keeping with *McCarthy* – and, indeed, neither this Dutch citizen's acquisition of the Italian nationality through marriage, nor her residence in Italy had had anything to do with her subsequent relationship ties to an Egyptian national.
The Council of State thus seems indeed to have taken the lead where the Court of Justice had refused to take it in *McCarthy*. Such examples of a Dutch judicial authority keeping an eye on the *European* perspective regarding the application of EU law, are to be welcomed indeed. Of course, a Dutch national who resides in Italy for almost forty years makes clear use of her free-movement rights, whether she acquires Italian nationality or not. Of course, when she returns "home" afterwards, it really becomes ambiguous whether she in fact has returned "home" – she may have resided in Italy for more than half of her life, calling Italy "home" rather than the Netherlands. It is only logical that she may rely on her Italian nationality in the Netherlands, just as she should have been able to rely on her Dutch nationality in Italy – and this basic approach indeed should be adhered to more generally.
In conclusion, the Court's jurisprudence, which has, particularly with the ruling in *Zhu and Chen*, been consistent and logical with regard to EU citizens residing in one member state while having the nationality of another, has taken an unpredictable turn with the ruling in *McCarthy*. From the Court's choice of words it would appear as if the family members of a host state national could *never* be covered by Directive 2004/38 – such EU citizens, after all, do not *reside* in a member state "other" than that of which they are nationals. The implied presumption that the directive thus never covers the family members of a host state national, however, is dispelled at least in Dutch jurisprudence, under which the family members of Dutch citizens having first *moved* between two states of which they possess the nationality, apparently do – upon "return" – *reside* in a member state "other" than that of which they are nationals. The difference cannot be explained by logic, nor with reference to the wordings of the directive's article 3, according to which, after all, the family members of any EU citizen either *moving to* or, alternatively, *residing in* another member state, are beneficiaries explicitly. The application of EU law already being difficult and sometimes counter-intuitive as it is, the Court may really be said to have missed the mark with its solution of the *McCarthy* case.

Moving to or residing in another member state?

Returning to the beneficiaries of the Citizenship Directive, the second point of attention concerns the condition that an EU citizen has to *move* or *reside* outside of his "home state".

[37] Ibid. par. 3
[38] Ibid. par. 5
[39] Ibid. par. 5.2

As already hinted at above, a deep-rooted conviction is present in the Dutch immigration policy that these criteria are somehow cumulative (except when the EU citizen was *born* in his host state), meaning that in order normally to be a beneficiary of the Citizenship Directive, the EU citizen must not only *move* to the other member states, but must actually *reside* in the member state of which he is not a national.[40] Sometimes it is even implied the directive cannot at all be invoked against one's own state of nationality.[41] The Dutch policy rules in question, although they do not distinguish clearly between rights derived from Directive 2004/38 and those derived from primary EU-law, hold that Dutch citizens seeking family reunification are in principle not able to invoke EU law against their own authority, except when they have either durably made use of their right to free movement and wish to return to the Netherlands together with their family, or when they are exercising service providers and are able to show that the presence in the Netherlands of their family member in question is necessary in order for the exercise of their right to provide services to be effective.[42] Since both exceptions, however, refer to jurisprudence by the Court of Justice which was delivered on the basis of primary law rather than Directive 2004/38, Dutch policy seems to maintain indeed that the directive strictly does not apply to Dutch citizens residing in the Netherlands, even if these citizens do *move* abroad.

This policy is largely followed by the lower courts in the Netherlands, although exceptions are made. The District Courts of Utrecht and Haarlem recently held that third-country nationals' short-term visa applications could not be considered according to article 5 of the Citizenship Directive (the right of entry), even when a Dutch family member held a Belgian residence certificate.[43] The reason those courts gave for this was that the Citizenship Directive does not apply to Dutch citizens residing in the Netherlands (apparently neither when they hold Belgian residence papers as well), so that their third-country family members are not among its beneficiaries either.[44] Likewise, the District Court Zwolle recently held it had to find a *durable* exercise of free movement rights on the part of the EU-citizen in question, before it could analogously apply the Citizenship Directive to them and their family members.[45] The District Court Amsterdam, in a recent ruling, admittedly refused to apply Directive 2004/38 only after finding that "it was not shown whether the applicant's Slovakian spouse had moved to or was residing in another member state than that of which she was a national", thus apparently placing the criteria of either moving to or residing in another member state at an equal footing.[46] In a slightly earlier ruling, the District Court Amsterdam did apply the Citizenship Directive to the third-country spouse of a Dutch national who resided in the Netherlands, but who likewise traveled to Germany where he owned a

[40] See: the Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule (B)10 5.3.2. The same is also noted by Tjebbes, see: M. Tjebbes, "WBV 2009/1. Een 'noodverordening' om de 'Europa-route' te barricaderen?", *Migrantenrecht* vol. 42 (2009), iss. 3 p. 92 – 95

[41] The Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule [B]10 5.3.2 explicitly states that "Directive 2004/38 is not applicable to a citizen of the Union who resides in the member state of which he possesses the nationality".

[42] The Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule [B]10 5.3.2, rule [B]10 5.3.2.1 and rule [B]10 5.3.2.2

[43] District Court Den Haag (residing in Utrecht), Case no. AWB 09/33579, [17-03-2011], *LJN* BP9259; see, for a similar ruling: District Court Den Haag (residing in Haarlem), Case no. AWB 08/43229, [20-01-2009] *LJN* BH0882

[44] District Court Den Haag (residing in Utrecht), Case no. AWB 09/33579, [17-03-2011], *LJN* BP9259

[45] District Court Den Haag (residing in Zwolle), Case no. AWB 11/4873, [09-03-2012] *LJN* BV8504 par. 2.3

[46] District Court Den Haag (residing in Amsterdam), Case nos. AWB 10/27051 and AWB 10/27052, [15-12-2010] *LJN* BQ1756 par. 7

company.[47] In some cases, the Courts have allowed those concerned to prove their residence abroad by means of residence documents issued by other member states; yet, as the aforementioned cases before the Utrecht and Haarlem District Courts show, such documents are not always found to provide sufficient proof.[48]

The Council of State has recently referred preliminary questions to the Court of Justice, concerning precisely this issue.[49] The two cases which have been joined for procedural purposes concern the third country family members of Dutch citizens who did "move to" other member states in order to visit their relatives there, but who barely can be said to have "resided" there with them. In one case, two partners who were later married and who possessed Dutch and an unspecified third country's nationality, had first resided together in the Netherlands, until the third country partner was evicted for the offense of having used a forged passport. As of January 2006, he stated, he resided in an apartment rented in the Belgian town of Retie, where his Dutch partner visited him regularly during weekends, a claim which, according to the Council of State, was substantiated expediently. In April 2007, the third country partner was likewise evicted from Belgium because of the previous Dutch eviction which belatedly was brought to the Belgians' attention. He then moved his residence to Morocco. After the Dutch eviction order was finally withdrawn in March 2009, the partners, who had at this stage married, were united again in the Netherlands, posing the question, of course, whether this reunion was sanctioned by Directive 2004/38.[50]

This case alone raises two highly important questions. In the first place, the facts obviously go against what the Dutch authorities and lower courts consider *durable* exercise of a person's right of free movement. The Dutch national in the case only resided in Belgium during weekends, thereby quite explicitly leaving her main residence in the Netherlands. The other question is how a period wherein the family lives apart after having – incidentally – stayed together in a host state for a while, impacts on the application of the Citizenship Directive. It shows besides how little connection exists between the Court of Justice and the law as applied in fact; frankly, if this case warrants a preliminary reference by the Dutch Council of State, it should have come up in Belgium in the first place. The third country family member could, after all, have argued against his being expelled from Belgium more easily than against his prior eviction from the Netherlands; his case in Belgium, after all, fell under the Citizenship Directive. Or did it? That is a question which, in theory, it should not be for the Dutch Council of State to address to the Court of Justice.

In the other case referred, a Dutch national and her spouse (the two were married in France) had probably resided together in Spain for two months, although the Council of State's statement on the facts shows a little hesitation on this point.[51] After the Dutch wife returned to the Netherlands she continued to visit her husband on holidays. The husband's residence in Spain was secured in a manner which would certainly not have worked in the Netherlands; the couple had simply registered as if residing together and, apparently, this had worked. Thus, where, in the first case referred, Belgium may arguably be said to have applied the Directive somewhat on the strict side, the Spanish authorities may in this case perhaps be attributed some leniency. In any case, the second reference by the Council of State raises

[47] District Court Den Haag (residing in Amsterdam), Case nos. AWB 08/28060 and AWB 08/28068, [07-07-2009] *LJN* BJ2237 par. 3.13.1; see also: District Court Den Haag (residing in Amsterdam), Case nos. AWB 07/28736, AWB 06/61137 and AWB 06/60811, [18-04-2008] *LJN* BD0949 par. 12

[48] Compare: District Court Den Haag (residing in Amsterdam), Case no. AWB 11/10661, [11-05-2011] *LJN* BQ8295 par. 2, where residence documents were accepted, and District Court Den Haag (residing in Haarlem) Case no. AWB 08/43229, [20-01-2009] *LJN* BH0882 par. 2, where they were not.

[49] Council of State, Case nos. 201011889/1/T1/V4 and 201108529/1/T1/V4, [05-10-2012] (raadvanstate.nl), par. 3

[50] Ibid. par. 3

[51] Ibid. par. 7

similar questions for the Court of Justice; although initially, the couple had arguably resided together in a host state more genuinely than was ever the case with the first couple, their residence together became more fraught afterwards. In sum, therefore, it was very good of the Council to refer both questions at the same time, as this will give the Court of Justice a perfect opportunity to bring some much-needed clarity as to the Citizenship Directive's application.

Frontier workers

Besides the cases just mentioned, the Dutch Council of State also considers two other and fairly different claims relating to the Citizenship Directive's application, which it likewise referred to the Court of Justice on the same day.[52] The cases concern frontier workers who, unlike the Dutch spouses mentioned above, have never resided even sporadically in any other country but the Netherlands, but who do work there regularly. Frontier workers naturally *move to* a member state of which they do not hold the nationality, but on the other hand do not *reside* there. Thus, the cases are prone to bring clarity to the arguably cumulative nature of the two preconditions in article 3. Is it really the case its wordings preclude anyone from invoking the directive against his own state of nationality? Both parties to the proceedings have invoked EU jurisprudence in support of their claims – the applicants rely on the ECJ's two judgments in *Jipa* and *Aladzhov*, claiming the Court, in those judgments, clearly envisaged EU citizens to be capable of invoking at least the Citizenship Directive's right of exit against their own states of nationality, implying that a mere moving across an internal border suffices for its applicability.[53] The Dutch Minister for Immigration, on the other hand, relies on the Court's judgments in *McCarthy* and *Metock*, holding that the Court, in those rulings, has already decided the Directive's scope in his favour.[54]

The jurisprudence of the Court of Justice

To clarify the focus of the discussion pending before the Court of Justice, it is necessary to go into the Court's four rulings on which the parties rely in some more detail: *Jipa, Aladzhov, Metock* and *McCarthy*. In the *Jipa* ruling, the Court of Justice was confronted with the case of Gheorge Jipa, a Romanian national who had traveled to Belgium and was subsequently repatriated for "illegal residence" – this was all (just) before Romania's accession to the EU.[55] After that accession, the Romanian minister applied to the local judiciary in order to obtain an exit prohibition against Mr. Jipa due to his having resided illegally in Belgium.[56] Under those circumstances, the Court relied on earlier jurisprudence, stating that Mr. Jipa, as an EU citizen, could invoke the associated rights of free movement, even against his member

[52] Council of State, Case nos. 201007849/1/T1/V2 and 201108230/1/T1/V4, [05-10-2012] (raadvanstate.nl)
[53] ECJ Case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*, [10-07-2008], ECR 2008 p. I-5157; ECJ Case C-434/10, *Petar Aladzhov v. Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti*, [17-11-2011], (not yet published in the Reports)
[54] ECJ Case C-127/08, *Blaise Baheten Metock c.s. v. Minister for Justice, Equality and Law Reform*, [25-07-2008], ECR 2008 p. I-06241; ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011], (not yet published in the Reports)
[55] ECJ Case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*, [10-07-2008], ECR 2008 p. I-5157 par. 9
[56] Ibid. par. 10

state of origin.[57] Next, it noted that freedom of movement includes both the right to enter a host member state as well as the right to leave one's state of origin. The fundamental freedoms, after all, would be rendered meaningless if home states could, without valid justification, prohibit their own nationals from leaving their territories in order to enter the territory of another member state.[58] Then, it considered that, "[m]oreover, article 4(1) of Directive 2004/38 expressly provides that all Union citizens with a valid identity card or passport have the right to leave the territory of a member state to travel to another member state".[59]

At this point it admittedly appears a bit ambiguous whether the Court applied primary law or Directive 2004/38 – it may be article 4 of the directive served only as an aid of interpretation in the field of primary law, even though the Court's wordings do not support either view explicitly. However, after having decided that the matter in *Jipa* was in general covered by the European right to freedom of movement, the Court went on to consider Romania's justifications explicitly in the light of article 27 of the Citizenship Directive rather than, for instance, article 45 TFEU or the Court's overriding-reasons case law.[60] It held that "[a]s far as the main proceedings (were) concerned, those limitations and conditions derive(d) in particular from Article 27(1) of Directive 2004/38, which provides that Member States may restrict the freedom of movement of Union citizens and their family members on grounds inter alia of public policy or public security".[61] These wordings clearly seem to indicate the Court applied Directive 2004/38 instead of primary law to solve the issue, although, regrettably, the Directive's applicability was not explicitly assessed in the light of its article 3.

In the case of *Aladzhov*, the issue as well as the result was similar.[62] Mr. Aladzhov was one of three managers of a Bulgarian company owing €22.000,- in VAT and customs duties.[63] Due to this debt, the Bulgarian authorities, like their Romanian counterparts had sought to do in *Jipa*, imposed an exit prohibition against Mr. Aladzhov, until he had either paid or provided sufficient security.[64] Just as in the *Jipa* case, the Court assessed the compatibility of this restriction with Union law specifically in the light of the Citizenship Directive, without, however, assessing whether Mr. Aladzhov was a beneficiary of that directive in the first place.[65] Two possible solutions may be drawn from this; either both Mr. Jipa and Mr. Aladzhov *were* beneficiaries of the Directive, meaning that one explicitly does not have to *reside* in a member state of which one is not a national, or Mr. Jipa and Mr. Aladzhov *were not* beneficiaries in the sense of article 3, implying that it is not strictly necessary to be one in order to derive rights from that directive. The latter of these alternatives, although decidedly less consistent with the way the Dutch administration and judiciary have thus far understood

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[57] Ibid. par. 17; see also: ECJ Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [20-09-2001], ECR 2001 p. I-06193 par. 31 – 33; ECJ Case C-192/05, *K. Tas-Hagen and R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, [26-10-2006], ECR 2006 p. I-10451, par. 19; ECJ Joined cases C-11/06 and C-12/06, *Rhiannon Morgan v. Bezirksregierung Köln & Iris Bucher v. Landrat des Kreises Düren*, [23-10-2007], ECR 2007 p. I-09161 par. 22 and 23

[58] ECJ Case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*, [10-07-2008], ECR 2008 p. I-5157 par. 18; here, see also, with regard to the freedom of establishment: ECJ Case 81/87, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [27-09-1988], ECR 1988 p. 05483 par. 16; ECJ

[59] ECJ Case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*, [10-07-2008], ECR 2008 p. I-5157 par. 19

[60] Ibid. par. 19

[61] Ibid. par. 22

[62] ECJ Case C-434/10, *Petar Aladzhov v. Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti*, [17-11-2011], (not yet published in the Reports)

[63] Ibid. par. 11 and 12

[64] Ibid. par. 14

[65] Ibid. par. 29 – 30

article 3, would enable authorities to acknowledge one can on the one hand derive a right of *exit* from the Citizenship Directive without being its general beneficiary, while on the other hand maintaining that being a beneficiary in the sense of article 3 is necessary in order to derive a right of *residence* from the directive's further provisions.

Whereas both judgments in *Jipa* and *Aladzhov* concerned clear home state situations, the ruling in *Metock* addressed the Directive's applicability in the host member state.[66] The case originated in Ireland, where four married couples claimed to be entitled to reside. Although, in general, Ireland is known to have no objections of principle against married couples residing on its territory, the specific features making the concerned marriages problematic were that the husbands held various third countries' nationalities, whereas the wives were non-Irish Union citizens having made use of their right to freedom of movement.[67] The case revolved around the question whether third country nationals could be required to have gained legal residence in Europe on the basis of the home state's national law first, before becoming entitled to accompany their EU family member across Europe on the basis of the Citizenship Directive.[68] This question, although it is of clear significance, concerns the family members as beneficiaries rather than the EU citizens themselves – and is therefore properly addressed later on. In the course of the proceedings, however, the Court also made a general remark about the Directive's applicability, which is of importance here. It held, namely, that "Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen […] and accompany or join the Union citizen *in a member state other than that of which he is a national*, and as conferring on them rights of entry and residence in that member state".[69]

Can this reasoning be inverted? This is ultimately of great interest to the case of any frontier worker working abroad, but residing in his home state. When reading the text of article 3, it does not require family members to join the Union citizen in the state of which he does not hold the nationality; article 3 merely proclaims that the directive applies to Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them. Must *Metock* now be understood to mean that family members, too, may only join the Union citizen in the member state of which he is no national? The facts of the *Metock* case do not indicate this; the main proceedings, after all, clearly did not concern frontier-worker like circumstances – all the married couples were actually residing in a member state of which the Union citizen husbands did not have the nationality.[70] Moreover, the wordings of the Court's ruling explain only that their non-EU spouses were entitled to join them there, and do not – obviously – elaborate on the possibility of them moving to other member states as well. Still, the logic of this consideration in *Metock* provides food for thought, at the moment particularly for the thoughts of the Dutch Council of State.

The ruling in *McCarthy*, finally, goes a long way to closing the circle between home and host states' responsibilities under article 3.[71] The case has already briefly been touched upon above, with regard to the problem of multiple nationalities; now, it is necessary to look into it more closely. The applicant in the case was an Anglo-Irish citizen who resided in the UK and wished her Jamaican husband to reside with her.[72] As seen above, the Court could have

[66] ECJ Case C-127/08, *Blaise Baheten Metock and others v. Minister for Justice, Equality and Law Reform*, [25-07-2008], ECR 2008 p. I-06241
[67] Ibid. par. 18 – 37
[68] Ibid. par. 47
[69] Ibid. par. 54
[70] Ibid. par. 18 – 37
[71] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011], (not yet published in the Reports)
[72] Ibid. par. 14 – 17

considered the UK to be a host state under these circumstances, due to Mrs. McCarthy having Irish nationality, but it chose not to, rather holding that a directive comprising conditions of residence cannot apply to any person's residence in his state of nationality because his residence there must necessarily be unconditional.[73] Then, the Court went on to consider two more things, both of which are interesting to frontier workers. First of all, the Court inferred from article 1(a) of the directive that its subject is the exercise of the right of free movement and residence – the Court emphasized the singular form, implying that this is only one, single right; secondly, the various provisions governing the residence rights accruing over time each refer to either 'another member state' or 'the host member state', from which the Court deduced that they govern the legal situation of a Union citizen in a member state of which he is not a national.[74] This is remarkable, especially since the Directive, in article 2, expressly defines the term "host member state" as the state where a Union citizen exercises his right of free movement, without any reference to nationality.
Frontier workers – and thereby their third country family members – are thus exactly in the middle; on the one hand they do make use of their right of free movement, quite unlike Mrs. McCarthy, but on the other they do not reside in a member state of which they are no national. At the moment, little more can be said about their situations – at least as far as Directive 2004/38 is concerned; their coin is still spinning, but as their case is currently pending before the Court of Justice, it is bound to come down in the near future.

1.1.2 Family members

Article 3 imposes roughly three conditions on family members - two of which have already been discussed. In the first place, family members are only beneficiaries of the Directive if they are family of an EU citizen who is himself a beneficiary, meaning he has to move to or reside in a member state of which he is no national. Secondly, family members remain only eligible to free movement as long as they accompany or join the EU citizen. This latter requirement obviously poses no great problems when the family consists of all EU citizens, since all of them qualify as beneficiaries in their own right. Similarly, when rights of family reunification are at stake, the fact of a family having to reside together will not likely cause many problems; exceptions being possible of course. Under Dutch family law, for instance, it is not required that families live together; yet, this requirement is indeed slipped in through the back door as regards families of non-Dutch EU citizens – which one may consider to be a rather dubious affair to say the least.[75] The third requirement is obvious – one has to actually be a family member, more precisely a "family member as defined in article 2". Now there seems to be some plain legislation at last – article 2 par. 2 of the directive defines the term "family member" explicitly, listing the following categories of relatives:

a. The spouse;
b. The partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a member state, if the legislation of the host member state treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host member state;
c. The direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point b;

[73] Ibid. par. 34
[74] Ibid. par. 36 and 37
[75] In Dutch policy, this is not the case – see: the Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) point B10.5.1 A remark to a similar effect has been made in the preparatory documents of the Dutch family legislation in question, see: Kamerstukken I-2000-2001, 27 084, no. 152a p. 4

d. The dependent direct relatives in the ascending line and those of the spouse or partner as defined in point b;

As clear as at least some of these definitions may seem, there are still three things in this list which need clarification. In the first place, the directive does not state what it means by the terms "spouse", "direct descendants" and "direct relatives in the ascending line" – these are all taken together, since the same question arises with regard to each of these terms, namely how to determine a particular family relationship. The second point of interest concerns the conditions imposed on registered partnerships, which are more explicitly laid down. The third and final point which needs clarification is the term "dependent", as it is interpreted by the Court of Justice.

Determination of the family relationship

How must the national authorities – or the judiciary determine whether two particular persons are family in the sense of article 2? This discussion brings us close to a substantive argument on family law; in particular, a discussion on same-sex marriages is bound to arise.[76] Moreover, the status of children born from such marriages may eventually hinge on the outcome of the same discussion.[77] There are basically three alternative options. Firstly, article 2 may be interpreted as leaving the matter entirely to the legislation (including the private international law) of whichever national authority is called upon to apply the directive. In this case the term "spouse" will include same-sex spouses in states recognizing the homosexual variant of marriage at least in their private international laws, but will exclude them in the others.[78] Secondly, the requirement to allow "spouses" as beneficiaries of particular European rights may include an obligation to recognize all marriages validly concluded according to the laws of any member state; in that case, albeit homosexuals will not be allowed to marry in all jurisdictions, they will, after having validly married under any jurisdiction, be entitled to travel across Europe as a married couple.[79] Thirdly, the term could be interpreted autonomously from national law, which would most probably result in a *de facto* determination of marriage, just as EU law determines autonomously whether particular persons are "workers" on a *de facto* basis, independently from any national employment laws.[80]

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[76] H. Oosterom-Staples, "Toelating en verblijf van EU-burgers en hun familieleden volgens de verblijfsrichtlijn (1)", *Migrantenrecht*, vol. 22 (2007), iss. 3 p. 60

[77] In the Netherlands, for instance, a discussion on the status of such children is ongoing, which may eventually impact on the other member states' responsibility to allow for these Dutch-born children of same-sex married parents to legally reside on their territories.

[78] There is, after all, no uniform EU private international law regarding marriage, nor does Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility address the establishment or contesting of a parent-child relationship; see: art. 1 par. 3 under a of that regulation.

[79] In this case, the mere use of the term "spouse" would imply a uniform rule of private international law, at least as far as the application of Directive 2004/38 is concerned.

[80] See, for extensive case-law: ECJ Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [13-03-1982] ECR 1982 p. 01035; ECJ Case 139/85, *R.H. Kempf v. Staatssecretaris van Justitie*, [03-06-1986] ECR 1986 p. 01741; ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [03-07-1986] ECR 1986 p. 02121; ECJ Case 197/86, *Steven Malcolm Brown v. Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205; ECJ Case 33/88, *Pilar Allué and Carmel Mary Coonan v. Università degli studi di Venezia*, [30-05-1989] ECR 1989 p. 01591; ECJ Case 344/87, *I. Bettray v. Staatssecretaris van Justitie*, [31-05-1989] ECR 1989 p. 01612; ECJ Case C-4/91, *Annegret Bleis v. Ministère de l'Education Nationale*, [27-11-1991] ECR 1991 p. I-05627; ECJ Case C-337/97, *C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep*, [08-06-1999] ECR 1999 p. I-03289; ECJ Case C-43/99, *Ghislain Leclere and Alina Deaconescu v. Caisse nationale des prestations familiales*, [31-05-2001] ECR 2001 p. I-04265; ECJ Case C-413/01, *Franca Ninni-Orasche v Bundesminister*

It is certainly not an easy choice between these three alternatives. The first option, referring the matter to the law of whichever authority is faced with it, has the obvious disadvantage of legal diversity; therefore, the Court of Justice generally only applies this approach where a particular provision of EU law expressly requires this.[81] The second option would imply an approach similar to how the Court deals with nationality matters or, for instance, company law.[82] Member states, just as they are left entirely free to devise their own nationality and company laws, would remain entitled to regulate family relations as they would see fit; however, just as member states are obliged to respect and recognize each other's nationalities and company forms, they would likewise be bound to treat the family bonds established abroad as family even domestically.[83] The final possibility would go even further and could imply that even those who are technically not married, but are *de facto* exercising a relationship as married persons, would be entitled to claim the migration rights available under Directive 2004/38, similar to the case of individuals being regarded as workers even without having to conclude a valid employment contract under any national jurisdiction.[84]
Consulting the legislative documents preceding the adoption of the Citizenship Directive brings no real clarity as to which alternative must be elected. In an article in *Migrantenrecht*, Oosterom seems to consider the question of family relationships something which must be clarified under national law, referring to a conclusion reached by the Council's Working Party on Free Movement of Persons.[85] Indeed, according to the documents of the Council, that Working Party agreed by large majority to "accept the concept of "spouse" to be interpreted in a flexible manner according to the national law of the host member state so that it could cover the same-sex spouse if this form of marriage is accepted in that member state".[86] This clearly points in the direction of the first available alternative, whereby the terms "spouse" and, by extension, "descendant" must be interpreted according to the host state's national laws. Still, the findings of any of the Council's Working Parties can hardly be considered authoritative and the fact remains that the Court has in the past shown to be no great advocate of "flexible manners of interpretation".[87] Besides that, no express reference to the host state's national law has actually made it to the final text of Directive 2004/38.
It is quite to the contrary. The Commission, in its initial proposal, claimed to have put forward "a definition of family member that applies across the board", a statement with

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für Wissenschaft, Verkehr und Kunst, [06-11-2003] ECR 2003 p. I-13187; ECJ Case C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*, [23-03-2004] ECR 2004 p. I-02703; ECJ Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles*, [07-09-2004] ECR 2004 p. I-07571; ECJ Case C-109/04, *Karl Robert Kranemann v. Land Nordrhein-Westfalen*, [17-03-2005] ECR 2005 p. I-02421; ECJ Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft Nürnberg*, [04-06-2009] ECR 2009 p. I-04585; ECJ Case C-14/09, *Hava Genc v. Land Berlin*, [04-02-2010] ECR 2010 p. I-00931

[81] ECJ Case C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, [06-02-2003] ECR 2003 p. I-01251 par. 23; ECJ Case

[82] ECJ Case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, [07-07-1992] ECR 1992 p. I-04239; ECJ Case 81/87, *The Queen v, H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, [27-09-1988] ECR 1988 p. 05483; ECJ Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, [16-12-2008] ECR 2008 p. I-09641

[83] Compare ECJ Case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, [07-07-1992] ECR 1992 p. I-04239; ECJ Case C-148/02, *Carlos Garcia Avello v Belgian State*, [02-10-2003] ECR 2003 p. I-11613

[84] ECJ Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [13-03-1982] ECR 1982 p. 01035

[85] H. Oosterom-Staples, "Toelating en verblijf van EU-burgers en hun familieleden volgens de verblijfsrichtlijn (1)", *Migrantenrecht*, vol. 22 (2007), iss. 3 p. 90 and 91

[86] Council Document 8901/03 of 13 May 2003 p. 3 and 4

[87] Recently: ECJ Case 502/10, *Staatssecretaris van Justitie v. Mangat Singh*, [18-10-2012] (not yet published in the Reports) par. 42; ECJ Joined cases C-424/10 and C-425/10, *Tomasz Ziolkowski, Barbara Szeja and others v. Land Berlin*, [21-12-2011] (not yet published in the Reports) par. 32

which dependence on national law and the associated "flexible manner of interpretation" are difficult to reconcile.[88] The European Parliament then adopted amendments to a dual effect.[89] Firstly, the right of residence, according to Parliament, should be granted to the spouse "irrespective of sex"; yet, the existence of the marital relationship was to be determined "according to the relevant national legislation".[90] Both amendments were repealed again by the Commission because it considered that "harmonization of the conditions of residence for Union citizens […] must not result in the imposition […] of amendments to family law".[91] Of course, while this point is readily acceptable with regard to the first of the European Parliament's amendments, it certainly does not warrant the repeal of the second, which merely referred the determination of a family relationship to "the relevant national legislation". Admittedly, a reference to "the relevant national law" would not have been a monument of precision and would certainly not have ended all difficulties of interpretation; still, the one thing which it would have made clear was that the term "spouse" was not to be given a uniform European meaning.

It appears from the legislative documents available that the current text was indeed understood as referring the determination of family ties to the law of the host member state, allowing member states to essentially apply a different directive each. Members of Parliament Turco and Cappato, in a minority opinion on Parliament's second reading, blame pressure by the Council for this and concluded that "the outcome is an acceptance of discrimination against homosexual couples, in particular where one of the two partners is a non-Community citizen – despite being legally married or in a civil partnership in one of the countries which permit arrangements of this kind, such persons would lose these acquired rights when crossing EU borders".[92] The consequence of a referral to the host state's laws is aptly put; indeed, this is always the consequence of the application of the host state principle. Yet, with no explicit reference to national law, the conclusion that, indeed, the host state's laws must be applied to determine family relationships may safely be said to be rather quick.

On the other hand, the chances of a *de facto* interpretation of the term "spouse" cannot be regarded as likely either, especially given the Court's old judgment in *Reed*.[93] In that case, although it predated the Citizenship Directive, the Court was called to give an interpretation of the term "spouse" in article 10 of Regulation 1612/68 as it then stood. Exactly like the term is not defined now in the directive, it was not defined then in the regulation either. The Court, however, considered that a Union-wide interpretation had to maintain a compromise between the divergent laws of all the member states and could not be based on social and cultural developments arising from only a single member state.[94] Therefore, since no Union-wide development could be discerned to the effect that unmarried couples should be treated equally to married ones, the former could not benefit from Regulation 1612/68. This logic, obviously, still holds – in fact, it may even preclude legally married homosexual couples from benefiting from Directive 2004/38, if the Court on the one hand decides to grant a single EU interpretation to the term "spouse", but then refuses to accept same-sex marriages for lack of a Union-wide acceptance of them.[95]

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[88] COM 2001/257 final p. 7
[89] PS_TA(2003)0040 p. 8 and 9
[90] Ibid.
[91] COM 2003/199 final p. 3
[92] European Parliament Document A5-0090/2004 of the 23rd of February 2004, p. 7
[93] ECJ Case 59/85, *The Netherlands v. Ann Florence Reed*, [17-04-1986] ECR 1986 p. 01283
[94] Ibid. par. 13
[95] See, for instance: ECJ Case 275/02, *Engin Ayaz v. Land Baden-Württemberg*, [30-07-2004] ECR 2004 p. I-08765. In this case, the Court did grant a Union-wide definition to the term "member of the family" in article 10 of Decision 1/80 under the EEC – Turkey Association Agreement, drawing a clear comparison with Regulation 1612/68; however, it then failed to further define the term "spouse", which leaves the matter open for further

In fact, in its ruling in *D. & Sweden v. Council*, concerning a claim with regard to the EU's staff documents (in which, likewise, reference was made to a "married official"), the Court expressly considered that, "according to the definition generally accepted by the member states, the term marriage means a union between two persons of the opposite sex".[96] The case, however, concerned a Swedish homosexual couple, having entered a registered relationship under Swedish law rather than an actual marriage.[97], while the partners maintained to be covered by the term "marriage". In that regard, the Court considered that, since 1989, an increasing number of member states had introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage.[98] However, these registered partnerships could not simply be assimilated to what member states normally consider as a marriage because, apart from their great diversity, such arrangements for registering relationships between couples not previously recognized in law were regarded in the member states concerned as being distinct from marriage.[99] These wordings indicate that a homosexual couple actually *married* under the laws of a member state may well find a different outcome before the Court of Justice.
With so little being clear in the texts even of only article 2 and 3 of the directive, it was no wonder that on the 10th of December 2008 the Commission reported it had already received more than 1800 individual complaints, 40 Parliamentary questions and 33 petitions on the directive's application, that it had registered 115 complaints and opened 5 infringement cases for incorrect application – one can only do so much.[100] Considering the above, the time was certainly ripe for clearer guidelines on the directive's interpretation – which the Commission then duly enacted.[101] Again, however, these guidelines are not exactly clear in deciding whether the term "spouse" is a European term, whether it is a national term covered by a home state principle or whether it may be interpreted differently by each host member state. The Commission starts out by stating that "marriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the directive", giving a clear hint at a home state principle.[102] Immediately, however, it goes on by stating that "member states are not obliged to recognize polygamous marriages, contracted lawfully in a third country, which may be in conflict with their own legal order", which is an interesting remark, as an analogy with same-sex marriages contracted lawfully in a member state could be made.[103] It remains a guess why, but throughout its extensive documentation, the Commission remains ominously silent about the very idea of such an analogy; all it has remarked is that "same-sex couples enjoy full rights of free movement and residence in

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debate. Probably, this discussion will only be closed through homosexual marriages, since they constitute the only case where application of the term "spouse" will be problematic enough to reach the Court and politically sensitive enough for member states to oppose enough its uniform application.
[96] ECJ Joined Cases C-122/99 and C-125/99, *D and Kingdom of Sweden v. Council of the European Union*, [31-05-2001], ECR 2001 p. I-04319 par. 34. Note that the Council, in the legislative process preceding the adoption of Directive 2004/38, made express reference to this case-law, see: Council Document 13263/03 of 10 november 2003 p. 8
[97] ECJ Joined Cases C-122/99 and C-125/99, *D and Kingdom of Sweden v. Council of the European Union*, [31-05-2001], ECR 2001 p. I-04319 par.
[98] Ibid. par. 35
[99] Ibid. par. 36
[100] COM 2008, 840 final p. 9
[101] COM 2009, 313 final
[102] Ibid. p. 4
[103] Ibid.

thirteen member states which consider registered partners as family members", apparently considering that solves the issue.[104]
With so much still being unclear at the EU level, it might be interesting to look at the Dutch national law. The Dutch legislation does not define the terms "spouse" and "descendant" from the Directive. The Immigration Act merely designates as entitled "community subjects" the family members of EU citizens, as far as they are entitled under EU law to reside in the Netherlands.[105] Nevertheless, in policy, the Dutch authorities hold that "the legal bond between the community subject and family member is decisive for the right of residence", a clause which, again, does not denote according to which legal system that "legal bond" is to be established.[106] Should this be Dutch family law; perhaps including its private international law? What should happen if, say, a parental recognition by a French father with regard to his Algerian son is not recognized in the Netherlands for reasons of public order? Should different member states reach different answers here? As far as can be discerned from the jurisprudence of the Dutch Council of State, it simply applies Dutch law, presuming it is entitled to do so – and obviously, in the bulk load of cases this will never become problematic as most marriages are recognized broadly.[107] Yet, the notion of the same-sex marriage, and the divergence existing in this regard between the member states, may well prompt a more fundamental debate on the interpretation generally of the terms of Directive 2004/38.
Should such a debate emerge, it is indeed highly questionable what the Court in fact will do. It may, for example, be confronted with a pair of homosexual men or women, validly married under the laws of a member state, then wishing to reside in a state unwilling to recognize their marriage. If, say, the third-country spouse of this marriage also wishes to take along her children born from her former homosexual spouse, while the legislation of the state where the child was born did not require an adoption under these circumstances, the discussion will start to become interesting indeed. One thing is clear, however, which is that there will not be a way in between. Either the Court obliges (homosexual) marriages validly closed in any of the member states to be recognized as such in all the others, thereby allowing the progressive states to set the agenda, or the Court will go back to *Reed*, waiting for the conservative states to catch up and, thereby, implying that to establish a valid family bond in a member state does not mean one is also family in the European sense of the term.

Registered partnerships

With regard to registered partnerships, the EU legislator has actually done a remarkable thing by making clear at least a few things. Unlike the case of the spouse and, by extension, of the (spouse's) children, the question whether a registered partnership exists must expressly be answered according to national law; article 2 par. 2 of the directive states, after all, that only the "partner with whom a Union citizen has contracted a registered partnership, on the basis of the legislation of a member state" will count as a family member – and thereby as a beneficiary in the sense of article 3. Oosterom seems to consider that the registered partnership merely has to be valid under any of the member states' laws, relying on the Dutch

[104] COM 2008, 840 final p. 4; these member states are listed as follows: BE, BG, CZ, DK, FI, IT, LT, LU, PT, NL, ES, SE and the UK.
[105] Immigration Act (Vreemdelingenwet) Art. 1, sub e, 2
[106] Immigration Circular (Vreemdelingencirculaire) point B 10.5
[107] See: Council of State, Case no. 201009737/1/V4, [26-10-2011], *LJN* BU3404; Council of State, Case no. 200805279/1, [17-07-2008], *LJN* BF3060

language version of the Citizenship Directive.[108] This would mean that private international law can be taken into account to "import" registered partnerships concluded on the basis of a third country's laws. This point is admittedly less clear under the Dutch language version; however, the English, French and German versions do require the registered partnerships to be contracted "on the basis" of the laws of a member state, thereby apparently excluding all partnerships registered outside the EU.[109] Considering that the Directive, further on, does not in principle object to Union citizens assuming family relations abroad, this choice of words – again – is unlucky.

There is a second requirement, which has caused Oosterom to remark rightly that, on a closer look, the wordings of article 2 are not quite examples of clarity.[110] Apart from having to have concluded a registered partnership on the basis of a member state's laws, the partner will only be a family member if the legislation of the host member state treats registered partnerships as equivalent to marriage and if that partnership is furthermore *in accordance with the conditions laid down in the relevant legislation of the host member state*. The first of these requirements has the effect that the question whether particular registered partners count as family depends on which host state they choose because some might not know the family form at all or may treat it as inferior to marriage somehow. Secondly, even if a host state does recognize a registered partnership as equivalent to marriage, the partners must still comply with the conditions of its "relevant legislation". What does this mean: family law, or private international law? Does EU law itself form a part of it? Can a member state on the one hand recognize a registered partnership on the basis of its private international law, while on the other refuse to grant the third-country partner residence because the conditions stemming directly from its family law are not met? The best thing to do really seems to be simply to marry someone from the other sex, regardless of what any national laws might tell further.

As Dutch family law has been known for its relative leniency regarding the registered partnership, especially between homosexuals, it is unlikely for the abovementioned problems to occur in the Netherlands.[111] The Dutch immigration authorities accept partnerships registered in another EU country and, besides, the Dutch requirements are relatively easy to match; therefore, in many cases the family ties established through a registered partnership are taken as undisputed facts. To find out where the shoe hurts, it would probably be expedient to investigate the laws of the member states whose laws are less favourable to registered partnerships. Even there, the problem could be theoretical rather than an actual means of limiting the migration of EU citizens – which would be a good thing from the EU point of view. In any case, an exhaustive study of all these laws clearly goes beyond the aim of the present work.

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[108] H. Oosterom-Staples, "Toelating en verblijf van EU-burgers en hun familieleden volgens de verblijfsrichtlijn (1)", *Migrantenrecht*, vol. 22 (2007), iss. 3 p. 91

[109] The Dutch version literally reads that a partner with whom the Union citizen has concluded a registered partnership "in accordance with" (overeenkomstig) the laws of a member state is considered a family member; the German version, however, requires a "Grundlage [auf den] Rechtsvorschriften eines Mitgliedstaats", while the French version requires that the partnership be registered "sur la base de la législation d'un état member".

[110] H. Oosterom-Staples, "Toelating en verblijf van EU-burgers en hun familieleden volgens de verblijfsrichtlijn (1)", *Migrantenrecht*, vol. 22 (2007), iss. 3 p. 91

[111] Consider: District Court Den Haag (residing in Amsterdam), Case no. AWB 11/28120, [08-03-2012] *LJN* BW1166, par. 1. Although the case did not concern a registered partnership, it shows how easily the Court and the Dutch immigration authorities readily accept a marriage between a Dutch and a French national, as well as the parental relationship between that French national and her Moroccan mother. Such facts will certainly not be so easily accepted between homosexuals in other member states.

Dependency

With regard to the dependency required for relatives in the ascending line as well as for an EU citizen's – or his spouse's children above the age of 21, the same discussion as to the applicable law has already been firmly closed – the dependency is a European matter, interpreted in last resort by the Court of Justice – and applied to the facts by the national courts.[112] As the Court found in *Lebon*, "the status of dependent member of a worker's family does not presuppose the existence of a right to maintenance either [because] if that were the case, the composition of the family would depend on national legislation, which varies from one state to another, and that would lead to the application of community law in a manner that is not uniform".[113] Admittedly, the judgment concerned article 10 of Regulation 1612/68 rather than article 2 par. 2 of Directive 2004/38, but, considering the close relationship between both provisions, the meaning of *Lebon* may validly be extended to cover the Citizenship Directive as well.

So what is required of a relative in order to be deemed dependent? The Court of Justice has answered this question by bits and pieces, and in reverse, to make it easier. In *Lebon*, it began by stating that "the status of dependent member of a worker's family is the result of a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support".[114] It added that the status "presuppose the existence of a right to maintenance.[115] With its ruling in *Zhu and Chen* it added the relationship of dependence may likewise be reversed in the case of a young child, since "a refusal to allow the parent, whether a national of a member state or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect".[116] Finally, in *Jia*, the Court importantly added that "in order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host member state must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves", clarifying that "the need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national".[117]

In answer to the ECJ's judgment in *Jia*, the Dutch District Courts have provided some guidance as to the proof needed for the required dependency.[118] It appears to be the case that the applicant must show his or her financial situation as well as the fact of periodically receiving a financial support by his relative, while it is then for the defendant to argue that the applicant's income would be sufficient were the financial support taken away.[119] In the case

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[112] See: ECJ Case 316/85, *Centre public d'aide sociale de Courcelles v. Marie-Christine Lebon*, [18-06-1987] ECR 1987 p. 02811 par. 18 – 21; ECJ Case C-1/05, *Yunying Jia v. Migrationsverket*, [09-01-2007] ECR 2007 p. I-00001 par. 35

[113] ECJ Case 316/85, *Centre public d'aide sociale de Courcelles v. Marie-Christine Lebon*, [18-06-1987] ECR 1987 p. 02811 par. 21

[114] Ibid. par. 24

[115] Ibid. par. 22

[116] ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925 par. 45

[117] ECJ Case C-1/05, *Yunying Jia v. Migrationsverket*, [09-01-2007] ECR 2007 p. I-00001 par. 37

[118] District Court Den Haag (residing in Haarlem), Case no. AWB 09/15407, [10-05-2010] *LJN* BM8210 par. 2.20; District Court Den Haag (residing in Utrecht), Case no. AWB 10/2107, [08-07-2010] *LJN* BN4023 par. 2.18

[119] Ibid. See also: District Court Den Haag (residing in Amsterdam), Case no. AWB 09/28693, [11-02-2010] *LJN* BL7327 par. 8.2

of children above 21 who reside with their parents, it appears to be possible to assume dependency even without a thorough financial assessment.[120]

1.2 The residence rights granted under Directive 2004/38

The length of the above discussion might tempt one to presume that being a beneficiary of the directive means one is entitled to reside in any member state; yet, this is far from the truth. The conditions for residence, granted to the directive's beneficiaries, are listed in articles 6, 7, 12, 13, 14, 16 and 17, and can roughly be divided into three categories. Article 6 covers the right of residence up to three months, article 7 describes the conditions for residence for a period exceeding these initial three months, while articles 12, 13 and 14 proclaim under which conditions these two residence rights are retained, although presumably these provisions might as well mean to describe when they are not.[121] Finally, articles 16 and 17 bestow the pinnacle of European integration on those citizens having met even higher standards; normally, after having resided lawfully in the host member state for a period of five consecutive years, the beneficiary is granted the right of permanent residence. The next sections will address all these conditions in order.

1.2.1 The right of residence for up to three months

Article 6 par. 1 proclaims that "Union citizens shall have the right of residence on the territory of another member state for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport". Par. 2 then adds that "the provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a member state, accompanying or joining the Union citizen". It is of course quite logical that third country nationals cannot hold an EU identity card (at least not their own), but what is interesting is that the condition of "accompanying or joining the Union citizen" returns here. After all, if family members do not comply with this criterion, they will not even be beneficiaries of the Citizenship Directive in the first place, so that it appears excessive the condition is repeated here.
The most important element of article 6, however, is that it grants a right of residence only in "another member state". It seems a logical precondition because citizens who do not make use of their right of free movement clearly are not to be covered by the directive; yet, on the other hand, certainly not all citizens making use of their free-movement rights will actually *reside* in another member state. As seen above, frontier workers might *move to* the territory of another member state, but may decide to keep residence in their home member state. Presuming such persons are in principle beneficiaries of the directive, should their family members be refused a right of residence with them in their home state simply because it is not "another member state"? The wordings of article 6 strictly seem to suggest as much.
Practice in the Netherlands has never reached this problem, since the immigration authorities as well as the courts have thus far considered that in any case no home state right of residence

[120] District Court Den Haag (residing in Amsterdam) Case nos. AWB 11/21138 and AWB 11/21139, [14-09-2011] *LJN* BT8823
[121] See: Recital 16 of the preamble to the Citizenship Directive; compare also: District Court Den Haag (residing in Dordrecht), Case no. 11/11456, [21-02-2012] *LJN* BV7041, par. 2.4.4

can be derived from the Citizenship Directive, solely on the basis of article 3.[122] This means, for instance, that the Dutch lower courts generally maintain the right of entry, which is laid down in article 5 of the directive, does not entitle family members of EU citizens to enter the home state, even when those EU citizens do – perhaps frequently – move to a member state of which they are no nationals.[123] It would appear the same logic must hold with regard to the right of residence for periods of up to three months; family members, as Dutch practice sees it, are simply no beneficiaries *as against their EU relative's home state*. As already explained, however, this practice is currently in question, since the Council of State is considering a case of frontier workers residing in the Netherlands while working in Belgium.[124] Of course, these frontier workers – or rather their third-country family members – do not in particular wish to reside in the Netherlands for a period of up to three months; yet, should the Council of State indeed alter the Dutch practice with regard to article 3, it would thereby bring the right of residence established in article 6 to the forefront of the family immigration debate. Developments in this field will simply have to be awaited.

The host member state problem

At the European level, the Court of Justice, in its ruling in *McCarthy*, has already come very close to deciding that, indeed, the rights of residence established by the Citizenship Directive cannot govern the situation of an EU citizen or his family members versus the former's home state.[125] In order to assess whether Mrs. McCarthy was entitled under Directive 2004/38 to reside in the UK, the Court found that a literal, teleological and contextual analysis of the directive lead it to decide against her.[126] It is interesting to see the reasoning that followed.

> Whilst it is true that (…) Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the member states that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.
> Since (…) the residence of a person residing in the member state of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the member states, cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the member state of which he is a national.
> (…)
> Furthermore, the rights of residence referred to in Directive 2004/38, namely both the right of residence under Articles 6 and 7 and the permanent right of residence under Article 16, refer to the residence of a Union citizen either in 'another member state' or in 'the host member state' and therefore govern the legal situation of a Union citizen in a member state of which he is not a national.[127]

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[122] District Court Den Haag (residing in Utrecht), Case no. AWB 09/33579, [17-03-2011], *LJN* BP9259; see, for a similar ruling: District Court Den Haag (residing in Haarlem), Case no. AWB 08/43229, [20-01-2009] *LJN* BH0882
[123] Ibid.
[124] Council of State, Case nos. 201007849/1/T1/V2 and 201108230/1/T1/V4, [05-10-2012] (raadvanstate.nl)
[125] ECJ Case 434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the reports), par. 37
[126] Ibid. par. 31
[127] Ibid. par. 33, 34 and 37

While the first part of this reasoning certainly convinces with regard to Mrs. McCarthy herself – as a directive on the conditions of residence cannot reasonably be applied to an unconditional sort of residence, it is not as logical with regard to the third country family member of an EU citizen who resides in his home member state – as the residence rights of such third country nationals in that member state are certainly conditional. It must be stressed in this regard that Mrs. McCarthy had herself applied for an EU citizen's residence card in the UK, and that the proceedings before the Court of Justice derived from her own application rather than from the one of her Jamaican husband.[128] Besides, even though a person's right of *residence* may be conditional in his member state of nationality, the same cannot be sais of his right to *free movement*. Thus, it would seem possible to apply Directive 2004/38 to a Dutch frontier worker's family member because the family rights under the directive are not ancillary to the EU citizens' right of *residence* alone, but to their right of *free movement*.

The second argument posited by the Court in *McCarthy* is perhaps more problematic; here, the Court really appears to infer from the terms "host member state" and "another member state" that the directive does not establish any residence rights on the territory of an EU citizen's home member state, not for that citizen, nor for his or her third country relatives. It would thus perhaps seem clear that the family members of frontier workers residing in their home member state while working abroad can never derive any residence rights from the directive at all. In spite of the fact that frontier workers undoubtedly do make use of their right to freedom of movement, the Citizenship Directive, as one might infer from the above considerations of the *McCarthy* ruling, perhaps is not the proper instrument to assess residence rights in a home state.

On the other hand, the judgment in *McCarthy* is quite a lengthy one, in which the Court can almost be seen to reach its final conclusions only with great difficulty. "In circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a member state of which he is a national, that citizen is not covered by (…) Directive 2004/38".[129] "That finding cannot be influenced by the fact that the citizen concerned is also a national of a member state other than that where he resides [since] the fact that a Union citizen is a national of more than one member state does not mean that he has made use of his right of freedom of movement".[130] Would these and other similar remarks have been *necessary* if the Court had wished to delineate the directive's applicability along a simple home state / host state division? Furthermore, albeit the term "another member state" used in article 6 is admittedly not defined anywhere in the directive itself, it is a fact that the term "host member state", which is used in article 7 – and which the Court seems indeed to place at an equal footing – is literally defined in article 2 par. 3 as "the member state to which a Union citizen moves in order to exercise his/her rights of free movement and residence", a definition in which any reference to nationality is notoriously absent.

Further doubt arises as to the question whether or not a *home* and a *host* state cannot at all be the same member state, when one takes into consideration the Council of State's jurisprudence on *multiple nationalities*, which was already discussed above.[131] As indicated already, the Council of State recently decided the case of a Dutch woman who had acquired Italian nationality through marriage with an Italian national, and who had resided in Italy

[128] Ibid. par. 18
[129] Ibid. par. 39
[130] Ibid. par. 40 and 41
[131] Council of State, Case no. 201011940/1/V1, [02-11-2011], *LJN* BU3411; repeated in: Council of State, Case no. 201105940/1/V4, [20-11-2012], *LJN* BY4031; Council of State, Case no. 201108991/1/V1, [03-12-2012], *LJN* BY5575

together with her husband, from 1974 until 2006.[132] It was importantly *after her return* to the Netherlands that she started a relationship with an Egyptian national. Given her Dutch nationality alone, this partner would not have been eligible under Directive 2004/31 because he had not "accompanied" her during her years in Italy. The Council of State, however, decided that "given the Italian nationality" of this woman, she had to be regarded as a "beneficiary" in the sense of article 3.[133] The ruling admittedly does not draw attention to article 7, stating instead that, according to the Court of Justice's jurisprudence, the possession of Dutch nationality cannot detract from rights granted by EU law on the basis of her possession of another member state's nationality.[134] This presumes, however, that she had been eligible to reside in Italy on the basis of her Dutch nationality and in the Netherlands on the basis of her Italian nationality; in other words; both states were *home* and *host* states alike, albeit strictly not at the same time.

On a close look, it appears not to be impossible that an EU citizen actually possesses the nationality of his or her host state and, given that possibility, and the effectiveness of free movement which Directive 2004/38 is definitely set to achieve, it would indeed seem illogical not to apply its rights of residence to the family members of frontier workers. In a nutshell, it would require the application of this instrument to become applicable *regardless* of nationality and in *all* member states where EU citizens actually exercise their rights under EU law. Since frontier workers do this in two member states, they – and their family members – should be eligible even in their own state of nationality.

1.2.2 The right of residence for periods exceeding three months

Article 7 of the Citizenship Directive imposes some further conditions on those wishing to reside in a host member state for periods exceeding three months. Again, these rights are not simply granted to "beneficiaries" under a common set of conditions, but are rather granted under different conditions different categories of persons – one may read: beneficiaries. According to article 7 par. 1, the Union citizen must, in order to benefit, either

a. be a worker or a self-employed persons in the host member state; or
b. have both sufficient resources for himself and his family members not to become a burden on the host state's social assistance system as well as a comprehensive sickness insurance cover in the host member state; or
c. be a student at an accredited educational establishment in the host member state, while having a comprehensive sickness insurance cover there too, and while having assured the relevant national authorities of having sufficient resources for himself and his family members not to become a burden on the social assistance system of the host member state; or
d. be a family member of a Union citizen meeting any of the above sets of criteria.

According to article 7 par. 2 the right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a member state, accompanying or joining the Union citizen in the host member state, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c). Thus, three different categories of persons emerge, being, firstly, the Union citizen, who must in principle be either (self) employed, or a student or financially self-reliant. Secondly, these conditions are not imposed on EU citizens who are family members of other EU citizens – the conditions thus count only once per family unit. Thirdly, third country nationals who are family members of an EU citizen and who

[132] Council of State, Case no. 201105940/1/V4, [20-11-2012], *LJN* BY4031, par. 3
[133] Ibid. par. 5.2
[134] Ibid.

accompany that citizen in his host member state may benefit, provided the Union citizen meets one of the first three conditions imposed by paragraph 1. It is of interest to note that the third country family member of an EU citizen who, in turn, is only entitled to reside in a host state as a family member of another EU citizen, cannot claim a right under Directive 2004/38.[135]
One may, at this point, of course start the host state discussion again; yet, since this has already been done with regard to the right of residence for up to three months, it will not be reopened here. Since, also, the difficulties with regard to family relationships have already been addressed before, the rest of this section will simply address the conditions under paragraph 1 (a) (b) and (c). Thus, the position of respectively the worker or self-employed person, that of the economically inactive migrant EU citizen and that of the student will be assessed in order. Finally, a brief remark will be made with regard to providers and recipients of transnational services, even though their position is not expressly covered by the wordings of the Citizenship Directive.

Workers and self-employed persons

The initial Commission proposal granted the rights of residence for periods exceeding six months (the term was reduced to three by the Council) to all Union citizens who would be "engaged in gainful activity in an employed or self-employed capacity".[136] Thus, for a change, we may thank the Council for having introduced the term "worker", which, although esthetically perhaps lacking finesse, has the clear advantage that it is well-known in EU law.[137] The extensive case-law of the Court of Justice based on the identical term used in article 45 TFEU and its predecessors has thus been brought into the domain of Directive 2004/38 without much difficulty.[138] Likewise, the term "self-employed person" used in article 7 is commendably identical to the term used in article 49 TFEU with regard to the freedom of establishment, so that the case-law defining the self-employed in the field of primary law will be of help in applying the Citizenship Directive as well.[139] It is because of this that a more elaborate discussion on the definitions will be better placed in the second chapter, which, after all, describes the rights derived from the primary law of the European Union.
Once the status of a worker or a self-employed person is obtained along the logic of primary EU law, article 7 par. 3 of the Citizenship Directive maintains explicitly that this status is not to be lost in four particular kinds of situations. Firstly, a worker retains this status if he is temporarily unable to work as a result of an illness or accident.[140] The same holds true if he becomes unemployed involuntarily after having been employed for more than one year and if his unemployment is duly recorded and he has registered as a job-seeker with the relevant employment office.[141] Thirdly, if an EU citizen qualifying as a worker becomes unemployed involuntarily after completing a fixed-term employment contract of less than one year, or if

[135] See: art. 7 of the Citizenship Directive
[136] COM 2001/0257 final p. 33
[137] Council Document 13263/03 of the 11th of November 2003, p. 17.
[138] See: ECJ Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft Nürnberg*, [04-06-2009] ECR 2009 p. I-04585 par. 23 – 32; ECJ Case C-310/08, *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department*, [23-02-2010] ECR 2010 p. I-01065 par. 57 and 58
[139] There is no explicit jurisprudence to this effect; see, however: F. Antenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, Boom: Den Haag 2010 p. 317
[140] See: art. 7 par. 3 under a of Directive 2004/38
[141] See: art. 7 par. 3 under b of Directive 2004/38

he becomes unemployed involuntarily during the first twelve months, that citizen retains the status of a worker too, so long as he registers as a job-seeker with the relevant employment office.[142] In this case, the directive explicitly provides that the status should be maintained for at least six months. Finally, if a worker embarks on vocational training, that is not to affect his status as a worker, although the training is to be related to the previous employment, except if the worker has become unemployed involuntarily.[143] In sum, although these rules may be detailed, adding exception to exception, their content is quire workable except for the term "involuntary unemployment", which is therefore subjected to some further scrutiny.

Involuntary unemployment

At this point, a discussion is certain to arise which systematically is very much akin to the one on the determination of family ties, but which in substance goes into labour law or social security law rather than family law. After all, since the Citizenship Directive attaches such paramount importance to terms common to most member states' domestic labour laws – in particular to "involuntary unemployment" – the national authorities called upon to apply the directive will undoubtedly face the same threefold choice with which they are likewise presented in the determination of family ties: they can either each apply the term according to their own domestic jurisprudence, implying obviously that article 7 par. 3 would receive a very different meaning in each national jurisdiction. The authorities could also apply an adapted home state principle, for instance determining whether unemployment was voluntary or not according to the jurisprudence of the state whose laws govern the employment relationship.[144] Thirdly, the term "involuntary unemployment" could be given a uniform, European definition. Here, the case-law of the Court of Justice is much clearer than it is in the family debate, clearly favouring the third option.[145]
Jurisprudence has evolved in particular around cases where students wished to be entitled to a granting of study finance in their host member state; while in the 1980's and 1990's the Court in this regard still struggled with the Union's lack of competence in the field of education more than it presently does, it was only natural for students to try to be entitled to study finance in a worker's capacity.[146] Thus, in its ruling in *Lair*, the Court first derived from the system of Regulations 1612/68 and 1251/70 that migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship.[147] It also already introduced the term "involuntary unemployment" in the sense that a connection of continuity between a person's employment and his choice of further education could not be required where a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field

[142] See: art. 7 par. 3 under c of Directive 2004/38
[143] See: art. 7 par. 3 under d of Directive 2004/38
[144] The result would, admittedly, be more predictable here than in family law, since the private international law of the EU member states has been unified in this field by Regulation 593/2008; see: art. 8 of that regulation
[145] ECJ Case 39/86, *Sylvie Lair v Universität Hannover*, [21-06-1988] ECR 1988 p. 03161; ECJ Case C-413/01, *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*, [06-11-2003] ECR 2003 p. I-13187; ECJ Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft Nürnberg*, [04-06-2009] ECR 2009 p. I-04585
[146] In spite of developments in the Court's case-law, the incentive to apply for study finance as a worker, however, remains topical to date.
[147] ECJ Case 39/86, *Sylvie Lair v Universität Hannover*, [21-06-1988] ECR 1988 p. 03161 par. 36

of activity.[148] Presently, article 7 par. 3 under d of the Citizenship Directive may be understood as a re-codification of this jurisprudence.[149]
The next ruling needing attention is *Ninni-Orasche*, in which the Court was called upon to rule on the voluntary or involuntary nature of a person's unemployment which arose simply from the fact that the fixed term of her temporary employment contract had expired.[150] Naturally, a few intervening governments had maintained that the expiry of a fixed-term employment contract presupposed the ensuing unemployment to be voluntary.[151] The Commission, on the other hand, relying on existing case-law in the field of the Turkish association, held that, when an employment relationship which is intended from the outset to be temporary comes to an end because the contract expires, this is not, as a general rule, the result of the personal wishes of the worker, so that his unemployment must be assumed to be involuntary.[152] The Court replied, firstly, that matters of fact are for the national courts to assess.[153] That finding, however, did not prevent it from noting that the mere expiry of a contract of employment which from the outset has been concluded as a fixed-term contract cannot necessarily lead to the conclusion that the employee concerned after this expiry automatically becomes voluntarily unemployed.[154] Particularly when the employee has no great influence on the content of the contracts offered to him, the national courts must, in their assessment, take account of circumstances such as practices in the relevant sector of economic activity, the chances of finding employment in that sector which is not fixed-term, whether there is an interest in entering into only a fixed-term employment relationship or whether there is a possibility of renewing the contract of employment.[155]
Finally, the Court of Justice's ruling in *Vatsouras* is of importance here.[156] The case concerned two Greek nationals who had come to Germany and who, after briefly having worked there, applied for social assistance.[157] The Court, firstly, noted that, according to the national court, their brief employment had not granted either the status of a worker in the sense of article 45 TFEU and article 7 par. 1 under a of the Citizenship Directive.[158] Since, presumably, the Court considered this assumption to have been made rather quickly, considering perhaps that it is indeed quite difficult not to be a worker in the European sense if at least any genuine activities have been undertaken, it decided to dedicate a few considerations to the hypothetical situation in which the national court would reconsider.[159] In that light, the Court also came to explain the consequence of article 7 par. 3 under c, as it was clear the employment in question had not lasted more than a year in either case. In that regard, the Court importantly held that, were the referring court to deem the applicants to be workers indeed, they would also have been able to retain their status as workers for at least six months, subject to compliance with the conditions laid down in Article 7(3)(c) of

[148] Ibid. par. 37
[149] See: COM 2001/257 final, p. 13; in the Commission's initial proposal, the provision now included in article 7 par. 3 was included in article 8 par. 7
[150] ECJ Case C-413/01, *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*, [06-11-2003] ECR 2003 p. I-13187 par. 41 – 48
[151] Ibid. par. 37
[152] Ibid. par. 39
[153] Ibid. par. 41
[154] Ibid. par. 42
[155] Ibid. par. 43 and 44
[156] ECJ Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft Nürnberg*, [04-06-2009] ECR 2009 p. I-04585
[157] Ibid. par. 11 – 20
[158] Ibid. par. 24
[159] Ibid. par. 26 – 31

Directive 2004/38, and that the national court alone is responsible for factual assessments of this kind.[160]
Confronted with this evident responsibility, the Dutch Central Court of Appeal (Centrale Raad van Beroep), which is responsible for adjudicating claims relating to study finance in last resort, has consistently upheld a Dutch policy whereby those Union citizens who are able to prove their employment for at least 36 hours per month are entitled to study finance in the Netherlands because of their being "workers" in the European sense of the term.[161] Formally, this policy rule is not applied in reverse as well, as it explicitly requires the situations of those EU citizens who do not meet the required 32 hours in a given month to be assessed individually; yet, it shows from the competent authority's brochures and letters, as well as from numerous cases before the Central Court of Appeal that it is indeed not uncommon for EU citizens to be deemed "workers" during only the months in which they do meet the requisite number of hours, while being denied study finance during the months in which they do not.[162] As an example in this regard, it shows from the case-law that the fact of a canteen where a part-time worker is employed closing down during the summer months does not render his unemployment during that period involuntary, at least according to the Central Court of Appeal.[163] Obviously, none of this shows a clear disregard for article 7 par. 3 of the directive – as indeed the students under inspection might truly have resigned from their engagements of their own free will, perhaps to go on holiday; yet, jurisprudence does show the Dutch authorities have no exceedingly great interest in, for instance, the circumstances on the labour market or the chances for individuals of being engaged again, all factors which the Court did mention in *Ninni-Orasche*.[164]
In the field of immigration, however, the Dutch policy on involuntary unemployment seems to dance to a quite different tune, setting "involuntary unemployment" squarely against "culpable unemployment" while stating that Union citizens are deemed to be unemployed involuntarily so long as they have not caused their unemployment through their own doing.[165] Jurisprudence on these rules, however, at least published case-law, is scarce. This is a pity because it could help clarify for EU citizens how they should behave, what they should do and may expect in case of difficulties at work, situations of unexpected unemployment et cetera.

Economically inactive persons

According to article 7 par. 1 under b, the Union citizen who is neither a worker or a self-employed person, nor a student in the sense of article 7 par. 1 under c, can claim a right of residence under the following two conditions. Firstly, they must have sufficient resources at their disposal for themselves and their family members not to become a burden on the social assistance system of the host member state, while they must, secondly, have comprehensive sickness insurance cover in the host member state.

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[160] Ibid. par. 31
[161] See for the policy rule in question: Staatscourant 2006, 1246; see also: Central Court of Appeal, Case nos. 10/4868 WSF and 10/4869 WSF, [08-07-2011] *LJN* BR1101; Central Court of Appeal, Case nos. 06/3999 WSF, 06/4001 WSF, 06/4002 WSF and 06/6812 WSF, [18-12-2009] *LJN* BK8135; Central Court of Appeal, Case nos. 05/7058 WSF and 06/123 WSF, [30-10-2009] *LJN* BK2521
[162] Neither a general brochure, nor an example letter published on the website of the Executive Education Service (Dienst Uitvoering Onderwijs) mention even the possibility of retaining the worker's status in case of involuntary unemployment, see: http://www.duo.nl
[163] Central Court of Appeal, Case nos. 05/7058 WSF and 06/123 WSF, [30-10-2009] *LJN* BK2521, par. 6.3
[164] Compare also: District Court Haarlem, Case nos. 07-4861 and 07-4859, [10-08-2007] *LJN* BB1627 par. 2.12
[165] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 3.5.3

As to the resources, a first thing to note is that, according to article 8 par. 4 of the Citizenship Directive, member states may not lay down a fixed amount which they regard as sufficient, but must take into account the personal situation of the person concerned. In any case, the amount required may not be set higher than the threshold below which nationals of the host member state become eligible for social assistance. The wordings seem to indicate that a particular amount may be set above which EU citizens can be certain to have enough, but that such a reasoning may not be reversed, meaning that the fact that a particular person's resources do not reach a set threshold cannot in itself lead to the conclusion that that person does not have sufficient resources. In other words, his personal financial circumstances, particularly his expenses, must be considered. Besides, article 8 par. 4 makes it reasonably clear that any EU citizen having resources at a higher level than would entitle him to social assistance in the host member state, cannot be said to have insufficient resources.[166]
Dutch policy and legislation, as a result of a recent amendment, is at clear odds with article 8 par. 4 of the directive. According to the Dutch Immigration Circular, the term "sufficient" must be understood as meaning at least the normative amount set for the particular category to which the EU citizen belongs (singles, single parents, married couples etc.).[167] The amounts required for these categories are listed in the Dutch immigration legislation, and range from around €1000,- gross per month for singles to roughly €1450,- for married couples.[168] In order to become eligible for social assistance, however, Dutch law requires a person's accountable income to drop below a threshold which is considerably lower, varying between €230,- per month for eighteen-year-old single persons to around €1350,- for families.[169]

Students

For the definition of the status of a student one cannot refer back to primary law as easily as for workers and self-employed persons, since under primary law there is no such thing as "free movement of students". Fortunately, however, the Citizenship Directive itself gives a clear definition.[170] According to article 7 par. 1 under c, EU citizens who are enrolled at a private or public establishment, accredited or financed by the host member state on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training, are entitled to reside on the territory of another member state. Thus, it is up to the host state's authorities to decide which education institutions they wish to include in the scope of Directive 2004/38 and which they do not. In this regard, the Dutch Immigration Circular dedicates an explicit section to the term "vocational training", stating it must be interpreted broadly, including every means of education which trains

[166] See also: COM 2009/313 final, p. 8
[167] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 4.1.1
[168] Art. 3.74 of the Dutch Immigration Decree (Vreemdelingenbesluit) read in connection with art. 3.19 of the Dutch Immigration Regulation (Voorschrift Vreemdelingen) and art. 8 of the Dutch Minimum Wage Act (Wet minimumloon en minimumvakantiebijslag); see also: www.ind.nl for an up-to-date confirmation of the required amounts of income. The normative amounts, which used to be linked to the norms for social assistance in the case of what Dutch law termed "family formation", but were altered as a result of the ECJ's ruling in *Chakroun* (ECJ Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, [04-03-2010] ECR 2010 p. I-01839), see: Staatscourant 2010, 12193 p. 5. Therefore, where the current norms may indeed well be legal for third country nationals in respect of Directive 2003/86 as explained by the Court, it is still unfortunate that the resources of EU citizens and their family members are now measured in terms of minimum wage instead of social assistance as well.
[169] Art. 20 and 21 of the Dutch Employment and Assistance Act (Wet Werk en Bijstand)
[170] It was introduced by an amendment of Parliament, see: European Parliament Document A5-0009/2003 of the 23rd of January 2003 p. 21

persons for a special occupation, craft or position, or which teaches a particular skill by which such an occupation may be assumed, irrespective of the age or the level of education of the attendant or student.[171] University studies and even internships may thus be covered by the term as it is applied by the Dutch authorities.
Besides being enrolled at a recognized education institution, the EU citizen who wishes to make use of his right of residence as a student must also have a comprehensive sickness insurance cover in the host member state. Furthermore, he must, according to article 7 par. 1 under c, assure the relevant national authority, by means of a declaration or by such equivalent means as he may choose, that he has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host member state. The latter requirement clearly resembles the requirement imposed on economically inactive migrant EU citizens, who must likewise have sufficient resources for themselves and their families; this may have prompted the Commission to infer that both requirements are actually the same.[172] However, in practice the burden of proof resting on students may be considerably lower than that imposed on the economically inactive; whereas the latter must actually prove that their resources are sufficient in order for their host state's authorities to recognize their residence as legal (which is particularly important in determining the status of third country family members), the student will only have to "assure" the relevant authorities of the fact that his income suffices. Dutch policy acknowledges this difference.[173]
With regard to students, attention must finally be drawn to article 7 par. 4, which states that, exceptionally, only the spouse, the registered partner and dependent children may accompany a Union citizen residing in another member state as a student. As a consequence, non-dependent children and relatives in the ascending line, although they certainly are family members in the sense of article 2 – and are thus to be considered in general as beneficiaries of the directive, do not hold a right of residence if their EU family member merely resides in another member state on the basis of article 7 par. 1 under c, that is: as a student.

Providers and recipients of services

Prior to the entry into force of the Citizenship Directive, the position of service providers and recipients of services in other member states was governed by both primary law and article 1 par. 1 under a and b and article 4 par. 2 of Directive 73/148, which was repealed two years after the entry into force of the Citizenship Directive.[174] This repeal was decided upon because the old directive likewise covered the position of self-employed persons and because that was no longer necessary after the adoption of the new Citizenship Directive.[175] While Parliament had therefore initially proposed to include the recipients of services again in the Citizenship Directive, this amendment was rejected because the Council considered that recipients of services cannot be treated on the same foot as workers or self-employed persons.[176] Does this mean their position has actually become less favourable?
At the outset, it must be said the old directive, before its repeal, had already given rise to a considerable line of case-law effectively opening up the European markets for all kinds of

[171] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 4.2.1
[172] COM 2009/313 final, p. 8
[173] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 4.2.2; compare with rule B-10 4.1.1
[174] See: art. 38 par. 2 of Directive 2004/38
[175] Council Document 13263/03 of the 10th of November 2003, p. 9
[176] See, for Parliament's amendment: Parliament Document A5-0009/2003 of the 23rd of January 2003, p. 20; see, for the Council's rejection: Council Document 13263/03 of the 10th of November 2003, p. 9

services generally. For such markets to merge into a single market for a particular kind of service, it is, economically speaking, necessary that not only the providers of these services may freely offer them in all member states, but that the recipients of services may also go to other member states in order to receive them. Some services, after all, for instance tourism-related services, one simply cannot enjoy in his home state. One may assume the Court, in its old *Royer* case, was influenced by such economic reasoning when it held that service recipients had "substantially identical provisions of Community law" applying to them as did workers, self-employed persons and those providing cross-border services, although, at the time, it did not expressly state so.[177] The Court did, however, proceed to describe their rights, referring to the preamble of Directive 73/148 and stating that "freedom to provide services entails that persons providing and receiving services should have the right of residence for the time during which the services are being provided".[178] There was no mention of any "resources" having to be "sufficient".

In *Luisi and Carbone*, the Court then took the opportunity to explain very generally why service recipients should indeed be free to travel across the Union, and to reside in any member state for as long as they are in receipt of these services. Although the Court obviously drew from primary law in this regard, its explanation immediately influenced the way in which secondary law was afterwards applied. The Court famously held that, "[i]n order to enable services to be provided, the person providing the service may go to the member state where the person for whom it is provided is established or else the latter may go to the state in which the person providing the service is established".[179] This interpretation, according to the Court, had to be maintained because, "[w]hilst the former case is expressly mentioned in the third paragraph of article 60 (of the EEC Treaty), which permits the person providing the service to pursue his activity temporarily in the member state where the service is provided, the latter case is the necessary corollary thereof, which fulfills the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital".[180] Summarizing this, one can simply state that the buyer and seller are both equally part of their economic transaction.

Has this approach altered with the implementation of Directive 2004/38 – and the repeal of Directive 73/148? When considering the Dutch policy on this, it appears to be the case that the position of service providers has not deteriorated substantially; yet, the same cannot be said for the recipients. In the first place, the Dutch Immigration Circular does not explicitly state either service providers or recipients among those benefiting from the directive's right to reside for periods exceeding three months, stating only which documents must be provided by workers and self-employed persons.[181] In its considerations on the right to permanent residence, however, and particularly where it discusses the proof required of the applicants' past legal residence, it appears that periods in which an EU citizen has resided in the Netherlands providing services count either as periods in which that citizen was employed, or as periods in which he was self-employed.[182] The Circular adds that "recipients of services count as economically inactive persons".[183] Comparing this with article 1, under b of the repealed Directive 73/148 is telling, which, after all, only maintained that "the member states …, acting as provided in this directive [were to] abolish restrictions on the movement and

[177] ECJ Case 48/79, *Jean Noël Royer*, [08-04-1976] ECR 1976 p. 00497 par. 14 and 15
[178] Ibid. par. 27
[179] Ibid. par. 10
[180] ECJ Joined cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, [31-01-1984] ECR 1984 p. 00377 par. 10
[181] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 3.3
[182] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 3.6
[183] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 3.6

residence of nationals of member states wishing to go to another member state as recipients of services", imposing no income requirements and none relating to sickness insurance either. Taking the point of view of the persons concerned (or their family members, which article 1 favoured as well) one can hardly call the change of approach an improvement.[184]
In fact, it is not only when taking the personal perspective of those concerned that changes such as the one described must be seriously criticized because they substantially undermine the openness of the European internal market. When recipients of services, for instance medical treatment, cannot reside in other member states in order to receive services the reception of which takes longer than three months, and if those persons cannot be accompanied by their family member during intensive medical treatment, this will effectively partition the European market for that kind of services. Of course, even as economically inactive EU citizens it is not wholly impossible – and in fact not even particularly burdensome – to gain residence by showing proof of sufficient resources; yet, the fact remains that the integration of the European market has had to take a step back, presumably to appease concerns regarding social security, which may or may not be founded on facts.

1.2.3 The right of permanent residence

The right of permanent residence is the pinnacle of rights for the acquisition of which all EU migrants continuously strive; it is a residence right which is not only permanent, but which likewise no longer depends on a citizen's status as a worker or a student, nor of his having either sickness insurance or sufficient monthly resources. Moreover, it can be revoked only in cases of serious disturbance of public order or national security, or by excessive absence from the host state's territory. The question which many will therefore understandably ask themselves upon reading this is how to acquire this widely famed right of permanent residence for citizens of the European Union.
Taking the wordings of article 16 par. 1 of the directive, the Union citizen who has resided legally for a continuous period of five years in the host member state shall have the right of permanent residence there. Likewise, according to par. 2, his family members who are not nationals of a member state and have legally resided with the Union citizen in the host Member State for a continuous period of five years, will be entitled to the right of permanent residence. These rights, according to the directive, shall not be subject to the conditions provided for in Chapter III, nor shall they be lost through absence from the host member state's territory, except if such absence exceeds two consecutive years. Article 17 and 18, finally, address certain exceptions to the five-year rule laid down in article 16: workers or self-employed persons reaching the age of retirement set by the legislation of the host member states after having resided there for three years and after having worked continuously for the preceding twelve months, for instance, immediately acquire the right of permanent residence upon their retirement.[185] There are a few other exceptions.
There are two things which will be addressed with regard to the right of permanent residence. In the first place, attention is drawn to the question whether family members of EU citizens still need to accompany or join the EU citizens in order to acquire and retain their right of permanent residence. Secondly, with regard to the periods of past legal residence, attention is drawn to the requirement that the five years of residence in the host member state must have comprised legal residence.

[184] Compare: art. 1 under b, c and d, and art. 4 par. 2 of the repealed Directive 73/148
[185] Art. 17 par. 1 under a of the Citizenship Directive

The (in)dependent nature of the family member's rights

The wordings of article 16 perhaps indicate to some that, whilst the right of permanent residence is no longer dependent upon the conditions of the directive's Chapter III, one still must qualify as a beneficiary of the directive in order generally to either acquire or retain the right of permanent residence. In this line of reasoning, the requirement imposed by article 3 that family members must either accompany or join the EU citizen in order to be entitled may cause difficulties in this regard, especially when family ties are broken over the course of time or when, for instance, the EU citizen prefers to return to his home member state, while his third country family member wishes to remain in the state to which he or she has become accustomed.
Dutch policy is lenient in this regard, assuming that family members having acquired the right of permanent residence gain a position which is independent from their status as a family member.[186] It will be no surprise, therefore, that Dutch jurisprudence on this matter does not exist, since Union citizens can hardly object to a policy such as this. Besides, a parallel is often made between the Citizenship Directive and either Directive 2003/109 on the "long term resident" status for third country nationals or Decision 1/80 under the EEC – Turkey Association Agreement.[187] Because under both schemes the position of family members is made independent more explicitly after a prolonged period of legal residence, it would seem logical to assume the same for EU citizens' family members.[188] Finally, such an assumption would sit best with the Citizenship Directive's preamble, which, after all, calls for the right of permanent residence to be wholly unconditional.[189]

Legal residence

Article 16 prescribes that the five years of residence must have been enjoyed legally, which has triggered the question whether periods in which the person concerned derived his right of residence from a residence permit issued under national law could be taken into consideration. In *Ziolkowski*, the Court gave a nuanced answer to this question.[190] On the one hand, it referred to the directive's preamble, from which it inferred that the five years of residence must have been enjoyed under the conditions set out in article 7.[191] Therefore, it could appear as if residence derived from a national permit could not be taken into consideration; yet, the Court stated that, should an EU citizen (or his family member) have resided on the basis of a national permit, while incidentally also meeting the criteria set out in article 7 of the directive, that citizen acquires the right of permanent residence after five years of continued residence. This ruling is of help, for example, to third country nationals holding a residence permit in a member state when they marry an EU citizen there, preferably one actually exercising his or her free movement rights. If that third country national does not immediately wish to apply for a residence card under the directive, preferring to continue his

[186] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 5.4.2 & B-10 5.4.3
[187] See, for instance: ECJ Case C-371/08, *Nural Ziebell v. Land Baden-Württemberg*, [08-12-2011] (not yet published in the Reports) par. 69
[188] Family members of third country nationals, after all, may gain the "long term resident" status simply because of their legal residence; this status cannot be revoked simply by reason of family ties having broken, see: art. 7 and 8 of Directive 2003/109; for the case-law on the Turkish association, see, for instance: ECJ Case C-303/08, *Land Baden-Württemberg v. Metin Bozkurt*, [22-12-2010] ECR 2010 p. I-13445 par. 36
[189] Recital 18 of the preamble to the Citizenship Directive
[190] ECJ Joined cases C-424/10 and C-425/10, *Tomasz Ziolkowski, Barbara Szeja and others v. Land Berlin*, [21-12-2011] (not yet published in the reports)
[191] Ibid. par. 42 – 46

residence until the expiry of his permit, he may still accumulate periods which are relevant for attaining the right of permanent residence eventually.

Conclusion

This first chapter considered what migration rights – especially family migration rights – may be derived from Directive 2004/38. This instrument of secondary law has been introduced nearly a decade ago with a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence.[192] Under previous instruments of secondary law as well as under the existing case-law of the Court of Justice, rights of family reunification have always been deemed a corollary of freedom of movement for economically active nationals of the member states, firstly because of the notion that the free-movement rights would not be attractive enough if the persons concerned were not entitled to move and reside in the company of their closest family members, but also with increasing regard for the idea that rights under EU law should be enjoyed in dignity.
The Citizenship Directive not only unified all the various schemes of migration rights granted to workers, self-employed persons, students, service providers and recipients, but also strived to combine these rights with the residence rights that should be granted the remainder of Union citizens plus family: the economically inactive persons. Thus, the directive – at least in its ambition – presently aims to encompass all the conditions which article 21 TFEU allows the Union legislature to attach to the general rights to move and reside for all Union citizens. Thereby, the directive may indeed be seen as a laudable step towards a truly comprehensive EU set of migration rights; on the other hand, however, when considering its provisions in detail, little remains of the clarity one might at first glance expect. The conditions imposed on students, workers, self-employed persons and service recipients are all different and complex, and in some cases are taken as a step back even, especially where the recipients of services are concerned. The Citizenship Directive's system of residence rights thus unfortunately remains complex and does not lend itself for an easy definition.

[192] Recital 8 of the preamble to Directive 2004/38

Chapter 2 – Family migration tied to the primary free movement law

Introduction

After having considered the Citizenship Directive's extensive scheme of residence rights, one may reasonably ask whether it should even be necessary at all to assess primary free-movement law. Indeed, logically, the Union legislator has tried not only to unify the differences which previous to the directive's adoption existed between various instruments of secondary law, but also to codify the case-law of the Court of Justice on all matters concerning free-movement. In the past, the Court has been known not to sit idle when a certain question could not be answered along the lines of any instrument devised by the Commission, Parliament and Council; when none of the relevant instruments of secondary law could be applied, the Court has always proceeded to consider whether questions could be answered merely by use of the Treaty texts, which are all framed very generally. It is not necessary to assess all this case-law, since some of it has indeed already been taken to heart by the Union legislature, having now been implemented in the Citizenship Directive. Exceptions remain, however, and besides, the directive, too, has its shortcomings, as was extensively seen in chapter 1. Therefore, since the adoption of the Citizenship Directive, the Court of Justice, again, has taken the lead, adjudicating questions on the basis of primary law alone wherever secondary legislation lagged behind in solving them. It is this case-law which is the subject of the present chapter.

At the outset, a remark must be made in this regard about the order of preference which the Court maintains in dealing with the classic free movement rights as against the citizenship provisions of the TFEU. At this point, it must be said the provisions on economical factor mobility, including the free movement of goods and capital, workers, self-employed persons and companies and service providers and recipients, as well as any ensuing family migration rights, have been with us since the earliest days of the European Economic Community. Contrarily, it was only during the last decade of the twentieth century that the notion of a European citizenship was introduced at all. EU citizenship, as already seen, granted a more general aura to the idea of free-movement, disentangling it from economical activity. Since, on the other hand, the classic provisions on free movement were not repealed at the same time, the question logically emerged which of these provisions took precedence, and whether those failing to attain rights of residence under either secondary law or under the classic free movement provisions of the Treaty, could still derive rights under the newly introduced articles on European citizenship.

This dilemma the Court importantly solved in its ruling in *Skanavi and Chryssanthakopoulos* and in many subsequent cases.[193] The Court found that, since the predecessor of the present article 21 par. 2 of the TFEU set out only generally the right of every citizen of the Union to move and reside freely within the territory of the member states, and since this general provision found specific expression in the predecessor to the present article 49 TFEU on the freedom of establishment, it should be necessary for the Court to rule on the interpretation of the general provision only where the facts of a case do not fall within the scope of the specific

[193] ECJ Case C-193/94, *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos*, [29-02-1996] ECR 1996 p. I-00929; see also: ECJ Case C-100/01, *Ministre de l'Intérieur v Aitor Oteiza Olazabal*, [26-11-2002] ECR 2002 p. I-10981; ECJ Case C-92/01, *Georgios Stylianakis v. Elliniko Dimosio*, [06-02-2003] ECR 2003 p. I-01291; ECJ Case C-56/09, *Emiliano Zanotti v. Agenzia delle Entrate - Ufficio Roma 2*, [20-05-2010] ECR 2010 p. I-04517

provision.[194]The same approach has been consistently followed with many of the other classic free movement provisions, so that, once any of them apply to a given case, it is safe to assume that it is not necessary to ascertain the possibilities under article 21 TFEU.[195] This is why the present chapter is placed ahead of the chapter dealing on citizenship of the Union generally.
This chapter is structured along the lines of the TFEU, devoting attention to all the relevant Fundamental Freedoms separately. Mostly for reasons of clarity, however, these freedoms are not addressed in the same order in which they appear in the Treaty itself; they are rather presented in an order which places those freedoms which are more closely and naturally linked with free movement of persons ahead of those freedoms the application of which is more far-fetched. Thus, the first subsection addresses the free movement of workers, which obviously covers the greater part of the European population. Secondly, the freedom to provide services is addressed, after which the freedom of establishment follows. Finally, attention is drawn shortly to the free movement of goods and capital, as their impact on family migration one may safely assume is relatively small..

2.1 Free movement of workers

Freedom of movement for workers serves a clear economic end; the cross-border mobility of labour as a factor of production is generally beneficial to the economies at both sides of the frontier. For this reason, article 48 of the EEC Treaty was introduced already in the very beginning of European integration, and has, since then, changed only its number, but almost none of its operative texts. It presently reads as follows, now named article 45 TFEU:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
    a. to accept offers of employment actually made;
    b. to move freely within the territory of Member States for this purpose;
    c. to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
    d. to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

The flourishing of the European economies, which presently plays such an important role, at least in the Netherlands, in the discourse on the presence and future of the European Union, was thus, at least in part, secured through the straightforward opening up of national labour

[194] ECJ Case C-193/94, *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos*, [29-02-1996] ECR 1996 p. I-00929 par. 22
[195] Ibid. See also: ECJ Case C-100/01, *Ministre de l'Intérieur v Aitor Oteiza Olazabal*, [26-11-2002] ECR 2002 p. I-10981; ECJ Case C-92/01, *Georgios Stylianakis v. Elliniko Dimosio*, [06-02-2003] ECR 2003 p. I-01291; ECJ Case C-56/09, *Emiliano Zanotti v. Agenzia delle Entrate - Ufficio Roma 2*, [20-05-2010] ECR 2010 p. I-04517

markets. However, since workers are not only productive, but are besides human beings requiring a certain degree of dignity, the EEC legislature realized from the outset that family migration had to form a part of the free movement of workers as well in order for such a freedom to be anything but a delusion. The Court of Justice, noting the importance the legislature thus attached to the family as a means of stabilizing integration, continued to uphold its interests even where the Commission and Council – and later the European Parliament – failed to translate their general regard for the migration of workers' families into clear provisions of secondary law. Needless to say, the ensuing case-law may well even have prompted the legislative institutions into further action, where they perhaps were reluctant at first. European integration is a thing one does not do alone.

Much of the Court's early case-law on the free movement of workers has thus been based on a mix of secondary and primary law on the one hand, and has, on the other, been overtaken by now by pursuant codifications, particularly by Directive 2004/38. Therefore, as far as the free movement of workers is concerned, there are only two things which need attention in this chapter, which, after all, only means to describe the impact primary free movement law has had – and is perhaps still bound to have – on family migration in Europe. These two things are, in the first place, the definition of the term "worker", which the Court undeniably shaped on the basis of primary law – with particular emphasis on what is now article 45 par. 4 TFEU, and secondly the possibilities of deriving residence rights for such a worker's family members in the home state of that worker. The latter option, it has after all been considered elaborately in the first chapter, is highly questionable under Directive 2004/38.

2.1.1 The definition of the term "worker"

Already in its early ruling in *Hoekstra*, the Court of Justice decided the term "worker" used in what is now article 45 TFEU should be given a uniform, Union-wide interpretation.[196] This decision the Court convincingly justified by stating that, "if the definition of this term were a matter within the competence of national law, it would therefore be possible for each member state to modify the meaning of the concept of "migrant worker" and to eliminate at will the protection afforded by the Treaty to certain categories of persons".[197] This approach has continuously been upheld in subsequent case-law, and the definition of the term "worker" has accordingly been clarified on many occasions. Important rulings in this regard include *Levin*, *Kempf*, *Lawrie-Blum*, *Brown*, *Allué and Coonan*, *Bettray*, *Bleis*, *Meeusen*, *Leclere and Deaconescu*, *Ninni-Orasche*, *Collins*, *Trojani*, *Kranemann*, *Vatsouras* and *Genc*.[198]

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[196] ECJ Case 75/63, *Mrs M.K.H. Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, [19-03-1964] ECR 1964 p. 00177 under 1, par. 6 and 7

[197] Ibid. under 1, par. 7

[198] ECJ Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [13-03-1982] ECR 1982 p. 01035; ECJ Case 139/85, *R.H. Kempf v. Staatssecretaris van Justitie*, [03-06-1986] ECR 1986 p. 01741; ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [03-07-1986] ECR 1986 p. 02121; ECJ Case 197/86, *Steven Malcolm Brown v. Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205; ECJ Case 33/88, *Pilar Allué and Carmel Mary Coonan v. Università degli studi di Venezia*, [30-05-1989] ECR 1989 p. 01591; ECJ Case 344/87, *I. Bettray v. Staatssecretaris van Justitie*, [31-05-1989] ECR 1989 p. 01612; ECJ Case C-4/91, *Annegret Bleis v. Ministère de l'Education Nationale*, [27-11-1991] ECR 1991 p. I-05627; ECJ Case C-337/97, *C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep*, [08-06-1999] ECR 1999 p. I-03289; ECJ Case C-43/99, *Ghislain Leclere and Alina Deaconescu v. Caisse nationale des prestations familiales*, [31-05-2001] ECR 2001 p. I-04265; ECJ Case C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, [06-11-2003] ECR 2003 p. I-13187; ECJ Case C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*, [23-03-2004] ECR 2004 p. I-02703; ECJ Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles*, [07-09-2004] ECR 2004 p. I-07571; ECJ Case C-109/04, *Karl Robert Kranemann v. Land Nordrhein-Westfalen*, [17-03-2005] ECR 2005 p. I-02421; ECJ Joined Cases C-22/08 and

In *Levin*, the question was put whether a part-time worker – Mrs. Levin apparently did only "a few hours' paid work each week" – could benefit from being a "worker" in the sense of what is now article 45 TFEU.[199] More specifically, the Dutch Council of State, which was the referring court in the case, inquired whether a person had to at least earn the legal minimum wage with one's employment in order for the Treaty – as well as the secondary legislation – to apply.[200] The Court answered, referring to the aim of promoting "a harmonious development of economic activities and a raising of the standard of living" pursued generally by what was then the European Economic Community, that "the effectiveness of Community law would be impaired and the achievement of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration".[201] Part-time workers thus had to be granted the Treaty's benefits as well.[202]
This course of applying a lenient and extensive definition was further reinforced in *Kempf*, referred again by the Dutch Council of State.[203] Pursuant to the answer given in *Levin*, the case unsurprisingly was brought whether an appeal to a host state's social assistance funding could influence the recipient's status as a worker, especially if that recipient only did part-time work – the case concerned a music teacher who relied rather heavily on public funding.[204] The applicant and the Commission, reviewing the Court's earlier jurisprudence in which it had deemed social benefits guaranteeing a minimum means of subsistence generally to be "social advantages" in the sense of Regulation 1612/68, which, thus, had to be issued indiscriminately to "workers" from the other member states.[205] The Court, recalling its reasoning in *Levin*, that a part-time worker who earns less than the minimum of subsistence is a worker nonetheless, even when he must supplement his income in order to support himself, now firmly held that "in that regard it is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his family, as was the case in *Levin*, or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the member state in which he resides, provided that the effective and genuine nature of his work is established".[206] Thus, only activities undertaken on such a small scale as to be considered purely marginal and ancillary may validly be excluded.[207]
It was rather logical, after this outspokenly liberal overture, the Court was subsequently confronted with the issue in *Bettray*; the case concerned a migrant who had undergone rehabilitation relating to a previous drug addiction, who was now working under a social employment scheme subsidized heavily by the Dutch government.[208] The Dutch government unsurprisingly sought to put a limit on the Court's undeniable agenda thus far, claiming in particular that the *sui generis* nature of the employment relationship under national law, the

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C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft Nürnberg*, [04-06-2009] ECR 2009 p. I-04585; ECJ Case C-14/09, *Hava Genc v. Land Berlin*, [04-02-2010] ECR 2010 p. I-00931
[199] Opinion of A-G Sir Gordon Slynn in Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [20-01-1982] ECR 1982 p. 01058
[200] ECJ Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [13-03-1982] ECR 1982 p. 01035 par. 4
[201] Ibid. par. 15
[202] Ibid. par. 16
[203] ECJ Case 139/85, *R.H. Kempf v. Staatssecretaris van Justitie*, [03-06-1986] ECR 1986 p. 01741
[204] Ibid. par. 2 – 5
[205] Ibid. par. 6; see also, among other cases: ECJ Case 249/83, *Vera Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout*, [27-03-1985] ECR 1985 p. 00973 par. 22
[206] ECJ Case 139/85, *R.H. Kempf v. Staatssecretaris van Justitie*, [03-06-1986] ECR 1986 p. 01741 par. 14
[207] Ibid. par. 10; see also: ECJ Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [13-03-1982] ECR 1982 p. 01035 par. 17
[208] ECJ Case 344/87, *I. Bettray v. Staatssecretaris van Justitie*, [31-05-1989] ECR 1989 p. 01612 par. 4

very low productivity of the persons employed, the fact that their remuneration was financed largely by public subsidies, and the pre-eminently social and non-economic nature of the scheme precluded the Treaty's free-movement provisions from applying.[209]
The Court started out, in its reply, by citing its earlier notions, stating that persons employed under the scheme under consideration performed services under the direction of other persons in return for which they received remuneration, so that the essential feature of an employment relationship were evidently present.[210] That conclusion, then, could not be altered by considerations on the productivity of those employed in the scheme or on their remuneration being largely provided from public funds, none of which, according to the Court, were capable of having any consequence regarding the question whether or not to identify particular persons as workers.[211] Likewise, the Dutch point on the *sui generis* nature under national law of particular forms of employment was swiftly rejected.[212]
On the other hand, the Court did emphasize that work, in order to be granted protection by EU free movement law, must be "genuine" work. With regard to the Dutch social employment scheme, it stated, more precisely, that it appeared from the Court's file the jobs in question were reserved for persons who, because of a personal situation, are unable to be employed under normal conditions, that the social employment ends once the person concerned is able again, that the employees were not selected for their aptness to perform certain activities, but that, on the contrary, the activities were rather chosen in the light of the capabilities of the persons who were going to perform them, and that those activities were carried out in associations created solely for that purpose by local authorities.[213] Consequently, the scheme's participants did not classify as workers, and the Court had set a limit to its liberalizing program.[214]
In *Ninni-Orasche* the Court assessed short-term employees with contracts of a fixed duration; the applicant had in fact worked as a waitress only between 6 July and 25 September 1995.[215] Here, perhaps as it was by this time well into this century, the Court took a position clearly leaving more room for the national courts' assessment, stating only generally which factors those courts were to take into consideration.[216] Firstly, the fact that employment is of short duration does not, in itself, exclude that employment from the scope of the Treaty.[217] Rather, as the Court put it, the national court must, "when establishing whether the activities a particular person employs are effective and genuine, "base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue".[218] The Court then went on

[209] Ibid. par. 10
[210] Ibid. par. 14
[211] Ibid. par. 15
[212] Ibid. par. 15; see also: ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [03-07-1986] ECR 1986 p. 02121 par. 26; see also: ECJ Case 307/84, *Commission of the European Communities v. French Republic*, [03-06-1986] ECR 1986 p. 01725 par. 11; ECJ Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, [12-02-1974] ECR 1974 p. 00153 par. 5
[213] ECJ Case 344/87, *I. Bettray v. Staatssecretaris van Justitie*, [31-05-1989] ECR 1989 p. 01612 par. 18 and 19
[214] Ibid. par. 20
[215] ECJ Case C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, [06-11-2003] ECR 2003 p. I-13187 par. 10; see also the annotation by W. Fleuren in: Migrantenrecht (1989) vol. 4 iss. 8 p. 247 and 248; clearly, Mr. Fleuren disagrees with the Court's assessment of the Dutch scheme as it stood at the time of the case, considering it was more than a mere rehabilitation facility.
[216] ECJ Case C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, [06-11-2003] ECR 2003 p. I-13187 par. 26 et seq.
[217] Ibid. par. 25
[218] Ibid. par. 27; see also: ECJ Case C-337/97, *C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep*, [08-06-1999] ECR 1999 p. I-03289 par. 13; ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-*

to emphasize on which aspects of workers' cases the national courts must not base their rulings; such factors include, according to *Ninni-Orasche*, the conduct of the person concerned before and after the employment, for instance the fact that a migrant has already resided a long time in his host state before taking up employment there, the relative duration of employment as opposed to the total duration of his residence, and considerations relating to abuse of rights.[219] All this appears to be a hint that most waitresses carrying on their jobs for two and a half months should be considered workers in the sense of the Treaty.

The ruling in *Trojani* provided the Court with an opportunity to further delineate the outer limits of the term "worker" as used in the Treaty.[220] The facts of the case were, in some respects, similar to those of *Bettray*; for a clear understanding, it may be useful to cite A-G Geelhoed's description to the Court: "Mr Trojani is of French nationality. He is unmarried and has no children. He has no means of subsistence and has been living temporarily at a Salvation Army hostel in Brussels since 8 January 2002. He registered with the Commune of Brussels and has a temporary registration certificate covering his period of residence from 8 April to 7 September 2002. The national court was not provided with any information concerning Mr Trojani's residential status after 7 September 2002, but he himself has told the Court of Justice that he now has a five-year temporary residence permit. For some 30 hours a week, Mr Trojani does various jobs for the Salvation Army hostel as part of a personal rehabilitation scheme. In return, he receives compensation in kind to cover his living expenses. This compensation consists of board and lodging plus EUR 25 a week in pocket-money".[221] This is evidently no description of employment, this is living off charity.

It is no wonder A-G Geelhoed's conclusion greatly resembles that of A-G Jacobs, delivered in the Bettray case, nor is it surprising to find the Court leaning heavily on their common reasoning as well as its own findings in *Bettray*. Geelhoed describes the work done by Mr. Trojani as comprising the cleaning of the Salvation Army hostel, which he inferred was "simply a duty that goes with the accommodation, comparable, for example, with the chores customarily carried out in youth hostels".[222] The Advocate-General added to this that, in his opinion, "in these particular atypical circumstances there can be no question of a fully-fledged employment relationship", since "the relationship between Mr Trojani and the Salvation Army is based essentially on the provision of shelter rather than work".[223] The parallel with A-G Jacobs' opinion in *Bettray* is striking, who had, after all, commented on the Dutch social employment program, that "the scheme is comparable to those, often run by charitable foundations, under which the disabled make or package small household items", adding that "these may then be sold, but the purchaser generally buys the items not because he particularly needs them, but in order to contribute to the charity".[224] Just as Mr. Trojani, in the eyes of A-G Geelhoed, was rather provided with shelter than himself providing his working capacity, the Dutch scheme which was the issue in *Bettray* in the opinion of A-G Jacobs, did little more than providing "something for its beneficiaries to do".[225]

Württemberg, [03-07-1986] ECR 1986 p. 02121 par. 17; ECJ Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [13-03-1982] ECR 1982 p. 01035 par. 17

[219] ECJ Case C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, [06-11-2003] ECR 2003 p. I-13187 par. 28 – 31

[220] ECJ Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles*, [07-09-2004] ECR 2004 p. I-07571;

[221] Opinion of A-G Geelhoed in Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles*, [19-02-2004] ECR 2004 p. I-07573 par. 2 – 4

[222] Ibid. par. 53

[223] Ibid. par. 56

[224] Opinion of A-G Jacobs in Case 344/87, *I. Bettray v. Staatssecretaris van Justitie*, [08-03-1989] ECR 1989 p. 01621 par. 33

[225] Ibid. par. 33

The Court itself was notoriously brief on the matter, which is often taken as an indication of internal divisions being hard-pressed to form a compromise. All the judgment tells us is that the order for reference had established for the Court that Mr. Trojani did perform various jobs for and under the direction of the Salvation Army for approximately 30 hours a week, and that he did receive some pocket money in return for this, so that the national court had already established the constituent elements of any paid employment relationship, being subordination and the payment of remuneration.[226] Still, for a person in Mr. Trojani's circumstances to have the status of worker, the national courts seized of their cases must, as the Court of Justice added, establish that the paid activity in question is real and genuine, in the course of which they must in particular ascertain whether the services actually performed are capable of being regarded as forming part of the normal labour market.[227] For that purpose, referring specifically to Mr. Trojani's case, account may be taken of the status and practices of the hostel, the content of the social reintegration programme and the nature and details of performance of the services.[228]
Of course, it is always a narrow edge between some forms of employment and other forms of charity, but the above summary of case-law unquestionably does point out that, in principle, any work one might generally call a proper "job" must certainly fall within the scope of the Treaty's provisions on free movement of workers and the EU's secondary law on the issue. Part-time jobs, short-term jobs, moonlight jobs, holiday jobs, even internships and traineeships are all deemed capable of bestowing on the employee the status of a worker. Moreover, the specific legal status of particular contracts is entirely irrelevant for the purpose of this definition; all that must be established is that a person works for and under the supervision of another person during a certain lapse of time, and receives a certain remuneration in return. The additional requirement that the work carried out must be real and genuine, as opposed to marginal and ancillary, should be treated with great care, as the Court has twice been confronted with clear fringe cases and has even in those cases been reluctant to state expressly that the persons concerned were not to be seen as workers. But if any cases do fall in that category – which some undoubtedly should – they should only be those cases warranting sympathy; in fact, one may reasonably expect the Salvation Army to be present in one form or another in a disproportionate share of those cases being termed "purely marginal and ancillary".

Students who are workers

There is a specific line of jurisprudence in which the Court of Justice has given an expressly different meaning to the term "ancillary" which it introduced in order to limit the field of application of the freedom of movement for workers; this case-law relates to students. From the earliest beginnings of European integration onto the present day, students can be divided into two categories, namely those who are workers besides being students, and those who are not covered by the worker's definition. Whereas most attention is often drawn to the unemployed category of students, particularly since this category has witnessed the greatest improvements over time regarding their legal position in other member states, the aim of the following paragraphs is obviously only to describe a particular knack in the Court's case-law dealing with students who are at the same time workers. Besides, it is stressed at the outset that the possibility of obtaining study finance is, at this point, irrelevant, as this chapter

[226] ECJ Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles*, [07-09-2004] ECR 2004 p. I-07571 par. 20 – 22
[227] Ibid. par. 23 and 24
[228] Ibid. par. 24

merely aims to ascertain which categories of persons are entitled to migrate – along with their families – through Europe. Thus, it is only as far as the worker's definition that the interest of the subsequent remarks stretches.

The trouble began a few years after the Court of Justice's initial bridgehead cases *Levin* and *Kempf*. Perhaps it was only due after these rulings that a throng of case-law emerged in the 1980's and 90's putting some limits on member states' obligations, particularly in regard of study finance. Still, much as this case-law shows an evidently genuine mind to alleviating the consequences of the Court's earlier logic in favour of member states' budgetary concerns, the according mixing of interests has not at all provided for the clearest law.

Whereas in *Lair* the Court notoriously held that study finance covering tuition fees and general maintenance must be granted EU workers as a social advantage under what used to be Regulation 1612/68, thus sparking the case-law referred to in the first chapter, concerning the retention of one's status as a worker, in *Brown*, a related case decided on the same day, it took the opportunity to for the first time define further the notion of "purely marginal and ancillary" occupational activities.[229] The applicant, an 18-years-old person of dual French and English nationality, had resided with his parents in France during the greater part of his youth, but wished to pursue a university degree at Cambridge in the United Kingdom.[230] Perhaps it was indeed carried out *in order to be entitled* to study finance – which, however, was certainly more experimental back in 1984 than it would be today; Mr. Brown had sought an eight months full-time traineeship with an engineering company, where he carried out "electrical engineering tasks of a practical nature which the company required to be carried out as part of its normal trading activity".[231] The rub, however, was that the applicant would certainly not have been given this traineeship if he had not already secured his admission to Cambridge University beforehand.[232]

Under these circumstances, the Court made two statements which are of importance here. On the one hand, as it was rather evident the traineeship in question passed the test which the Court had set out in *Levin* and *Kempf* with flying colours, the Court explained once again that "any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a worker", underlining that nationals of other member states who enter into employment in the host state for a period of eight months with a view to subsequently undertaking university studies there are undoubtedly workers in that sense.[233] Then, with regard specifically to the grant of maintenance support, the Court rather vaguely commented it could not be inferred from its case-law that Community workers should be entitled to a

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[229] ECJ Case 39/86, *Sylvie Lair v. Universität Hannover*, [21-06-1988] ECR 1988 p. 03161; ECJ Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205

[230] ECJ Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205 par. 3; see also: Opinion of A-G Sir Gordon Slynn in Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [17-09-1987] ECR 1988 p. 03205 par. 2

[231] Opinion of A-G Sir Gordon Slynn in Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [17-09-1987] ECR 1988 p. 03205 par. 3

[232] ECJ Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205 par. 6; see also: Opinion of A-G Sir Gordon Slynn in Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [17-09-1987] ECR 1988 p. 03205 par. 3

[233] ECJ Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205 par. 21 – 23; Drijber infers from the Court's ruling in *Lawrie-Blum* that it would not have been possible for the Court to exclude all interns or trainees generally from the scope of the Treaty's free-movement provisions due to the admittedly evident educational component inherent to internships and traineeships, see: B.J. Drijber, "Gelijke behandeling van studenten uit de EEG. Zijn er nog grenzen?", *Nederlands Juristenblad* 1988 p. 1639; compare: ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [03-07-1986] ECR 1986 p. 02121. On the other hand, the exclusion proposes would have stretched quite a bit farther than the solution reached by the Court in *Brown*.

study grant on the basis of their worker status where it is established that they acquired that status exclusively as a result of being accepted for admission to university, adding that "in such circumstances, the employment relationship, which is the only basis for the rights deriving from Regulation No 1612/68, is merely ancillary to the studies to be financed by the grant".[234]

What should be inferred from this ruling? The Court's remarks implicitly appear to address what might be exaggerated as a kind of fraud, whereby a person wishing to be entitled to study grants first secures his admission to university, upon which he is accepted as a trainee with the sole purpose of making the Treaty provisions on free movement of workers applicable.[235] To that end, the Court arguably interpreted its earlier notion of "merely ancillary employment" in an unfortunately flexible manner; the importance of the employment must, after all, be compared to a particular other thing, for instance the acquisition of a social advantage, and if the employment itself is substantially less important to the person concerned than that other thing, it becomes ancillary to it, thereby depriving the worker of an advantage he would otherwise have been due. The potential of such case-law is far-reaching if not an actual danger to the evolution of EU migration law; after all, if the logic of *Brown* were indeed to be applied analogously, employees could run the risk of being denied particular social advantages simply because the activities they employ in their spare time tend to show that perhaps they *sought* only to be eligible for those benefits. Such an approach clearly imposes perverse incentives on migrants, nor does it make the option of migrating in the first place any more attractive at all.

In *Raulin*, it was a good thing, therefore, the Court did not return to the considerations of *Brown* discussed above.[236] The case concerned

Employment in the public service

Article 45 par. 4 TFEU excludes from the Treaty's sphere of application "employment in the public service", a provision the predecessor of which many member state representatives have tried, mostly during the 1980's, to stretch beyond its proper limits in order to limit the impact of what was then EEC law on immigration and related matters. The Commission has actively opposed this by bringing several infringement procedures before the Court of Justice on this issue, and the Court, adamant as it was in those days in securing a scope of application for the free movement of workers which would really be effective in opening up labour markets, duly refused the defendant member states the sort of lenient approach towards employment in the public service which they sought to secure.

The first issue which had to be resolved arose in *Sotgiu*, and concerned the states' perception according to which the status of a person employed in the public service should be determined on the basis of national law – a person whose contractual bonds with his employer were governed by public law, or whose post was called that of a functionary had to be considered a civil servant for that fact alone.[237] The Court swiftly dismissed this proposition, stating that "legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of

[234] ECJ Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, [21-06-1988] ECR 1988 p. 03205 par. 27

[235] See: B.J. Drijber, "Gelijke behandeling van studenten uit de EEG. Zijn er nog grenzen?", *Nederlands Juristenblad* 1988 p. 1639

[236] ECJ Case C-357/89, *V.J.M. Raulin v. Minister van Onderwijs en Wetenschappen*, [26-02-1992] ECR 1992 p. I-01027

[237] ECJ Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, [12-02-1974] ECR 1974 p. 00153 par. 2

Community law".[238] It then added rather vaguely that the exception made by what is now article 15 par. 4 TFEU "concerns only access to posts forming part of the public services and that the nature of the legal relationship between the employee and the employing administration is of no consequence in this respect".[239] A helpful remark indeed, for any national judge who wishes to know what not to do; yet, the answer given quite obviously triggered renewed questions on what the scope of the public service exception should be.
On the 21st of November 1978 the European Commission notified the Belgian government about a policy then common in Belgium according to which a wide group of persons performing work for public authorities were deemed "civil servants" – and had to be Belgians.[240] This included "posts for trainee locomotive drivers, loaders, plate-layers, shunters and signallers with the national railways and unskilled workers with the local railways as well as posts for hospital nurses, children's nurses, night-watchmen, plumbers, carpenters, electricians, garden hands, architects and supervisors with the city of Brussels and the commune of Auderghem".[241] This list, expediently included by the Court in its subsequent judgment, is illustrative of the general question which the Court of Justice was called to answer, a question which in fact often returns in a discussion on European law: was it national, perhaps constitutional law, or EU law itself defining the term "employment in the public service" mentioned in what is now article 45 par. 4 TFEU.
The Court of Justice, contemplating the first option, observed that "determining the sphere of application of article 48(4) raises special difficulties since in the various member states authorities acting under powers conferred by public law have assumed responsibilities of an economic and social nature or are involved in activities which are not identifiable with the functions which are typical of the public service yet which by their nature still come under the sphere of application of the treaty", so that "extending the exception contained in article 48(4) to posts which, whilst coming under the state or other organizations governed by public law, still do not involve any association with tasks belonging to the public service properly so called, would be to remove a considerable number of posts from the ambit of the principles set out in the treaty and to create inequalities between member states according to the different ways in which the state and certain sectors of economic life are organized".[242] The Court then proceeded by stating, as far as necessary, a uniform definition of "public service", needed for the demarcation of the Treaty's applicability; according to the judgment, only those posts which are "typical of the specific activities of the public service" and in which "the exercise of powers conferred by public law and responsibility for safeguarding the general interests of the state" are vested should be covered by that term.[243]
The most famous instance, however, in which this issue was again brought to the Court's attention was in *Lawrie-Blum*; providing the Court with another opportunity to express its outspokenly liberal intentions.[244] A UK citizen wished to enter the German employment market as a grammar school teacher, but was refused because of her nationality, and because of the predecessor of article 45 par. 4 TFEU.[245] The Court, recalling its earlier case-law,

[238] Ibid. par. 5
[239] Ibid. par. 6; as a side note, it must be added the Court also emphasized that the public service exception only covers *access* to certain areas of employment and does not exclude from such employment, if granted to foreign EU nationals, the obligation of equal treatment.
[240] ECJ Case 149/79, *Commission of the European Communities v. Kingdom of Belgium*, [17-12-1980] ECR 1980 p. 03881 par. 5
[241] Ibid. par. 3
[242] Ibid. par. 11
[243] Ibid. par. 12; repeated in: ECJ Case 307/84, *Commission of the European Communities v. French Republic*, [03-06-1986] ECR 1986 p. 01725 par. 12
[244] ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [03-07-1986] ECR 1986 p. 02121
[245] Ibid. par. 2 and 8

proceeded this time by giving some further guidance as to what kind of posts are in fact excluded on the basis of what is now article 45 par. 4. That provision, according to the Court, refers only to "those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities and which therefore require a special relationship of allegiance to the state on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality".[246] After this, it was no real surprise to find that secondary school teachers do not belong to that category.[247]
Subsequently, the Commission and the Court, in various infringement proceedings, have made it quite clear what sort of posts is not to be called "public service" in the sense of article 45 par. 4 TFEU.[248] But where to draw the line, or in other words, what *is* in fact employment in the public service? When considering, for instance, jobs with municipal or other decentralized authorities or even ministries, the Commission has gradually become stricter with member states, as is apparent from an evaluative report published late in 2002.[249] Following the Court of Justice's case-law in which the question of actual exercise of powers bestowed by public law must be assessed for each specific post and cannot be assumed for certain sectors or for jobs under certain authorities, the Commission maintains that "even if management and decision-making posts which involve the exercise of public authority and responsibility for safeguarding the general interests of the State may be restricted to nationals of the host Member State, this is not the case in relation to all jobs in the same field. For example, the post of an official who helps prepare decisions on granting planning permission should not be restricted to nationals of the host Member State".[250] The same approach is followed with police, the armed forces, the diplomatic corps, the judiciary etc.; judges, soldiers, diplomats and police officers are exempt from the application of the Treaty, but their administrative services are not, so that foreign EU citizens may take up such posts and be entitled to European protection.[251]

Dutch policy and jurisprudence

[246] Ibid. par. 27; see also: ECJ Case 149/79, *Commission of the European Communities v. Kingdom of Belgium*, [26-05-1982] ECR 1982 p. 01845 par. 7; ECJ Case 149/97, *Commission of the European Communities v. Kingdom of Belgium*, [17-12-1980] ECR 1980 p. 03881 par. 11 and 12
[247] ECJ Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [03-07-1986] ECR 1986 p. 02121 par. 28; see also: ECJ Case C-4/91, *Annegret Bleis v. Ministère de l'Education Nationale*, [27-11-1991] ECR 1991 p. I-05627 par. 7 and 8
[248] ECJ Case 225/85, *Commission of the European Communities v. Italian Republic*, [16-06-1987] ECR 1987 p. 02625; ECJ Case C-473/93, *Commission of the European Communities v. Grand Duchy of Luxemburg*, [02-07-1996] ECR 1996 p. I-03207; ECJ Case C-173/94, *Commission of the European Communities v. Kingdom of Belgium*, [02-07-1996] ECR 1996 p. I-03265; ECJ Case C-290/94, *Commission of the European Communities v. Hellenic Republic*, [02-07-1996] ECR 1996 p. I-03285; ECJ Case C-114/97, *Commission of the European Communities v. Kingdom of Spain*, [29-10-1998] ECR 1998 p. I-06717; ECJ Case C-355/98, *Commission of the European Communities v Kingdom of Belgium,* [09-03-2000] ECR 2000 p. I-01221; ECJ Case C-283/99, *Commission of the European Communities v. Italian Republic*, [31-05-2001] ECR 2001 p. I-04363; the notion has also been elaborated further in preliminary reference proceedings, see, for instance: ECJ Case C-405/01, *Colegio de Oficiales de la Marina Mercante Española v. Administración del Estado*, [30-09-2003] ECR 2003 p. I-10319; ECJ Case C-47/02, *Albert Anker, Klaas Ras and Albertus Snoek v. Bundesrepublik Deutschland*, [30-09-2003] ECR 2003 p. I-10447
[249] COM 2002/0694 (final) p. 19
[250] Ibid.
[251] Ibid.

Starting out with a positive remark, it must be said that Dutch policy has gradually become more and more lenient towards recognizing various forms of employment as "real and genuine". Policy rules, however, are phrased rather generally, and often refer back to the Court of Justice's own case-law.[252] However, there is one thing the rules do add of themselves which seemingly works in favour of EU migrant workers – and, by extension, their family members. According to the Dutch Immigration Circular, namely, there are two ways of entering a "clear zone" in which employment is simply deemed real and genuine without further investigation. Persons hoping to be considered workers may either show the immigration authorities that more than half of their periodical income is generated through the activities they pursue, or, alternatively, that they work for more than 40 percent of the time which is considered a normal full-time job in the relevant sector.[253]

The lower courts in the Netherlands do sporadically affirm correctly that the abovementioned policy rules are of an indicative nature only, stating that a failure to comply with either criterion cannot automatically result in a denial of the worker's status.[254] On most occasions, however, the fact that a particular person's income does not amount to 50% of the social assistance he may claim in total is of itself considered a sufficient reasoning for denying that person the worker's status.[255] Thus, a policy rule which on paper merely means to favour the legal certainty for EU citizens immigrating to the Netherlands, establishing a "clear zone" for cases which obviously do fall within the Treaty's ambit, turns out in practice to insert a new benchmark imposed autonomously by Dutch law. It need not be stated explicitly this is a clear example of "legal designations" being "varied at the whim of national legislatures", nor does it need explaining how the Court of Justice has previously assessed even the possibility of such variance occurring within the Union.[256]

There is another aspect of the Dutch interpretation of the term "real and genuine employment" which, however, is even more at odds with the general idea that one may well infer from the above review of the Court of Justice's case-law; it concerns a variance of interpretation applied between cases, on the one hand, where EU citizens claim the worker's status in order to reside legally in the Netherlands and, on the other, cases where the worker's status is invoked by the Dutch employment authorities in order to fine illegal employment of foreign EU nationals. According to the Dutch Council of State, namely, in order to fine an employer for work carried out by an EU citizen who is not free to access the Dutch labour market – a situation which generally arises due to special derogations following new member states' accessions – the Dutch authorities must first ascertain that the EU citizen in question is in fact a worker in the European sense of the term,[257] Apparently, the Council of State considers that "marginal and ancillary" employment carried out by, currently, Bulgarian and Romanian nationals, is not a thing their employers may be fined for under Dutch – and EU law.[258]

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[252] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 3.2; the rules, for instance, simply tell that "the concept of real and genuine employment must, according to settled jurisprudence, be interpreted broadly" and that "the scale of the employment may not be so small as to make the employment purely marginal and ancillary". There are more direct references to the Court's case-law like this.

[253] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 3.2.1

[254] District Court Den Haag (residing in Amsterdam), Case no. AWB 06/1681, [06-04-2007] *LJN* BA4413 par. 9

[255] District Court Den Haag (residing in Haarlem), Case no. AWB 05/42971, [15-12-2006] *LJN* BA2078 par. 2.13; District Court Den Haag (residing in Groningen), Case no. AWB 11/36144, [08-06-2012] *LJN* BX2645 par. 2.7; in social assistance cases, see: District Court Haarlem, Case nos. 07-4861 and 07-4859, [10-08-2007] *LJN* BB1627 par. 2.12;

[256] ECJ Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, [12-02-1974] ECR 1974 p. 00153 par. 5

[257] Council of State, Case no. 200704789/1, [02-07-2008] *LJN* BO6132 par. 2.4.4.

[258] This logic was also inferred by District Court Amsterdam, Case AWB 07/616, [02-02-2009] *LJN* BH5442 par. 4.14; see also: District Court Breda, Case AWB 10/1362, [24-11-2010] *LJN* BO9897 par. 2.5. Generally, the logic of the Council of State may certainly be valid because access to the labour market is generally only

Having established this, a logical mind might expect all work below 40% of a normal full-time job as well as work for a remuneration below 50% of what the employee could claim in social assistance, to be exempt from the scope of the Dutch legislation regulating the employment of foreign nationals as far at least as EU citizens are concerned; yet, the meaning attached to the Court of Justice's terms "purely marginal and ancillary" suddenly turns out to be interpreted remarkably restrictively in cases under that particular legislation. As an example, a Romanian national was considered to be a worker with the stroke of a pen, merely because of having worked for 4 hours and 45 minutes in total, for which a remuneration was paid of only €43,23 – circumstances which, according to the District Court of Arnhem, evidently precluded the employment from being considered "purely marginal and ancillary".[259] Likewise, a group of Bulgarian builders who were seen working for only half a day were nevertheless deemed – even by the Council of State itself – to have performed "real and genuine" – and thereby illegal employment.[260]
How differently do the courts address the various forms and types of employment which EU citizens present to them in order to claim entitlement to reside in the Netherlands. Recently, a newspaper boy was refused the worker's status because he earned only €150,- per month with his newspaper job – which is arguably still more than €43,23 in total.[261] On another occasion, an employee the nature of whose work was not even mentioned was refused because her annual income had amounted to only € 1.923,-, which was below 50% of the relevant normative amount for eligibility to social assistance.[262] It appears the discretion the Court of Justice generally leaves to the national courts because it expects the scheme of preliminary references to be one of judicial cooperation is rather welcome within the Dutch legal order.[263]
In all honesty, such a clear variance in national interpretation of a case-law which is outspokenly solid and cohesive at the EU level, evidently maintained within the Netherlands only to accommodate the interests of whichever administrative authority is dealing with immigrants, is a development one may call worrisome to put it politely – and it is certainly no showcase of sincere judicial cooperation.

2.1.2 Home state residence rights for family members

In Chapter 1 it was expediently considered how difficult it is for family members of EU citizens to derive a residence right from the EU nationality of their relative if they wish to effectuate such rights in the latter's home state; the wordings of Directive 2004/38 leave it highly questionable whether the directive covers such rights at all. This makes it necessary to ascertain which home-state residence rights may be derived from primary free-movement law and, in this instance, from the provisions on free movement of workers. There are two lines of jurisprudence in this regard which need attention; on the one hand, the Court of Justice has adopted home state residence rights for family members of migrant workers returning to the latter's home state after having resided in another EU member state, while, on the other, it is

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limited for the nationals of newly acceded member states for as far as it covers the freedom of movement for workers, so that those pursuing merely marginal and ancillary activities must be considered economically inactive migrant citizens.
[259] District Court Arnhem, Case no. AWB 10/4334, [12-04-2011] *LJN* BQ3558 par. 3.4 and 3.5
[260] Council of State, Case no. 201111314/1/V6, [11-07-2012] *LJN* BX1113 par. 2.4.3
[261] District Court Den Haag (residing in Groningen), Case no. AWB 11/36144, [08-06-2012] *LJN* BX2645 par. 2.7
[262] District Court Den Haag (residing in Haarlem), Case no. AWB 05/42971, [15-12-2006] *LJN* BA2078 par. 2.13
[263] See, for instance: ECJ Case C-14/09, *Hava Genc v. Land Berlin* [04-02-2010] ECR 2010 p. I-00931 par. 29 – 33

interesting to note what consequences primary law may have for the situation of frontier workers and their family members.

2.1.2.1 Returning to the worker's home state

In 1992 the Court of Justice held, in its landmark ruling in *Singh*, that "a national of a member state might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person […] in the territory of another member state if, on returning to the member state of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another member state".[264] It added to this that such an EU national "would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his member state of origin under conditions at least equivalent to those granted them by Community law in the territory of another member state".[265] It is the logic of this case which has ensured that an EU citizen's third-country relatives may, under particular circumstances, be treated according to the rules the EU established for this category even in the member state of which the EU citizen has the nationality.[266] It is worthwhile to look into this possibility in more detail.

First, a condition which in *Singh*, apparently, was still attached to the option of return – and of taking one's family along – was later dismissed by the Court in its *Eind* ruling.[267] Whereas in *Singh* the worker in question had found new work in his home member state and therefore wished to return his residence there, the situation in *Eind* was different in that the worker there – he had worked genuinely in the UK – had not at all found a new occupation in his home country, the Netherlands.[268] The Dutch Council of State was therefore uncertain whether a person in such a position would actually be deterred from exercising his rights of free movement – if his family members were to be allowed to return with him as well, his situation after returning would after all be *even better* than that which his host state had been obliged to grant him and his family there; in the UK, after all, his and his family's residence remained conditional on him retaining his worker's status or having sufficient resources.[269] The Court plainly refused to accept this approach, stating simply that, indeed, "a national of a member state could be deterred from leaving (…) in order to pursue gainful employment in the territory of another member state if he does not have the certainty of being able to return to his member state of origin, irrespective of whether he is going to engage in economic activity in the latter state".[270] The reasoning is rather logical; indeed, the basic idea of free movement of workers is that workers do travel across the EU as needed in the market and, if taking the step abroad would indeed have meant a factor as important on a personal level as anyone's right to reside as a family would have remained conditional on the EU national perpetually being employed, rather few would have risked their chances. Thus, both decisions in *Singh* and *Eind* show a very principled approach, the logic of which relates directly to the

[264] ECJ Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [07-07-1992] ECR 1992 p. I-04265 par. 19
[265] Ibid. par. 20
[266] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 5.3.2.1; see also:
[267] ECJ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, [11-12-2007] ECR 2007 p. I-10719
[268] Ibid. par. 12
[269] Ibid. par. 33
[270] Ibid. par. 35

divergence which until the present day continues to exist between the legal positions of EU citizens as against their home and their host states respectively.
An entirely different feature of the return option, which is, however, of some interest, is the generality of their reception by the Dutch authorities. Both rulings undeniably only refer to the situation of persons who had been "gainfully employed" in their host member states, albeit the Court's assessment of Mr. Singh and Mr. Eind's respective situations after returning is phrased more generally by reference to "economic activity".[271] One might, for this reason, expect the underlying logic not necessarily to be applicable to, for instance, self-employed persons, service providers and service recipients, let alone economically inactive migrants. However, in Dutch policy, it is accepted without much ado that the family members of Dutch nationals who have resided, as a family, on the territory of another member state and who then wish to return home, are entitled to reside in the Netherlands, regardless of the manner in which the residence abroad was previously enjoyed.[272] This kind of constructive policy must certainly be welcomed, as it is very obvious the option of migrating, regardless of whichever valid purpose is behind it, becomes equally ineffective without the certainty of being able to return to one's home country without ceasing to be entitled to live together with one's (perhaps newly established) family. It is indeed clear from such policy rules that EU law at this point is not only complied with in the Netherlands, but is also understood and accepted as pursuing proper objectives.
As already explained in the first chapter, however, Dutch jurisprudence often requires a specific period of residence abroad (usually around three months) for the return option of *Singh* and *Eind* to become available, even though no instrument of EU law actually states anything in this direction. Of course, in a host member state article 45 TFEU and Directive 2004/38 apply as of the first day of entry of either the EU citizen or his (third country) family members. Furthermore, as the Court stated clearly in *Eind*, none of the EU instruments do explicitly cover the situation of return – EU law is applied only by analogy, simply to make free movement more effective.[273] Mr. Singh, however, had been employed in Germany from 1983 to the end of 1985, and Mr. Eind had resided in the UK from February 2000 until October 2001.[274] So why are three months required instead of one and a half years?
Generally, the Dutch courts appear to maintain this rule in order to demarcate between the genuine migrants and those merely trying to escape their wholly internal situations – and particularly the fact that those are exclusively covered by Dutch law, which is more stringent. As already discussed in chapter 1, on the 5th of October 2012 the Dutch Council of State has referred preliminary questions on this account to the Court of Justice.[275] The order for reference indeed draws special attention to the concept of "abuse of rights", which implicitly appears to be the underlying motive for which the Dutch judiciary presumes the return option may be made conditional upon a prior residence abroad of at least a certain duration.[276] In order to assess this argument, it is expedient to draw some special attention to the Council of

[271] ECJ Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [07-07-1992] ECR 1992 p. I-04265 par. 20; ECJ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, [11-12-2007] ECR 2007 p. I-10719 par. 45
[272] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 5.3.2.1
[273] ECJ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, [11-12-2007] ECR 2007 p. I-10719, par. 45
[274] ECJ Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [07-07-1992] ECR 1992 p. I-04265 par. 3; ECJ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, [11-12-2007] ECR 2007 p. I-10719 par. 10 and 11
[275] Council of State, Case nos. 201011889/1/T1/V4 and 201108529/1/T1/V4, [05-10-2012] (raadvanstate.nl)
[276] Council of State, Case nos. 201011889/1/T1/V4 and 201108529/1/T1/V4, [05-10-2012] (raadvanstate.nl) par. 16.1

State's argument, as well as to the prohibition of "abuse of rights" as it is generally maintained by the Court of Justice in the field of free movement of workers.

Abuse of rights

The Council of State's ruling, it must first be made clear, does not explicitly address the free movement of workers; as already established in the first chapter, the Dutch nationals in both cases referred had barely resided abroad and, in one of the cases, the Dutch national under inspection, had actually returned to the Netherlands because she could not find employment in Spain.[277] However, given the generality with which the return option is accepted in Dutch law, and particularly since the Council of State has explicitly referred to the Court's judgments in *Singh* and *Eind*, both of which did concern persons who had been "gainfully employed" in a host state, and in which the Court of Justice had expressly invoked what is now article 45 TFEU in order to find that secondary legislation should be applied analogously after the return of these workers and their family members, it is still considered appropriate to discuss the reference here rather than in chapter 1 or under a different fundamental freedom in this chapter. It is recommended, however, that the generality of the return option should be kept in mind.

The Council of State inquires, essentially, whether it would be possible to require, for the return option derived from *Singh* and *Eind*, a minimum duration of residence abroad of approximately three months, on the basis of article 35 of Directive 2004/38 – applied analogously, one must presume, on the basis of article 45 TFEU.[278] The Council of State derives from article 35, and more in particular from the Commission's Guidelines on this provision, that it might allow the member states to require a minimum duration of residence abroad before allowing for the return option, simply as a means of discerning a "normal" use of free movement rights by their nationals from an "abusive" one.[279] In that light, it is true that article 35 of the directive allows the member states in general to "adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience", and that the Commission's Guidelines hold that abuse may be assumed "when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under Community law".[280] Yet, does this entail that no "use" of free movement rights can ever be real and genuine if it has not lasted for at least three months?

When considering this question, fortunately, there is an extensive amount of literature as well as a wealth of EU case law to be consulted on the notion of "abuse of rights".[281] In fact, one

[277] Ibid. par. 3 and 7
[278] Ibid. par. 16.1; see also: COM 2009, 313 final p. 14
[279] Ibid.
[280] COM 2009, 313 final p. 17
[281] For instance: ECJ Case C-127/08, *Blaise Baheten Metock c.s. v. Minister for Justice, Equality and Law Reform*, [25-07-2008], ECR 2008 p. I-06241; ECJ Joined cases C-151/04 and C-152/04, *Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durré*, [15-12-2005] ECR 2005 p. I-11203 par. 45; ECJ Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, [23-07-2003] ECR 2003 p. I-09607 par. 55 – 57; ECJ Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, [14-12-2000] ECR 2000 p. I-11569 par. 52; ECJ Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, [09-03-1999] ECR 1999 p. I-01459 par. 24; ECJ Case 125/76, *Peter Cremer v. Bundesanstalt für landwirtschaftliche Marktordnung*, [11-10-1977] ECR 1977 p. 01593 par. 21; ECJ Case 33/74, *Johannes Henricus Maria van*

of the earliest abuse cases, the Court's ruling in *Van Binsbergen*, is indeed quite exemplary of what the doctrine is essentially designed to achieve.[282] Mr. Van Binsbergen had applied for an unemployment benefit and, when his claim was refused, had authorized his attorney to lodge appellate proceedings against that denial.[283] This barrister, however, a certain Mr. Kortmann, was not allowed to act on Mr. Van Binsbergen's behalf *ad litem* since he was not established (anymore) in the Netherlands, such establishment being a requirement under the relevant Dutch professional rules of conduct.[284] Mr. Van Binsbergen (or probably Mr. Kortmann on his behalf) then invoked what is now article 56 TFEU (on the freedom to provide services), claiming the Dutch rule of conduct should be set aside.

The German and UK governments, intervening in the case, had proffered that this problem should be resolved simply with reference to the interests of third parties; in principle, thus, the residence requirement should indeed be deemed a restriction of the freedom to provide services; yet, it could then still justified on account of the difficulties which individuals might face in holding their lawyers accountable for any professional misconduct if those lawyers were resident in other member states.[285] The interest of consumer protection should thus simply be able to justify the application of the relevant residence requirement *in any case*, that is, regardless of the intentions and actual cross-border activities of those concerned.

The Court, however, decided the case following a different approach. It held that the application of specific requirements to persons providing a particular kind of service are compatible with EU law "where they have as their purpose the application of professional rules justified by the general good (...) which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another member state".[286] Then, the Court went on by famously declaring that "a member state cannot be denied the right to take measures to prevent the exercise by a person providing services *whose activity is entirely or principally directed towards its territory* of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state".[287]

The outcome is very different. Had the intervening parties' proposal been followed, a Dutch barrister would have remained obliged to abide by the residence requirement regardless of his professional activities in Belgium; after all, if the interest of consumer protection would have been able to justify such a restriction of the freedom to provide services, it would arguably be able to do so as against any barristers established abroad, not only against those whose activities were entirely or principally directed towards Dutch territory. In this sense, the Court's approach may be seen as a more progressive alternative. Had Mr. Kortmann, after all, established himself in Belgium mainly to offer his services to Belgian clients, while incidentally taking on the case of Mr. Van Binsbergen, the Court's ruling seems to indicate a

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Binsbergen v. Bestuur van de Bederijfsvereniging voor de Metaalnijverheid, [03-05-1974] ECR 1974 p. 01299; see also, in general: K.S. Ziegler, "Abuse of law in the context of the free movement of workers" *in*: R. de la Feria & S. Vogenauer, *Prohibition of abuse of law. A new general principle of EU law?*, Oxford: Hart 2011 p. 295 – 314; E. Spaventa, "Comments on abuse of law and the free movement of workers" *in*: R. de la Feria & S. Vogenauer, *Prohibition of abuse of law. A new general principle of EU law?*, Oxford: Hart 2011 p. 315 – 320; also, for a more specific annotation of the *Metoch* ruling, J. Faull, "Prohibition of abuse of law. A new general principle of EU law" *in*: R. de la Feria & S. Vogenauer, *Prohibition of abuse of law. A new general principle of EU law?*, Oxford: Hart 2011 p. 291 – 293

[282] ECJ Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bederijfsvereniging voor de Metaalnijverheid*, [03-05-1974] ECR 1974 p. 01299

[283] Ibid. par. I: "facts"

[284] Ibid.

[285] Ibid. The Commission had proposed to exclude professional rules of conduct altogether.

[286] Ibid. par. 12

[287] Ibid. par. 13

residence condition could not be held against him, while, in the case at hand – especially given the fact that nearly all of Mr. Kortmann's services were directed towards the Netherlands – such a requirement was valid because EU law could not be relied upon merely in order to "evade" the applicability of national rules of conduct.[288]
On the other hand, if the member states' reasoning had been followed, the justification of the residence requirement had at least been *necessary* even in the case of Mr. Kortmann, regardless of who his clients might happen to be. The residence condition would have had to indeed support the interests of consumers rather than Dutch competitors and, secondly, it would have had to be proportionate. Given the fact that the Court decided the case primarily on the specific situation of Mr. Kortmann, it may not have been unlikely the Court was not at all convinced that consumer protection warranted the residence requirement concerned. Thus, while apparently the Court's approach seems to have been favourable to free movement, on closer inspection it cannot be denied the abuse of rights doctrine does grant the member states a margin of discretion with regard to *abusive* cross-border activities which they would not have had without it.
The logic of the Court's choice of approach may be linked to the fact that it was 1974 – and that the transitional period had expired only little over four years prior to the judgment. The harmonization and coordination programs of the EEC were, at that time, much less developed than they are today and, hence, the degree of divergence between the laws of different member states, one may presume, were accordingly larger. On the other hand, the negative obligations which the Treaty provisions on free movement imposed even then on the member states were nigh identical to the ones present in the TFEU today; the strict preclusion of restrictions on the free movement of goods, services, capital and workers, as well as on the freedom of establishment, were worded almost literally in the same way. The consequence certainly was one of *imbalance*, because on the one hand the member states were not yet obliged, due to a lack of harmonization and/or coordination of laws, to really establish a cohesive EU-wide system of rules in many fields of law, while on the other individuals could already rely on the same idea of market liberalization as is applicable today in order to challenge many normal rules of domestic law which, in their eyes, were discriminatory or unjustifiably intrusive on their fundamental freedoms. The Court, therefore, may simply have tried to alleviate its own workload because, failing a legislative system of harmonization or coordination, it was indeed only to be expected that an overwhelming part of domestic laws could be challenged – and would have had to be justified – on the mere crossing of a border.[289] The solution of *Van Binsbergen* thereby appears to be essentially a simple extension of the "wholly internal situation" doctrine; just as, according to that doctrine, EU law is simply inapplicable to situations confined in all aspects to the territory of only a single member state, so, too, does EU law have no objection against member states' restrictive measures insofar as they are applied to situations in which their nationals, although having indeed crossed an internal frontier, nevertheless (continue to) direct their relevant (economic) activities entirely or principally towards the home state's territory.
The abuse of rights doctrine was importantly nuanced by the Court's ruling in *Centros*, which regarded the freedom of establishment.[290] Mr. and Mrs. Bryde, two Danish nationals residing

[288] Also noted by Brinkhorst, see: H.J. Bronkhorst, "De ontwikkelingen op het gebied van het vestigingsrecht en het vrij verrichten van diensten in de Europese Gemeenschap", *S.E.W.*, vol. 24 (1976) p. 330-346
[289] A similar suggestion was later also noted in the field of the free movement of goods, with regard to the Court's judgment in *Keck*, see: ECJ Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, [24-11-1993] ECR 1993 p. I-06097; see also: L.W. Gormley, "Reasoning renounced? The remarkable judgment in Keck & Mithouard", *European Business Law Review*, vol. 5 (1994) p. 63-67
[290] ECJ Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, [09-03-1999] ECR 1999 p. I-01459

in Denmark, had established a company called Centros Ltd. The company under English law had its registered office "in the United Kingdom, at the home of a friend of Mr. Bryde".[291] The company had "never traded since its formation", but Mr. and Mrs. Bryde, who were the only two shareholders, intended to set up a branch office in Denmark. Clearly, the whole design thus had nothing to do with the English market – in other words: all of the company's economic activities were "directed towards Denmark" – and the only reason for which Centros Ltd. had been established under English rather than Danish company law was that in this way the shareholders had not needed to provide or pay up any share capital before the legal formation of the company.[292]

The case was perfect for an extension of *Van Binsbergen*; yet, the Court still decided it would not follow that ruling's line of approach, even though the facts clearly gave it ample opportunity to do so. The Court first cited extensively its earlier case-law on abuse of rights.[293] Then, in spite of all that case-law, it held that "the fact that a national of a member state who wishes to set up a company chooses to form it in the member state whose rules of company law seem to him the least restrictive and to set up branches in other member states cannot, in itself, constitute an abuse of the right of establishment" since "the right to form a company in accordance with the law of a member state and to set up branches in other member states is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".[294] Whereas in *Van Binsbergen*, Mr. Kortmann had thus not been able to "evade" the applicability of the Dutch rules of conduct, Mr. and Mrs. Bryde had now been successfully been able to "evade" the Danish rules of company formation, since the setting up of companies and the cross-border setting up of agencies was itself within the *essence* of the freedom of establishment protected by the Treaty.

How does this relate to persons incidentally moving to other member states simply and perhaps even explicitly in order to make use of the system of family migration the EU itself imposes on host states? In 1974 there were neither a European instrument of secondary law regarding the rules of conduct applicable to regulated professions, nor in fact even a legal basis in primary law on which such an instrument could legally have been adopted. In contrast, however, the domain of family migration, just like that of the cross-border establishment of branch offices, falls clearly within the *essence* of both the classic fundamental freedoms and the Treaty provisions on EU citizenship. Thus, where Mr. Kortmann may admittedly be said to have tried, willingly or not, to "evade" the applicability of a set of rules clearly outside the material competence of the EU legislator, persons moving abroad incidentally for family migration purposes are utterly unable to "evade" such rules, because they will simply and necessarily face a body of law which has actually been harmonized completely by the EU legislator itself – in fact, they explicitly *intend* to abide by the rules of Directive 2004/38.

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[291] Ibid. par. 3

[292] Ibid. par. 9 – 12

[293] Ibid. par. 24; see: ECJ Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [03-02-1993] ECR 1993 p. I-00487; ECJ Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [05-10-1994] ECR 1994 p. I-04795; ECJ Case 115/78, *J. Knoors v. Staatssecretaris van Economische Zaken*, [07-02-1979] ECR 1979 p. 00399; ECJ Case C-61/89, *Criminal proceedings against Marc Gaston Bouchoucha*, [03-10-1990] ECR 1990 p. I-03551; ECJ Case 229/83, *Association des Centres distributeurs Édouard Leclerc e.a. v. SARL "Au blé vert" e.a.*, [10-01-1985] ECR 1985 p. 00001; ECJ Case C-206/94, *Brennet AG v. Vittorio Paletta*, [02-05-1996] ECR 1996 p. I-02357; ECJ Case 39/86, Sylvie Lair v Universität Hannover, [21-06-1988] ECR 1988 p. 03161; ECJ Case C-8/92, *General Milk Products GmbH v. Hauptzollamt Hamburg-Jonas*, [03-03-1993] ECR 1993 p. I-00779; ECJ Case C-367/96, *Alexandros Kefalas e.a. v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*, [12-05-1998] ECR 1998 p. I-02843

[294] ECJ Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, [09-03-1999] ECR 1999 p. I-01459 par. 27

Is this to be called "fraudulently evasive" or is it simply *inherent* to the system of EU family migration that EU citizens can, by moving abroad, genuinely opt to have Directive 2004/38 applied to their family situations? A principled answer would favour the latter alternative, particularly given the fact that primary EU law at present does grant the Council, Commission and Parliament the competence to devise a complete harmonization of family migration law, covering all family reunification applications in all member states. In relation to this, it may be expedient lastly again to cite the Court's ruling in *Centros*, particularly the remarks that, at the time of the ruling, "the fact that company law [was] not completely harmonized (…) [was] of little consequence" and that "moreover, it [was] always open to the Council, on the basis of the powers conferred upon it (…), to achieve complete harmonization".[295] In answering the questions put to it by the Dutch Council of State, the Court of Justice might well take these remarks as a lead.

2.1.2.2 Frontier workers

It was already explained in Chapter 1 the Council of State has not only referred questions regarding the applicability of *Singh* and *Eind* in relation to the doctrine of abuse of rights, but also as regards the status of the third country family members of frontier workers residing with their family in their home state while being employed abroad.[296] In Chapter 1 it was assessed whether such family members could be regarded as beneficiaries of Directive 2004/31; in the present chapter, it will be seen what rights they might derive from the primary law on the free movement of workers.

The most important ruling of the Court of Justice in this regard is *Carpenter*.[297] Mrs. Mary Carpenter was a national of the Phinippines who had come to the United Kingdom on a tourist visa and who, while not returning to her country of origin as prescribed, had subsequently married a British national, Mr. Peter Carpenter.[298] Mr. Carpenter, while residing in the United Kingdom, owned "a business selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals".[299] Although the undertaking, like the publishers of the journals for which it offered advertising space, was based in the United Kingdom, "a significant proportion of the business [was] conducted with advertisers established in other member states of the European Community".[300]. Mr Carpenter thus frequently had to travel to other member states for the purpose of his business.

The discussion elaborated upon in Chapter 1, on the applicability of Directive 2004/38 to facts similar to those described above, is not repeated here; the Court of Justice did assess whether the Citizenship Directive's predecessor applied to the facts of the *Carpenter* case, but decided it did not.[301] It went on, however, to state that the answer to the question referred to the Court therefore depended on whether a right of residence in favour of the spouse could be inferred from "the principles or other rules of Community law".[302] The Court, noting that Mr Carpenter was exercising his right to provide services as guaranteed by what is now

[295] Ibid. par. 28
[296] Council of State, Case nos. 201007849/1/T1/V2 and 201108230/1/T1/V4, [05-10-2012] (www.raadvanstate.nl)
[297] ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279
[298] Ibid. par. 13
[299] Ibid. par. 14
[300] Ibid.
[301] Ibid. par. 35
[302] Ibid. par. 36

article 56 TFEU, decided that to refuse his wife residence in the United Kingdom was tantamount to a restriction of Mr. Carpenter's exercise of that right, since "the Community legislature has recognized the importance of ensuring the protection of the family life of nationals of the member states in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty"; it was, in other words, "clear that the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter [exercised] a fundamental freedom".[303]
As always, the mere finding of a restriction on one of the fundamental freedoms was in itself insufficient to conclude the refusal to grant Mrs. Carpenter residence in the UK was in fact contrary to the Treaty; after all, restrictions may be justified either under the Treaty itself, or under the Court's case-law on imperative reasons of the public interest.[304] The justifications proffered by the United Kingdom, however, were rejected for being incompatible with the fundamental rights "whose observance the Court ensures".[305] It must be added here that, before the national court, Mrs. Carpenter was not only refused residence but was also threatened with expulsion because of her having illegally over-stayed her short-term visa; in those circumstances, the Court found the decision to deport Mrs. Carpenter had not struck a fair balance between the competing interests, that is, on the one hand, the right of Mr. Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.[306] It added that, "although (…) Mr. Carpenter's spouse [had] infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, [had] not been the subject of any other complaint that could give cause to fear that she might in the future [have constituted] a danger to public order or public safety" and that, "moreover, it [was] clear that Mr. and Mrs. Carpenter's marriage, which [had been] celebrated in the United Kingdom in 1996, [was] genuine and that Mrs. Carpenter [continued] to lead a true family life there, in particular by looking after her husband's children from a previous marriage".[307] Public order hardly seemed to be an issue.
There has not been a ruling by the Court of Justice yet indicating that the logic of the *Carpenter* case should also be applied analogously to persons established in their home states while exercising *other* fundamental freedoms (than the freedom to provide services), directing their activities towards the territories of the other member states; for instance, persons being *employed* abroad. Dutch policy indicates this is not possible and the *Carpenter* jurisprudence is strictly applicable to providers of cross-border services.[308] Jurisprudence, however, is less clear.[309] On the one hand, the partner of a Dutch market trader who, like Mr. Carpenter, had to travel to other member states in order to meet with suppliers established abroad, was not eligible simply because her Dutch partner traded in *goods* rather than *services*.[310] On the other hand, the District Court in Den Bosch held in 2008 that the spouse of a trader in goods could analogously rely on *Carpenter* since the Court of Justice had

[303] Ibid. par. 38 and 39
[304] Ibid. par. 40
[305] Ibid.
[306] Ibid. par. 43
[307] Ibid. par. 44
[308] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-10 5.3.2.2
[309] For instance: District Court Den Haag (residing in Haarlem), Case nos. AWB 10/12844 and AWB 08/42013, [26-04-2011], *LJN* BQ5774; District Court Den Haag (residing in Amsterdam), Case no. AWB 08/34644, [29-12-2009] *LJN* BK9765; District Court Den Haag (residing in 's Hertogenbosch), Case nos. AWB 07/41224 and AWB 08/8064, [30-05-2008], *LJN* BD3321
[310] District Court Den Haag (residing in Haarlem), Case nos. AWB 10/12844 and AWB 08/42013, [26-04-2011], *LJN* BQ5774, par. 2.16

referred in its ruling to "economic activities" generally.[311] The Council of State, by citing the *Carpenter* ruling in its reference in the frontier workers' case mentioned in Chapter 1, also seems to indicate an analogous application of the Court's jurisprudence to the other fundamental freedoms would be possible and perhaps even logical.[312]
Since this issue, however, presently remains in some dispute, it is considered better to discuss the detailed logic and the facts of *Carpenter*, as well as the ruling's reception in Dutch legal practice, under the heading of the freedom to provide services, rather than of the free movement of workers. The reader, however, is invited to keep developments before the Court of Justice well in mind, as the frontier workers' case will inevitably bring clarity regarding home state residence rights for family members of intra-community workers.

2.1.3 Conclusion

The above section on the free movement of workers has been thus lengthy that it warrants an intermediate conclusion. In short, the above remarks may be summarized by three statements. On the one hand, the Court of Justice's case-law on the worker's definition has been very favourable to the idea of free movement, granting a wide category of EU citizens possibilities of family reunification in their *host states*. Part-time workers, workers earning less than a minimum wage, workers employed in the public sector, all have been granted the desirable worker's status. Of course, it is mostly in relationship with Directive 2004/38 that this status can be effectuated and is given advantages, but it is acquired through article 45 TFEU.
The situation for EU workers becomes complicated when they reside in their member state of nationality. Two lines of jurisprudence may be inferred from the Court's three rulings in *Singh*, *Eind* and *Carpenter*.[313] The first two cases concern EU nationals *having resided and worked* abroad and wishing to return home together with the family members who resided with them in their host states. The third ruling concerned the spouse of a citizen of the United Kingdom who provided services to clients established abroad. In Dutch policy and jurisprudence, it is of interest to note, the first two rulings are interpreted broadly and applied to all EU citizens having merely resided in another member state, regardless of whether or not they were actually *workers* there, while the Court's ruling in *Carpenter* is often applied strictly to service providers alone. This outcome is distinctly illogical, since in the Court of Justice's reasoning both the return option and the home-state residence rights of *Carpenter* are derived solely from the point of view of securing the effectiveness of the Treaty's free-movement rights. There really is no reason why this logic should hold in case of *workers* or *service providers* alone and should not rather be applied more broadly to those having made or making use of other, but equally important fundamental freedoms.
On a different account, moreover, Dutch practice may even be seen as quite restrictive even regarding the Court of Justice's rulings in *Singh* and *Eind*; the Dutch authorities and courts, namely, at present require what is called a "real and effective" exercise of free-movement, meaning that Dutch nationals having resided abroad for only a short period of time do not qualify for the return option – or at least their third-country family members do not. It is as if the need to secure the effectiveness of short-term exercises of free movement – in accordance

[311] District Court Den Haag (residing in Den Bosch), Case nos. AWB 07/41224 and AWB 08/8064, [30-05-2008], *LJN* BO3321, par. 15 and 16
[312] Council of State, Case nos. 201007849/1/T1/V2 and 201108230/1/T1/V4, [05-10-2012] (raadvanstate.nl)
[313] ECJ Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [07-07-1992] ECR 1992 p. I-04265; ECJ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, [11-12-2007] ECR 2007 p. I-10719; ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279

with criteria designed explicitly to this effect by the EU legislator itself – is not as important as the preclusion of what is referred to as "abuse"; in other words, the Dutch authorities as well as the judiciary seem to maintain an *interest* in Dutch nationals not being covered by a piece of EU law which has been completely harmonized and which is therefore in any case inescapable, simply because that piece of the law would grant them family reunification rights under more favourable conditions than Dutch law would itself. EU law, for reason of its substantive rules alone, simply seems to be unwelcome in the Netherlands. It is left to the reader to draw further conclusions from this, while clarity on many of these accounts must be awaited as the Court of Justice now considers four questions put to it by the Dutch Council of State.

2.2 The freedom to provide services

Under Directive 2004/38, it was seen in Chapter 1, various rights – including family migration rights – are granted to the providers of cross-border services (as "self-employed" persons), which makes it important to ascertain which EU citizens, under primary law, qualify as such providers of services. In section 2.2.1, attention will be paid to the Court of Justice's jurisprudence on this, denoting in general the beneficiaries of the fundamental freedom to provide services.
Secondly, while it may be true Directive 2004/38 does grant various rights to service providers, attention must be drawn to the substantive rights appertaining to the primary law on the freedom to provide services as well, since, under primary law, it is not only the providers of services being entitled to certain rights, but also the recipients of such services. Moreover, while Directive 2004/38 arguably covers the rights of those travelling to another member state in order to provide services there as a self-employed person, the Directive arguably leaves an important field uncovered, being the situation of family members in a service provider's home state. For these reasons, section 2.2.2 will elaborate on the substance pertaining to the freedom to provide services on the basis of primary law alone. Most importantly, the ruling in *Carpenter*, which was already mentioned expediently above, will be of issue here.[314]
Of course, renewed attention could also be drawn again to the Court's rulings in *Singh* and *Eind*, particularly to see if that case-law, which was delivered under the free movement of workers, could be applied analogously to the other fundamental freedoms; however, given the generality with which that case-law is received in the Netherlands (importance is attached to *residence* abroad, regardless of the purpose of such residence), this topic is not discussed again here.[315] Admittedly, it may yet be of interest in relation to other member states, which might, in this regard, use to interpret the Court's rulings in *Singh* and *Eind* more restrictively, but the topic would inevitably become too hypothetical for the purposes of this work.

2.2.1 The beneficiaries of the fundamental freedom

Sometimes, the freedom to provide services has been described as the odd man out among the fundamental freedoms, particularly because article 57 TFEU delimits its scope to the

[314] ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279
[315] ECJ Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [07-07-1992] ECR 1992 p. I-04265; ECJ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, [11-12-2007] ECR 2007 p. I-10719

provision of services only "insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons". The freedom to provide services thus serves as a safety net, ensuring that *all* economic activity is effectively liberalized within the European Union. Given the ancillary nature of the freedom to provide services, in order to denote its beneficiaries, one must first decide three preliminary issues. To begin with, the term "services" must after all be demarcated in relation to the other fundamental freedoms. Secondly, a cross-border element must be present or the freedom to provide services does not apply at all. Thirdly, it is expedient to assess what role particular actors play in relation to the provision of services; in other words, whether both provider and recipient – and perhaps their family members – are protected under the Treaty.

Services in the sense of article 56 and 57 TFEU

In extensive jurisprudence, the Court of Justice has made very clear what particular economic activities are protected under article 56 and 57 TFEU; the following criteria can be discerned.

- A "service" is an economic activity not protected under either the free movement of goods or capital, the freedom of establishment or the free movement of workers.
- The provision of "services" is only protected under the Treaty if the kind of services in question is usually provided for remuneration.
- Only the cross-border provision of services is protected under the Treaty.[316]

When having to delineate the fundamental freedom to provide services with regard to the other fundamental freedoms, for instance the free movement of goods, it would appear as if the latter freedom would take strict precedence; however, rather than defining an order of priority, the Court of Justice rather chooses to take a functional approach, deciding which of the fundamental freedoms is most important to a particular case.[317] Thus, the cross-border sale of concert and lottery tickets, fishing permits etc. forms part of the provision of services despite the tangible nature of the paper on which an admission or other right is laid down.[318] Similarly, the sale of goods necessary for the operation of restaurants and the like is considered ancillary to the services offered in those restaurants.[319] On the other hand, if a rule precluding certain forms of advertising is being questioned by a trader in goods, the cross-border transfer in goods will take precedence over the service of making commercials.[320] Likewise, the trade in waste materials is assessed under the free movement of goods, despite the services provided with regard to the disposition of these materials.[321]

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[316] K. Lenaerts & P. van Nuffel, *Europees recht*, Intersentia: Antwerpen – Cambridge 2011, p. 192 – 193

[317] C. Barnard, *The substantive law of the EU. The four freedoms*, Offord University Press: Oxford 2010, p. 356; see also: Opinion of A-G Fennelly in Case -97/98, *Peter Jägerskiöld v. Torolf Gustafsson*, [21-10-1999] ECR 1999 p. I-07319, par. 20

[318] ECJ Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, [24-03-1994] ECR 1994 p. I-01039, par. 23 and 24; ECJ Case ECJ Case C-97/98, *Peter Jägerskiöld v. Torolf Gustafsson*, [21-10-1999] ECR 1999 p. I-07319, par. 38 and 39

[319] ECJ Case C-491/03, *Ottmar Hermann v. Stadt Frankfurt am Main*, [10-03-2005] ECR 2005 p. I-02025, par. 27; ECJ Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, [16-12-2010] ECR 2010 p. I-13019, par. 49

[320] ECJ Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, [09-02-1995] ECR 1995 p. I-00179, par. 21 – 24

[321] ECJ Case C-2/90, *Commission of the European Communities v. Kingdom of Belgium*, [09-07-1992] ECR 1992 p. I-04431, par. 26

When it is established the fundamental freedom to provide services applies, rather than any of the other freedoms, it becomes necessary to ascertain whether the services in question are economic in nature, that is, whether they are usually provided for remuneration. It is clear from the Court's case-law, particularly from the rulings in *Bond van Adverteerders* and *Deliège*, that the remuneration need not in fact be paid by the recipients of the services in question, nor can it be excluded that a service for which a different person than the provider receives remuneration is still covered by the concept of a "service" in the sense of article 57 TFEU; the aim of that provision is, after all, to demarcate *economic* activities from *non-economic* ones.[322] In fact, the case-law shows a true wealth of examples; departing from a strictly economic point of view, the Court has, on numerous accounts, held that the term "service" includes, among other things, television broadcasting[323], advertising[324], education[325], legal advice[326], book-keeping[327], financial services[328], insurances[329], medical treatment[330], tourism[331], gambling[332], musical performances[333] and sports[334].

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[322] See: ECJ Case 352/85, *Bond van Adverteerders and others v. The Netherlands State*, [26-04-1988] ECR 1988 p. 02085, par. 16; ECJ Joined cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, [11-04-2000] ECR 2000 p. I-02549, par. 56

[323] ECJ Case 352/85, *Bond van Adverteerders and others v. The Netherlands State*, [26-04-1988] ECR 1988 p. 02085; ECJ Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [03-02-1993] ECR 1993 p. I-00487; ECJ Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [05-10-1994] ECR 1994 p. I-04795; ECJ Joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, [09-07-1997] ECR 1997 p. I-03843

[324] ECJ Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, [09-02-1995] ECR 1995 p. I-00179; ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279

[325] ECJ Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*, [11-09-2007] ECR 2007 p. I-06849; ECJ Case C-56/09, *Emiliano Zanotti v. Agenzia delle Entrate - Ufficio Roma 2*, [20-05-2010] ECR 2010 p. I-04517

[326] ECJ Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [03-12-1974] ECR 1974 p. 01299; ECJ Case C-289/02, *AMOK Verlags GmbH v. A & R Gastronomie GmbH*, [11-12-2003] ECR 2003 p. I-15059

[327] ECJ Case C-119/09, *Société fiduciaire nationale d'expertise comptable v. Ministre du Budget, des Comptes publics et de la Fonction publique*, [05-04-2011] (not yet published in the Reports)

[328] ECJ Case C-384/91, *Alpine Investments BV v. Minister van Financiën*, [10-05-1995] ECR 1995 p. I-01141

[329] ECJ Case C-385/99, *V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, [13-05-2001] ECR 2003 p. I-04509

[330] ECJ Case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*, [12-07-2001], ECR 2001 p. I-05473; ECJ Case C-8/02, *Ludwig Leichtle v. Bundesanstalt für Arbeit*, [18-03-2004] ECR 2004 p. I-02641

[331] ECJ Joined cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, [31-01-1984] ECR 1984 p. 00377; ECJ Case C-154/89, *Commission of the European Communities v. French Republic*, [26-02-1991] ECR 1991 p. I-00659; ECJ Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, [17-11-2009] ECR 2009 p. I-10821

[332] ECJ Case C-243/01, *Criminal proceedings against Piergiorgio Gambelli and Others*, [06-11-2003] ECR 2003 p. I-13031; ECJ Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, [08-07-2009] ECR 2009 p. I-07633; ECJ Case C-258/08, *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator*, [03-06-2010] ECR 2010 p. I-04757

[333] ECJ Joined cases C-92/92 and C-326/92, *Phil Collins v. Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH*, [20-10-1993] ECR 1993 p. I-05145; ECJ Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, [03-10-2006] ECR 2006 p. I-09461

[334] ECJ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, [12-12-1974] ECR 1974 p. 01405, par. 7 – 10; ECJ Joined cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines*

Cross-border elements

The final step in deciding whether article 56 TFEU applies consists in discerning cross-border provisions of services from merely domestic ones. Under article 56 TFEU, after all, only international (more precisely: intra-EU) trade in services is protected. The provision reads as follows.

> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended.

When reading this provision, it becomes clear at once that the cross-border dimension required is much less strictly defined here than, for example, in Directive 2004/38.Whereas the directive presumes that EU nationals themselves must *move to* or *reside in* a member state other than the one of which they are nationals, article 56 TFEU strictly only requires that a "service" as defined above is provided by a "national of a member state" who is "established" in a member state "other than that of the person for whom the services are intended".
A few preliminary remarks must be made on this account. In the first place, the wordings of article 56 TFEU, when taken literally, might entail a certain ambiguity as to what is meant by "the member state of the person for whom services are intended"; one could on the one hand attach to the *nationality* of the recipient, but also to the member state wherein that person or entity is *established*, or it would seem possible to apply article 56 in either case or only in case the recipient is established in his member state of nationality. When determining such ambiguities, it is of importance to keep in mind that the EU provisions on free movement have never been intended to cover the subject of family migration in the first place; their aim, although family rights of those EU nationals benefiting from them are indeed taken very seriously, remains strictly economical. Given this context, it becomes apparent at once that *nationality* would have been a most unusual connecting factor, since it would imply that a Dutch national established in the Netherlands, who provides a service for his German neighbor, would be protected under the Treaty, whereas he would not be protected if the recipient was established in Germany, while being of Dutch nationality. It is clear that, in an economical context, nationality is not what makes trade international.
In the Court of Justice's case-law, it is rather the *establishment* in particular member states which determines whether a cross-border element is present or not. In *FKP Scorpio Konzertproduktionen*, the Court, drawing on the wordings of what is now article 56 TFEU, even went as far as determining that, although the *provider* of services must clearly be "a national of a member state", in order for the fundamental freedom to apply, the same does not hold for the *recipient*, which may well be a third-country national established in another member state.[335]
The cross-border nature of the provision of particular services, indeed, is easily accepted; for instance, article 56 TFEU applies when the provider and recipient reside in different member states and the provider moves towards the territory of the recipient's member state in order to perform a service there. It may also be that the recipient moves to the member state in which the provider is established, for instance a hospital which can hardly be expected to move

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associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée, [11-04-2000] ECR 2000 p. I-02549

[335] ECJ Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, [03-10-2006] ECR 2006 p. I-09461 par. 66 – 68; see also: K. Lenaerts & P. van Nuffel, *Europees recht*, Intersentia: Antwerpen – Cambridge 2011, p. 193

across borders.[336] Indeed, the Court of Justice found in *Luisi and Carbone* that, "whilst the former case is expressly mentioned in the third paragraph of article 60 (now: article 57 TFEU, red.), which permits the person providing the service to pursue his activity temporarily in the member state where the service is provided, the latter case is the necessary corollary thereof, which fulfills the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital".[337]

A third possibility, which apparently even goes against the literal wordings of article 56 TFEU, arose in infringement proceedings against France; the case concerned tourists being established in the same member state as their tour operators, but moving *together* with (representatives of) those tour operators to the territory of another member state.[338] The Court remarked that "although Article 59 of the Treaty (now: article 56 TFEU) expressly contemplates only the situation of a person providing services who is established in a member state other than that in which the recipient of the service is established, the purpose of that Article is nevertheless to abolish restrictions on the freedom to provide services by persons who are not established *in the State in which the service is to be provided* (emphasis added)".[339]

Finally, it may be only the service itself which crosses the border, without either the provider or the recipient moving. In *Bond van Adverteerders*, the Court of Justice was seized of a dispute in which an advertisers' interest group had brought proceedings against the Dutch system of government-guided television broadcasting; unsurprisingly, in the advertisers' view, the regulated system left too little room for commercial breaks for which – more importantly from an EU perspective – no exemption was made in case the broadcaster was established in another member state.[340] The Court inevitably first had to delimit the provision of services, stating that in order to do so, "it is necessary first to identify the services in question, secondly to consider whether the services are trans-frontier in nature […] and, lastly, to establish whether the services in question are services normally provided for remuneration".[341] The transmission of the programs at issue, according to the Court, involved "at least two separate services", the first consisting in the cable operators relaying the foreign broadcasters' television programs to domestic network subscribers and the second comprising the inclusion in those programs of advertisements, possibly drawn up *on the home market*.[342]In this way, even an advertisement being prepared by an operator on the home market, intended for reception in the same member state, still becomes a cross-border service when the *intermediary*, who honestly does little more than passing along those commercials to the public, is established in another member state.

Providers and recipients of services

Just as an employment relationship necessarily comprises two parties, the free provision of cross-border services also cannot become effective without both a provider and a recipient being able to do business with each other. Therefore, following the already mentioned ruling

[336] ECJ Joined cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, [31-01-1984] ECR 1984 p. 00377
[337] Ibid. par. 10
[338] ECJ Case C-154/89, *Commission of the European Communities v. French Republic*, [26-02-1991] ECR 1991 p. I-00659
[339] Ibid. par. 9
[340] ECJ Case 352/85, Bond van Adverteerders and others v. The Netherlands State, [26-04-1988] ECR 1988 p. 02085
[341] Ibid. par. 13
[342] Ibid. par. 14

in *Luisi and Carbone*, the Court of Justice has decided on many occasions that it is necessary to protect both the recipient and the provider of cross-border services.[343] Summarizing the case-law, it simply is not the Treaty's aim (at least not in the area of free movement) to directly favour particular operators' personal situations; family rights are only ancillary to the general aim of furthering the liberalization within Europe. The Court therefore maintains that both the provider and the recipient of services are in principle entitled to the same thing, namely the unrestricted exercise of their part in the economic activity.[344] In *Eurowings*, the Court, referring to *Luisi and Carbone*, for instance held explicitly that what is now article 56 TFEU "confers rights not only on the provider of services but also on the recipient" so that the recipient of, in that case, leasing services, could "rely on the individual rights conferred on it by that provision".[345] Given all this, it really becomes of interest to see what those "individual rights" might entail, particularly in the field of family life.

2.2.2 The substantive protection afforded: the *Carpenter* case-law

When addressing what home-state family migration rights might be attached to the primary EU law on the provision of services, there is of course one judgment which must receive full attention; this is the Court of Justice's ruling in *Carpenter*, which was already discussed in some detail above.[346] The judgment concerned the question whether service providers being established in their own state of nationality could derive family reunification rights from either secondary or primary law. The facts, admittedly, have also already been stated above; for clarity, however, it is expedient here to assess these in some more detail, especially because Dutch policy and jurisprudence, as will be seen later on, attach a noteworthy importance to them. Of course, this section would not be complete without due attention for the reception of *Carpenter* by the Dutch immigration authorities and courts, including the Council of State.

The facts and the proceedings in *Carpenter*

The first remark which should be made on the facts of *Carpenter* in relation to the abovementioned definition of the "provision of services" is that Mr. Carpenter provided services on two accounts. In the first place, he simply sold an immaterial product – advertisement space in medical and scientific journals – to customers established abroad. Like in the case of television broadcasts, only the service itself crossed an internal frontier. Secondly, Mr. Carpenter also frequently traveled to other member states for the purposes of

[343] ECJ Joined cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, [31-01-1984] ECR 1984 p. 00377, par. 10; see also: ECJ Case C-429/02, *Bacardi France SAS, formerly Bacardi-Martini SAS v. Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Girosport SARL*, [13-07-2004] ECR 2004 p. I-06613, par. 34 and 35; ECJ Case 350/07, *Kattner Stahlbau GmbH v. Maschinenbau- und Metall- Berufsgenossenschaft*, [05-03-2009] ECR 2009 p. I-01531, par. 83

[344] ECJ Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, [26-10-1999] ECR 1999 p. I-07447, par. 34; ECJ Case C-233/09, *Gerhard Dijkman andMaria Dijkman-Lavaleije v. Belgische Staat*, [01-07-2010] ECR 2010 p. I-06649, par. 24; ECJ Case C-498/10, *X NV v. Staatssecretaris van* Financiën, [18-10-2012] (not yet published in the reports), par. 23

[345] ECJ Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, [26-10-1999] ECR 1999 p. I-07447, par. 34

[346] ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279

his business, although the Court's judgment does not specify what services he actually performed during such meetings.[347]
The family situation of Mr. Carpenter is also of importance. His spouse, who, as already mentioned, was a Philippines' national, had entered the United Kingdom on a tourist visa, overstaying, however, the duration thereof, and marrying Mr. Carpenter during her illegal stay in the United Kigndom.[348] When, subsequently, Mrs. Carpenter applied for a residence permit, her application was turned down and a deportation order was issued against her.[349] It was during the administrative proceedings which Mrs. Carpenter lodged against this deportation order, first before an Immigration Adjudicator and then, when the Adjudicator turned down her appeal, before the Immigration Appeal Tribunal, that Mrs. Carpenter put forward the following argument. Since her husband was a provider of intra-community services, Mrs. Carpenter argued, and since her husband's business required him to travel around in other Member States, providing and receiving services, he could do so more easily as she was looking after his children (from his first marriage), so that her deportation would effectively restrict her husband's right to provide and receive services.[350]
When the Immigration Appeal Tribunal was confronted with this line of reasoning, it must have considered whether such alterable and in any case quite incidental circumstances – one husband caring for children, another being at work himself – should be made decisive in the field of family migration. When it decided, therefore, to address questions of interpretation to the Court of Justice for a preliminary ruling, it obviously asked in the first place whether the third-country spouse of an EU national can rely on what is now article 56 TFEU or the predecessor to Directive 2004/38 in order to derive a right to reside with that EU national on the territory of its state of nationality if that EU national, although being established in his or her home state, still provides services to persons established in other member states. However, it added importantly whether "the answer to the question referred [would be] different if the non-national spouse indirectly assists the national of a member state in carrying on the provision of services in other member states by carrying out childcare".[351]
Advocate-General Stix-Hackl, who delivered a lengthy and scholarly opinion on the case, decided, first of all, that Mrs. Carpenter, as a third-country national, could not rely on the primary law regarding the freedom to provide services, since that law did not grant *her* any individual rights; the relevant provisions concerning the entry and residence of nationals of non-member countries, according to the A-G, were rather to be found in secondary law.[352] He proposed to the Court that Directive 73/148, the relevant predecessor to the present Directive 2004/38, should be interpreted extensively so as to protect and further also the exercise of fundamental freedoms – coupled with the fundamental right of family life, which EU nationals enjoy when providing cross-border services from the territory of their own member state.[353] The A-G, with reference to the Court's prior ruling in *Singh*, stated very plainly that, if the domestic immigration rules on family reunification were applied also in cases where British citizens were clearly exercising rights under EU law, "they would bring about a restriction of those Community law rights" since, "according to the relevant case-law of the Court, the right of residence and fundamental freedoms are interlinked [and] the rights derived from the freedom of movement for workers and the freedom of establishment cannot

[347] Ibid. par. 14
[348] Ibid. par. 13
[349] Ibid. par. 15 and 16
[350] Ibid. par. 17
[351] Ibid. par. 20
[352] Opinion of A-G Stix-Hackl in Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [13-07-2001] ECR 2002 p. I-06279, par. 38
[353] Ibid. par. 101

be fully effective if [EU citizens] may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse".[354]
A-G Stix-Hackl then went on by stressing extensively that a refusal to allow the spouse residence not only restricted the exercise of fundamental freedoms, but likewise interfered with the fundamental right to lead a family life.[355] Of course, whereas the fundamental rights necessarily have to be applied at the domestic level in all cases, they form an integral part of EU law as well, meaning that EU law must be interpreted in conformity with them in all those cases to which it applies, meaning every case except the wholly internal one. In A-G Stix-Hackl's well-versed opinion, which was noticeably inspired by the case-law of the European Court of Human Rights, there were many aspects which member states could validly take into account in order to legally and proportionally curb the exercise of the right to family life in special circumstances; for instance, the maintenance of public order, the seriousness of the breach of immigration rules, etc.[356] For clear reasons, however, the degree to which the spouse of an EU national actually aides that national in the exercise of his or her fundamental freedoms, was not part of them – the EU national simply makes EU law, including the fundamental rights, applicable by exercising a fundamental freedom and *by that fact alone* is granted the protection of his or her family life *as maintained in EU law*.
When the A-G thus came to assessing the "second part of the question referred", in which the Immigration Appeal Tribunal had asked whether the outcome should depend on the degree to which the third-country spouse actually supports the exercise of her family member's exercise of the fundamental freedom to provide services, the answer provided by A-G Stix-Hackl was both predictable and very clear. It is expedient to quote these remarks in full.

> As the Commission rightly submits, the circumstance that Mrs. Carpenter cares for Mr. Carpenter's children and thus indirectly assists him to exercise the rights deriving from the freedom to provide services has nothing to do with the question whether Mr. Carpenter has exercised his rights in such a way that his spouse comes within Community law.
>
> The relevant provisions of secondary Community law also argue against the circumstance that the spouse cares for the children of the citizen of the Union being legally relevant for the right of residence. Thus the relevant Directive 73/148 refers in Article 1(1), with respect to its scope, to a series of circumstances such as the degree of relationship, age, dependency and living together as a household. The care of children is not included in this - exhaustive - list. It may be concluded that the Community legislature manifestly attached no importance in this connection to caring for children.
>
> Finally, the case-law of the Court on the rights of nationals of non-member countries who are married to citizens of the Union also does not refer expressly to the circumstance that the national of a non-member country contributes to the professional activity of the citizen of the Union. Thus in the Singh judgment the Court focuses - as stated above - on the fact that the rights derived from the freedom of movement for workers and the freedom of establishment cannot be fully effective if [a Community national] may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. That that

[354] Ibid. par. 77 and 78
[355] Ibid. par. 80 et seq.
[356] Ibid. par. 97 – 100

> principle must be taken to apply to all the fundamental freedoms has already been shown.
>
> The alternative addressed in the second part of the question referred is therefore of no legal significance for the answer to the question, and so need not be considered further.[357]

The Court of Justice's own judgment differs from the A-G's proposals on two accounts. First, the Court reversed the order in which it assessed the applicability of secondary and primary law, starting with Directive 73/148.[358] Acknowledging that this directive only meant to accord residence rights to certain family members of EU citizens in order to allow those family members to accompany their EU relatives when they exercised, *in the circumstances provided for by the directive*, the rights which they derived from the Treaty, the Court admitted that the directive only obliged the member states to "grant the right of permanent residence to nationals of other Member States who established themselves within their territory" and that "the right of residence for persons providing and receiving services", which, apparently, Directive 73/148 also conferred, should be "of equal duration with the period during which the services are provided".[359] Contrary to what A-G Stix-Hackl had proposed, he directive, thus, was of no avail to Mrs. Carpenter.

The Court, however, went on by addressing the question "whether, in circumstances such as those in the main proceedings, a right of residence in favour of the spouse [could] be inferred from the principles or other rules of Community law".[360] To this end, the Court noted, first, that Mr. Carpenter was clearly exercising the right freely to provide services as guaranteed by what is now article 56 TFEU. In the wordings of the Court, "the services provided by Mr. Carpenter [made] up a significant proportion of his business, which [was] carried on both within his member state of origin for the benefit of persons established in other member states, and within those states".[361] Noticing, next, the importance which, in secondary law (even though it was not strictly applicable) the EU legislator had clearly and unconditionally attached to the family life of EU citizens as a means to eliminate obstacles to the exercise of the fundamental freedoms guaranteed to those citizens by the Treaty, the Court, citing, much like the A-G, its earlier ruling in *Singh*, quickly found that , clearly, "the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter [exercised] a fundamental freedom" since "that freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse".[362]

The Court thus found – almost *automatically* – that to refuse legal residence to an EU citizen's spouse – entailing that that spouse must leave national territory – also, and perhaps even implicitly entailed a restrictive effect as regards that EU citizen's exercise of free movement rights.[363] frankly, the member states would indeed be engaging in doublespeak if they did not agree on this, boldly stating one moment that "the right of all Union citizens to move and reside freely within the territory of the member states should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members,

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[357] Ibid. par. 103 – 106

[358] ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279, par. 31 – 35

[359] Ibid. par. 33

[360] Ibid. par. 36

[361] Ibid. par. 37

[362] Ibid. par. 38 and 39

[363] See also, for a useful commentary: S. Acierno, "The Carpenter judgment. Fundamental rights and the limits of the Community legal order", *European law review*, vol. 28 (2003), iss. 3 p. 398 – 407

irrespective of nationality", while proclaiming the next that family members must actually aid their EU relatives in their exercise of free movement rights before the refusal of their residence will have any impact on "the conditions of freedom and dignity" with which EU citizens are surely entitled to engage in cross-border trade from their own member states as well.[364]

It was in the course of what followed – what always follows the finding of a restrictive measure regarding the fundamental freedoms, namely the assessment of justifications put forward by the member states – that the Court of Justice took up its Advocate – General's lead where the incorporation of human rights within the EU *acquis* was concerned.[365] In short, the Court found that the decision to deport Mrs. Carpenter interfered with Mr. Carpenter's right to a family life and could not be regarded as necessary in a democratic society for being disproportionate. The conduct of Mrs. Carpenter, albeit she had overstayed the leave admitted to her by the tourist visa on which she had entered the United Kingdom, had "not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety".[366] For failing to abide by the fundamental right to lead a family life, as is required always within the scope of EU law, the Court found that the decision to deport Mrs. Carpenter constituted an infringement of Mr. Carpenter's right to exercise his fundamental freedom to provide services, which could not be justified.

Sadly, after having thus explained itself extensively, the Court failed to address explicitly the "second part of the question referred", relating to the matter whether or not the degree to which an EU citizen is actually aided by his or her family members had been in any way decisive in the Court's reasoning. The omission, as will be seen below, has indeed taken firm root in the way the Court's ruling, which, as has been explained in some length, was perfectly logical from a European perspective, has been accepted within the Dutch legal order.

Dutch policy on the *Carpenter* ruling

In the Netherlands, it has not always been without effort that the *Carpenter* ruling and the consequences it entails have found their way into immigration law, policy and practice. Indeed, it is true that two distinct paragraphs made it to the Dutch Immigration Circular 2000, pursuant to the judgment handed down in 2002; only, the content of these two inclusions does not entirely seem to reflect the Court's logic.[367] According to the Dutch interpretation, it merely follows from the ruling in *Carpenter* that, when a Dutch national must be regarded as a provider of services in the sense of the Treaty, it should be assessed whether the refusal to allow the family of that Dutch national a legal residence in the Netherlands would impede upon the latter's freedom to provide services.[368] Next, the policy document explains – although perhaps not entirely correctly – that, in the *Carpenter* case, a restriction was found *because* the family member in question had submitted to the care of the service provider's children to such an extent that she thereby had made a *substantial contribution* to the actual exercise of the freedom to provide services.[369]

[364] See: recital 5 of the preamble to Directive 2004/38
[365] ECJ Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [11-07-2002] ECR 2002 p. I-06279, par. 40
[366] Ibid. par. 44
[367] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000), rule B-10 5.3.2.2
[368] Ibid.
[369] Ibid.

The next step, according, still, to the Dutch Immigration Circular, should be to see whether an infringement regarding the freedom to provide services may yet be justified; in this assessment, it should first be ascertained whether or not there is "family life" in the sense of article 8 of the Convention on Human Rights. If such family life is indeed established, the policy rules assume that refusal to allow legal residence to the third-country family member would interfere with the right to family life as maintained in article 8 of the Convention, which may then only be justified on grounds of public order and national security.[370] The chapter closes with the statement that, in case an unjustified interference has been established, the family member will be allowed residence which flows from what is now the TFEU.

On one account, to start with a positive remark, the abovementioned Dutch policy rules apply to "family members" rather than only "spouses", as might have been chosen in answer to *Carpenter*; in this regard, the Dutch government has indeed shown its accommodating approach as regards the full effectiveness of the rights conferred on its nationals by EU law. However, much as this broad application is welcome, it cannot go unnoticed the same policy rules, on two other accounts, apparently favour a more stringent reading of the Court's ruling in *Carpenter*; on the one hand, it appears from them, as has also already been assessed, as if the logic which brought the Court to its final decision were somehow specific to the freedom to provide services, while nothing in the judgment actually even hints at this. Secondly, where the Court undeniably – and perhaps upon the explicit warning of it's a-G – made no notice at all concerning the specific consideration referred by the Immigration Appeal Tribunal as to Mrs. Carpenter actually *aiding* her husband in the exercise of his free-movement rights, the Dutch reception of *Carpenter* apparently, and quite to the contrary, attaches even a decisive importance to this particular feature of the case. In fact, where the Court's judgement, summarizing the facts, states only that Mrs. Carpenter "married Peter Carpenter, a United Kingdom national" and only addresses the child-care because that was the *argument* put forward by Mrs. Carpenter before the national court, the Dutch Immigration Circular somehow assumes that, indeed, she must have "submitted to the care of her husband's children to such an extent as to make a *substantial* contribution to the actual exercise of his fundamental freedom". What can be said of this, but that policy-makers should perhaps read the A-G's opinions more intently, or should try to understand them as astutely as the Court of Justice does itself?

Dutch case-law

The Dutch courts appear to be divided on the issue whether, in *Carpenter*-like situations, the actual degree of *aid* provided by third-country family members should be held to be decisive. The District Court in Amsterdam does not seem to hold firmly to that presumption; in December 2009, although it did uphold the immigration authorities' decision refusing residence to a third-country partner of a Dutch national who claimed to provide cross-border services (by "advising" and "lecturing" on the applicability of European Union law), came to its decision only by stating that the applicant had failed to prove that he actually had provided any meaningful cross-border services, while presenting the *Carpenter* case as if it would have allowed the residence right applied for if the lacking proof had indeed been delivered.[371] One cannot be sure, but the ruling certainly does not mention childcare (or an equal form of "aid") anywhere. Yet, in 2011, the same District Court in Amsterdam was called upon to decide on

[370] Ibid.
[371] District Court Den Haag, residing in Amsterdam, Case no. AWB 08/34644, [29-12-2009], *LJN* BK9765, par. 4.1 – 4.4

the right to reside of)a Dutch national's Dominican husband.[372] The EU citizen in question claimed, among other things, that unlike Mr. Carpenter she was a *recipient* of cross-border services for having rented a home in Spain.[373] The District Court refused the claim because, on the one hand, the Dutch lady in question had not shown a sufficiently substantial use of free-movement rights and, on the other, it could not see how her exercise of free-movement rights would be restricted by the refusal to allow her husband a right of residence.[374] There it is again, the same reason with which *family life* as a "condition of freedom and dignity" on the one hand, and the *restrictive effect* appertaining to a denial of residence on the other, are dislodged.

Again, in the two decisions, already mentioned, of the District Courts in Haarlem and Den Bosch, in which the situations of the families of market salesmen were addressed, the establishment of intra-community trade on the one hand and the actual impediment resulting from a denial of legal residence for the third-country family member on the other, were distinguished from each other.[375] The case was already mentioned because of the possibility that the *Carpenter* case-law be applied analogously to cases where EU citizens engage in the trade in *goods* rather than *services*; the District Courts, as may be recalled, were somewhat divided on this issue, even though neither did exclude such a possibility altogether. However, when deciding the issues presented to them, the Courts were united, in any case, that the Dutch market salesmen, both of whom who professionally bought goods from suppliers established in Germany, should, in order for their spouses to become entitled under the *Carpenter* case, make it clear how the rejection of their family members' claims would restrict their own exercise of the fundamental freedom to buy goods in Germany.[376] The reasoning is logical, but rests on an interpretation of *Carpenter* which is supported neither by reason of its explicit wordings, nor by A-G Stix-Hackl's firm rejection of the Immigration Appeal Tribunal's proposal to make residence for family members conditional upon the actual degree of *aid* they provide their EU relatives in the exercise of the latter's fundamental freedoms.

In exceptional cases, the Courts go even further. In 2009, for instance, a claim under EU law, lodged by the wife of a Dutch physiotherapist, was denied by the District Court in Utrecht, even though her husband had committed himself contractually to test on his patients the effectiveness of a rehabilitation trainer developed by a company established in Germany; the contract was concluded for approximately 7 months – and presumably comprised remuneration.[377] It is utterly beyond any doubt the fulfilment of such a contract falls squarely within the ambit of the Treaty – indeed, in a tax case decided in early 2005 the Court of Justice already, and rather predictably, decided that what is now article 56 TFEU "precludes legislation of a member state which restricts the benefit of a tax credit for research only to research carried out in that member state".[378] This is not illogical; research, after all,

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[372] District Court Den Haag, residing in Amsterdam, Case no. AWB 10/14155, [25-08-2011], *LJN* BU7702, par. 4.1 – 4.4

[373] Ibid. par. 4.2 and 4.3

[374] Ibid. par. 4.4

[375] District Court Den Haag (residing in Haarlem), Case nos. AWB 10/12844 and AWB 08/42013, [26-04-2011], *LJN* BQ5774; District Court Den Haag (residing in 's Hertogenbosch), Case nos. AWB 07/41224 and AWB 08/8064, [30-05-2008], *LJN* BD3321

[376] District Court Den Haag (residing in Haarlem), Case nos. AWB 10/12844 and AWB 08/42013, [26-04-2011], *LJN* BQ5774, par. 2.17; District Court Den Haag (residing in 's Hertogenbosch), Case nos. AWB 07/41224 and AWB 08/8064, [30-05-2008], *LJN* BD3321, par. 19

[377] District Court Den Haag (residing in Utrecht), Case no. AWB 08/28082, [11-06-2009], *LJN* BI7543, par. 2.6 and 2.16

[378] ECJ Case C-39/04, *Laboratoires Fournier SA v. Direction des vérifications nationales et internationals*, [10-03-2005] ECR 2005 p. I-02057, par. 26

especially when carried out by a self-employed professional for a client established abroad, is a cross-border *economic* activity; yet, for reasons one can only guess at, the District Court in Utrecht deemed it could justifiably exclude the application of the Treaty by denoting the activities as "research" rather than "services".[379] What is this, if not either a deplorable lack of legal understanding or – perhaps even more worrisome – a direct refusal to apply an unwelcome part of the law?

The Council of State, to be sure, does not make such mistakes. On the other hand, although it seems to be open to an analogous application of *Carpenter* to the other freedoms, it does firmly maintain that a "separation" of family members and a "restriction" regarding the exercise of free movement rights are not at all the same thing.[380] First of all, in the frontier workers' case, already referred to extensively, although the Council of State referred the issues by its ruling of the 5th of October 2012 in order for the Court to answer preliminary questions, it incidentally provided the Court of Justice with some preliminary remarks of its own.[381] In describing its assessment of the facts in relation to the Court's ruling in *Carpenter*, the Council of State, first of all, remarked that the Dutch frontier workers in question were making use of a different fundamental freedom than the one on which Mrs. Carpenter could indirectly rely. Secondly, the Council of State held that, unlike Mr. Carpenter, the present cases appeared not to be marked by any kind of *dependency* on third country family members where the exercise of free-movement rights was concerned.[382] It seems a classic example of exaggeration; where, indeed, the Court of Justice itself has only denoted that "the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, *therefore*, to the conditions under which Mr. Carpenter [exercised] a fundamental freedom", the Dutch Minister subtly added that Mrs. Carpenter must, by submitting to the care of Mr. Carpenter's children, have made a substantial contribution to his actual exercise of the freedom to provide services, while, now, the Council of State apparently added that he was actually *dependent* upon her.

In fact, the Council of State, although it did refer questions on this matter, must itself be quite convinced as to the outcome of the proceedings before the Court of Justice; on the 17th of December 2012, after all, it rejected the appeal lodged by a Dutch national's Tunisian spouse, even though her appeal concerned exactly the degree to which family members of service providers must actually aid their relatives in the exercise of their provision of cross-border services.[383] The Council of State's rejection shows a cunning understanding of the *Carpenter* ruling as well as a solid unwillingness to apply it in any sensible way. According to *Carpenter*, as the Council of State infers correctly, the separation of Mr. and Mrs. Carpenter would indeed have automatically caused detriment to the conditions under which Mr. Carpenter exercised a fundamental freedom; indeed, the Council of State thereby seems to accept that detriment to the exercise of a fundamental freedom flows *directly* from detriment to family life, being one of those "conditions of freedom and dignity" to which EU citizens, while exercising their fundamental freedoms happen to be entitled. However, the Council of State infers from the Court's reasoning as regards the possibility to *justify* such restrictions – the Court, as may be recalled, elaborately went into the fundamental right of a family life, holding that any possible justification must at least comply with that – that the Court somehow attached special significance to the fact that the family consisted not only of

[379] District Court Den Haag (residing in Utrecht), Case no. AWB 08/28082, [11-06-2009], *LJN* BI7543, par. 2.6 and 2.16

[380] Council of State, Case no. 201204895/1/V4, [17-12-2012], *LJN* BY7393; Council of State, Case nos. 201007849/1/T1/V2 and 201108230/1/T1/V4, [05-10-2012], *LJN* BX9530

[381] Council of State, Case nos. 201007849/1/T1/V2 and 201108230/1/T1/V4, [05-10-2012], *LJN* BX9530

[382] Ibid. par. 16

[383] Council of State, Case no. 201204895/1/V4, [17-12-2012], *LJN* BY7393

parents, but also of Mr. Carpenter's children, for whom Mrs. Carpenter took (special) care.[384] The Council of State thereby seems to be of a mind that to impede on the family life of a Dutch service provider whose family consists of adults only, although it does indeed (automatically) restrict the exercise of that service provider's free movement rights, is nevertheless *justified* because it interferes only with "family life" which, for lack of children, is somehow less important; the "conditions of freedom and dignity", in other words, are justifiably set aside for an unnamed, abstract interest of the state.
In conclusion, it really is a good thing the frontier workers' case now lies with the Court of Justice, which has shown consistently that it is determined to strengthen the rights of those seeking to make use of the fundamental freedoms the Treaty grants them, which is well aware of its own case-law while being blissfully ignorant of the exaggerations and distortions with which national law and jurisprudence deliberately, or for lack of understanding, reshape its meaning and purpose.

2.2.3 Conclusion

The freedom to provide services, like the freedom of movement for workers, has great potential from the perspective of family migration. It has been assessed above to what scope of activities, and to which economic actors participating in them, the fundamental freedom, laid down in article 56 TFEU, grants rights. The Court of Justice has been shown to have gone to great lengths in order to ensure, especially with regard to the freedom to provide services, that *all* cross-border activities in the EU are granted protection. Television broadcasters, advertisers, (private) teachers, lawyers, book-keepers, financial advisers, insurers, doctors, the providers of tourism and gambling, musicians and sportsmen have all been found to be service providers as soon as the activities they provide in any way cross an internal frontier; their clients, moreover, are service providers, who are likewise protected under article 56 TFEU.
In the first place, the providers of services are granted certain residence rights under Directive 2004/38 and so are their family members. However, in any case in which the directive should happen to be inapplicable, the Court of Justice has shown with its ruling in *Carpenter* that family migration rights may also flow directly from the Treaty because of the interest which the EU as such attaches to the right to live and work as a family. The degree of legal certainty entailed, however, is inevitably and considerably smaller, particularly since a directive's rules are much less difficult to interpret than a judgment delivered on very specific facts.
In particular, while the Court of Justice's ruling in *Carpenter* was delivered on the claim lodged by a service provider's spouse that her residence actually contributed to her husband's capacity to engage in cross-border trade, which feature may or may not have been decisive in the Court's reasoning. The judgment itself does not suggest it and the Advocate-General's opinion firmly denounces it; yet, in Dutch practice, it has been seen, the actual degree to which the third country family members of Dutch service providers actually *aid* them in their work, is made a decisive factor; the required degree of actual aid ranges from a substantial contribution in the Dutch Immigration Circular to actual dependency in the wordings of the Council of State.
Given the fact, however, that the frontier workers' case now lies with the Court of Justice, it is to be expected that clarity on this matter will be granted within the foreseeable future; EU law, in this field, as in so many others, continues to be in constant motion.

[384] Ibid. par. 2.2

2.3 Other fundamental freedoms

With regard to the possibilities which the Treaty provisions on the other fundamental freedoms may entail for family migration, there really is little legislation or jurisprudence on which to base an argumentation. With regard to the freedom of establishment, it is obvious that almost *all* residence possibilities for self-employed persons having durably established themselves in another member state, must be assessed under Directive 2004/38, at least in the host state. In this regard, reference should be made again to the problem described earlier with regard to the definition of a "host state" in relation to persons having multiple EU nationalities.[385] The host member state problem could – but this is not likely – cause Directive 2004/38 to be deemed not to grant residence rights to (the family members of) those having established themselves in a member state of which they are a national, while holding a second or a third EU nationality as well. In that case, those concerned would have to resort to primary law, in which they would, given the case-law described, have a fair chance of succeeding.

Obviously, those making use of their freedom of establishment may also analogously wish to rely on the Court's rulings in *Singh* and *Eind*, which were both delivered under the freedom of movement for workers. As seen, in Dutch practice, this will presently no longer cause any problems, since the fact of their having made use of the freedom of *establishment* presumes a period of some length in which they were *resident* in another member state, which is exactly what the Dutch authorities and most of the courts require.

The freedom of capital and the free movement of goods are different matters, since the exercise of those freedoms does not necessarily imply durable residence abroad; as has been regarded above, the free movement of goods can be exercised simply by buying a tangible object of some economic value from a supplier established across an internal frontier. The same goes for the freedom of movement for capital; those employed with a bank or stock-broker will professionally move millions in capital across many frontiers with a click on the right button.

It is clear that Directive 2004/38 does not attach importance to whether or not an EU citizen buys or sells tangible assets across borders, or transfers capital around in our Union; yet, those doing so *professionally* will, if the directive applies to them and their family members, quickly fall within the Court's definition of a "worker". If an EU citizen wishing to apply for legal residence in a host member state would therefore even reach the point where he would actually need to invoke the free movement of capital or goods, that would imply he would be neither in any "real and genuine" employment as broadly interpreted by the Court of Justice, nor be able to show "sufficient resources" capable of precluding that he or his family members would burden the social assistance system of their host member state. For obvious reasons, the mere transfer of a single sum of money or the cross-border purchase of a single something of economic value would never suffice, notwithstanding the fundamental character of the right with which that money was transferred or that tangible something acquired.

In a *home state* situation, however, the mere finding of "real and genuine" employment does not suffice for EU law as such – and more particularly Directive 2004/38 to apply. Thus, as has been seen above, the residence of a Dutch market tradesman's family members is addressed as something appertaining to his professional exercise of the free movement of goods. In some cases, the Dutch courts do not seem to have objections of principle against applying *Carpenter* to these situations in an analogous way, even though they do, in that

[385] See: Council of State, Case no. 201011940/1/V1, [02-11-2011], *LJN* BU3411; repeated in: Council of State, Case no. 201105940/1/V4, [20-11-2012], *LJN* BY4031; Council of State, Case no. 201108991/1/V1, [03-12-2012], *LJN* BY5575; also see: ECJ Case 434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the reports)

regard, require a *substantial* use of those free-movement rights (28% of the total of economic activity is mentioned), and besides focus on the degree to which third-country relatives actually aid the market-salesman in question with the exercise of his free-movement rights.[386] Given the fact, however, that the latter requirement has never been thoroughly re-assessed at the European Union level, that serious arguments can be made against it and that, currently, the frontier workers' case is pending before the Court of Justice, it cannot be ruled out that, in the near future, the only requirement would be to show a substantial amount of cross-border activities, whether relating to the free-movement of goods, services or capital, in order to become entitled to reside with one's family members under more favourable conditions than normally allowed in national law.

Is this outcome desirable? Certainly, for accountants doing business for large businesses, for the owners of insurance companies operating across the Union, for famous musicians, who attract their audiences from other member states and sell their records to many of them in return, for stock-brokers and for bankers it will mean an improvement indeed. But how about that Dutch citizen just doing a "normal" job, who must stand by as all those internationally operating other people benefit greatly from EU law, while his wife is struggling to pass her Dutch integration test? The example may be sentimental, but shows nevertheless that the doctrine of the wholly internal situation is really undergoing serious strain, as it simply cannot be explained anymore, not with reason, and not in a Union which people increasingly feel represents the layer of government deciding the important issues, why they must still *somehow* cross any of those internal frontiers before that Union starts granting its benefits to *them*.

Conclusion

This second chapter has shown the EU legislator, on the one hand, has been unwilling to regulate all family migration for EU citizens, and yet has been unable to prevent further decision-making. Fundamental freedoms, after all, are exactly that. During the '70's, '80's and '90's, the Court of Justice has firmly defined the scope and substance of the fundamental right for workers and the self-employed to move and reside in other member states, for service providers to exercise their freedom unrestrictedly, and for all those to return home without uncertainty as to their family situations. The same vigor with which the Court has thus precluded the member states from coming back on their explicitly stated commitment to an integrated market, has led to an outcome which is certainly unsatisfactory, at least in the long run. If workers may work in other member states and may be accompanied by their relatives, regardless of the latters' nationalities, and if they may return home under at least the same conditions, then domestic workers will increasingly start wondering why their situations are so very different. If a service provider, who undeniably exercises a fundamental freedom imposed as a negative obligation also on his own state of nationality, may even there become entitled to reside with his family members without regard being had for those family members' nationalities, then persons who do not provide services across borders will start asking the same questions. In fact, it is no wonder the Council of State, when it referred preliminary questions to the Court of Justice, made reference to the notion of *abuse* – it is perceived as such and yet, these *rights,* which people seek to have applied to them, are not falsely enjoyed through a subversive misuse of EU law; they are granted explicitly by EU law *itself*.

[386] District Court Den Haag (residing in Haarlem), Case nos. AWB 10/12844 and AWB 08/42013, [26-04-2011], *LJN* BQ5774; District Court Den Haag (residing in 's Hertogenbosch), Case nos. AWB 07/41224 and AWB 08/8064, [30-05-2008], *LJN* BD3321

The possibilities which the classic four freedoms potentially still have in store in order to further enhance the integration of economic Europe, as has also been seen above, have not been depleted yet. Inventive courts have already begun assessing what potential may yet derive, even in the field of family migration, from the freedom of movement granted to goods and, as soon as such claims are granted, the free movement for capital will surely follow. All this would indeed logically flow from the Court of Justice's previous case-law, and yet, with each further step the strain on the wholly internal situations doctrine would increase. It is against this background that the Court's case-law on EU citizenship *as such*, which will be examined in Chapter 3, should be understood.

Chapter 3 – Family reunification derived from Citizenship of the Union

Introduction

Union citizenship as a legal term was introduced for the first time with the entry into force of the Maastricht Treaty on the 1st of November 1993. Part Two of the Treaty Establishing a European Community, which, as of that date, replaced the earlier EEC-Treaty, started out, in article 8, by declaring that "Citizenship of the Union is hereby established". Barely a month later, on the 21st of December 1993, the Commission of the European Communities had to issue a first report on the matter – expectations must have been tense. The Commission, although it had found it to be "manifestly impossible to take stock of the development of the European Union (…) after a period of only a few weeks", could still conclude – or expect, or express its hope that the insertion of Union citizenship would prove to be "one of the most significant steps on the road to European integration".[387] "For the first time", the Commission went on, "the Treaty [had] created a direct *political* link between the citizens of the member states and the European Union such as (had) never existed with the Community".[388] The over-arching aim of it all, as is clear from many documents, was to further a sense of identity with the Union, which was considered to be lacking.[389]

It has almost been twenty years now since the notion of EU citizenship was first introduced legally and, indeed, the European Union as such has in the meantime been lauded internationally for many progressive and peaceful developments; yet, as to the sense of identity which was supposed to emanate from EU citizenship as such, it may be about time to conclude that other forms of citizenship have in the past been quicker at realizing that particular aim. Perhaps this is due to the fact that, in a material sense, citizenship as such has added little to what was already there. Admittedly, EU citizens were eligible to petition the European Parliament, they could vote and stand in elections in their various states of residence – although only at the municipal level, and they could, as of 1993, vote for the European Parliament not only in their member state of nationality, but also in another member state if they had chosen to reside there. Besides, should they find themselves in a third country where their own member state was not represented (probably a very rare occasion to begin with), they could, as a fundamental right, seek consular protection with another member state's mission, should there be any.[390]

These political improvements, however, as various reports show, were not at all perceived by the general public as very important or fundamental. In 2001, the Commission reported that "the turnout for the June 1999 elections to the European Parliament by European Union citizens residing in another member state [had been] very low (9%)".[391] Parliament assuredly did receive a steady trickle of petitions; yet, compared to the national parliaments the EU citizens' interest in the supranational level of government remains modest; where the European Parliament received 16 petitions issued by Dutch nationals in the year 1999 – 2000,

[387] COM 1993/702 (final) p. 1
[388] Ibid. p. 2
[389] Ibid.
[390] Currently: article 20, par. 2, under c and article 23 TFEU
[391] COM 2001/506 (final) p. 3 and 4

the Dutch national parliament equaled this amount in November 2002 alone.[392] As to consular protection in third countries, the European Commission reported on the 23rd of March 2011 that "citizens [were] not sufficiently aware of their Treaty right to equal treatment regarding consular protection", and that "the number of cases where EU citizens have requested consular protection from another member state [was] low".[393] In short, no one seems to care.

Why then could the European citizens not just go along, feeling they had indeed been granted a fundamentally new status towards the Union? The Commission's 2001 report on citizenship clarifies that, in 1997 – 2000 Parliament had declared only 1767 out of 3274 petitions admissible, owing, in part, to "a lack of information about the powers of the Union and each of its institutions".[394]. Parliament itself indeed noted that "a number of petitions come to us because people are not clear as to what rights they have as citizens or residents of the EU".[395] Both institutions then predictably suggested a better education about citizens' rights to solve all this.[396] For increasing citizens' output as regards consular protection the Commission, likewise, proposed to "raise awareness" with EU citizens, implying that a continent's population had been given gold while failing to notice.[397] With an almost dogmatic compliance, thus, the EU's institutions continue to fail to see that perhaps this much-applauded "fundamental status" appertaining to EU citizenship had simply turned out in fact to bear less impact than some thousand petitioners had hoped it would by the year 2000 and that there simply *are* little third countries in which less than 27 member states host embassies.[398] *National* politics continues to retain its foremost importance and, therefore, no fundamental right to petition a supranational yet mostly incompetent political bystander can hope to foster the kind of European identity for which the Citizenship of the Union has been established from the outset. And national politics, to be sure, remains firmly in the hands of *national* citizens.

Still, the Citizenship of the Union, little as it thus really achieved politically or sociologically, remained a legal term included in the Treaty and surrounded by supposedly rhetorical remarks on its outspokenly fundamental nature, remarks the Court of Justice, eventually, would not fail to take note of. Could the word "citizen" thus eventually grow into entailing a *legal* definition encroaching on the member states' competence to regulate the family migration of EU citizens, particularly of those being unable to invoke either Directive 2004/38 or one of the primary provisions of EU free movement law? Article 8a of the original EC Treaty, which has presently been replaced by article 20 TFEU, after all, unequivocally granted all EU citizens the right to move and reside freely within the territory of the member states, not for economic ends, nor as "economically inactive migrants", but as a right in itself, to be there *as citizens*, citizens, to be sure, who would increasingly claim the protection of their family lives as one of their *civil* rights.

The present chapter explores the Court's case-law on this topic, which has evolved slowly but steadily, and has at present reached the point where it may be safe to say the days of the

[392] See: Eur. Parl. document A5 – 0162/2000 p. 18; compare: Tweede Kamer der Staten Generaal, jaarcijfers 2007 p. 5

[393] COM 2011/149 (final) p. 5

[394] COM 2001/506 (final) p. 18

[395] A5 – 0162/2000 p. 10

[396] COM 2001/506 (final) p. 18

[397] COM 2011/149 (final) p. 5

[398] It must be admitted that, in secondary law, the right to consular protection has been broadened somewhat; see: article 1 of Decision 95/553. According to this decision, Union citizens may also seek protection if, even though "their" member state does host an embassy in a particular state, it (or any consular mission) is not "accessible", a term which is presumably varied in application, and is not much to rely on in any case of urgency.

wholly internal situation doctrine are numbered. In the first section, two cases are assessed which are exemplary of the Court of Justice's initial reluctance to give an independent meaning to the notion of EU citizenship. The second section devotes attention to the way in which case-law developed during the first decade of the new millennium; during this period citizenship as such did cause the depth of the EU judiciary's scrutiny to increase as the Court of Justice increasingly included the protection of fundamental rights – including the right to reside as a family – in its ambit of review. On the other hand, even though the scope in which EU law as such applies was also broadened somewhat, all efforts in this regard continued to hinge on the presumption that cross-border elements are in some way necessary for persons to become entitled to the protection – even of their citizenship. The third section then deals with the landmark ruling in *Ruiz Zambrano*, in which the Court, compelled by its Advocate – General, for the first time explicitly applied EU law – and particularly the right to reside as a citizen – in a classic example of a situation confined in all aspects to the territory of only a single member state. Instead of relying on cross-border elements, the Court chose to invoke the infringement of the "effective enjoyment" of the citizen's status as a criterion to trigger its own competence to review national practices and policies.

3.1 The early years of EU citizenship

Widening the scope of EU law?

Expectations indeed were high when EU citizenship was introduced in 1993. The German Landesarbeitsgericht Hamm, when confronted with claims lodged by the wives of two German employees residing in Germany, holding that the EU citizenship of their husbands entitled them to take up work in Germany, decided to address preliminary questions to the Court of Justice by order of the 1st of March 1996; the matter resulted in the *Uecker* judgment of the 5th of June 1997.[399] In fact, the question put very plainly by the Labour Court was a direct re-appraisal of the Court of Justice's earlier ruling in *Morsson and Jhanjhan*, in which the Court had deemed such a situation wholly outside the sphere of EU law.[400] In *Uecker*, the question was put straightly whether "the fundamental principles of a Community moving towards European Union (could) continue to permit a rule of national law incompatible with Article 48(2) of the EC Treaty still to be applied by a member state against its own nationals".[401] This was a question showing remarkable foresight and a clear European vision towards the dividing line between national and EU competences.
The Court of Justice did not accept the Labour Court's invitation to dismiss the wholly internal situations doctrine altogether for reason of that notion having become incompatible with "a Community moving towards European Union", stating instead that "citizenship of the Union, established by Article 8 of the EC Treaty, [was] not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law".[402] Furthermore, as the Court held, "article M of the Treaty on European Union [provided] that nothing in that Treaty [was] to affect the Treaties establishing the European

[399] ECJ Joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, [05-06-1997] ECR 1997 p. I-03171
[400] ECJ Joined cases 35/82 and 36/82, *Elestina Esselina Christina Morson v. State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v. State of the Netherlands*, [27-10-1982] ECR 1982 p. 03723
[401] ECJ Joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, [05-06-1997] ECR 1997 p. I-03171, par. 12
[402] Ibid. par. 23

Communities, subject to the provisions expressly amending those treaties".[403] In other words, while it had been nice of the Commission and Council to call the member states' nationals "Citizens of the Union", even providing them with some incidental political rights regarding the layers of government those citizens correctly understood were of little importance, in reality, EU citizenship had evidently been designed to alter almost nothing at all. In the mean time, while the European Commission's legal department had obviously – and successfully pleaded against the idea of the Court returning on *Morsson and Jhanjhan*, quite other departments continued to wonder what more they had to teach their precious EU citizens about the Union's division of powers in order to invoke a sense of Europeanness in them.

Priority of the fundamental freedoms

As particularly Chapter 2 has already made clear, even at the time when EU citizenship was introduced, there already existed an extensive case-law by which the positions of workers, self-employed EEC migrants and service providers and recipients were protected to a considerable degree. With EU citizenship, thus, it unavoidably became necessary to consider what impact citizenship would have on that case-law; in other words: were the cases of *workers* to be treated henceforth under what used to be article 8 of the original EC Treaty because of the fundamental nature of EU citizenship, or was citizenship only there to give solace to the fringe category of persons who were not protected for economic reasons. The former option would obviously have boosted a quick evolution of EU citizenship and could have resulted in the workers' benefits becoming more generally available as *civil* rights rather than *economic* necessities.

In *Martínez Sala*, the Court decided not to merge its line of case-law on workers, self-employed and other economically active EU migrants with the nascent idea of EU citizenship, thereby ensuring on the one hand that its developments in the economic dimension were not to be in any way altered or diminished, but also paving the way for a considerably slower progress of EU citizenship as such.[404] Mrs. María Martínez Sala, a Spanish national, was resident in Germany since she was 12 years old, but had been employed little in that country.[405] When, upon the birth of her daughter Jessica, she applied for a special child-raising allowance granted under German law, her application was refused because she was not either German or otherwise in the possession of a certain type of residence permit – Mrs. Martínez Sala, at the time, had merely been issued with a declaration stating that extension of her residence permit had been applied for.[406] Given the fact of her having been employed only occasionally and of the referring court having given insufficient insight as to her having become unemployed, the Court of Justice considered it was unable to state whether or not Mrs. Martínez Sala's case had to be determined under the free movement of workers. It implied, however, that if the referring court should come to the conclusion she were to be treated in a worker's capacity, then existing case-law on the substance of that case-law could be relied on in order to entitle Mrs. Martínez Sala to the child-raising allowance she claimed.[407]

The Court then had to assess what should be done if Mrs. Martínez Sala could somehow not be treated as a worker. She had been resident in Germany since she was 12 years old, except for a few early intervals, and even though she did not have sufficient resources not to become

[403] Ibid.
[404] ECJ Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [12-05-1998] ECR 1998 p. I-02691
[405] Ibid. par. 13
[406] Ibid. par. 15 and 16
[407] Ibid. par. 21 – 45

a burden on the social welfare system of the host member state (she was in receipt of income support), her residence in Germany had never been deemed illegal by the German authorities, which, however, refused to grant her the kind of permit she needed for the family allowance in question.[408] Could she rely on her EU citizenship alone in order to claim entitlement? The German Government pleaded against this, stating that Mrs. Martínez Sala did not meet either of the residence conditions laid down in the EU's secondary legislation, so that the German decision to regard her stay as legal rested solely on German domestic law.[409] According to Advocate – General La Pergola, the French and British representatives pleaded the same way, stating that the new article 8a of the EC Treaty "simply [reiterated] the rights of free movement and residence already accorded to the various individual categories of persons concerned and [welded] them together in a single provision of primary law - like the fragments of a mosaic, as the French Government put it at the hearing - but [left] untouched the limitations to which those rights [had earlier been] subject, depending on the circumstances, under either the Treaty or secondary legislation".[410] In other words, the A-G concluded, the Governments were of the opinion that EU citizenship "[did] not give freedom of movement any new broader substance than earlier legislation [had done]".[411]
Both the A-G and the Court itself disagreed on this point, indicating that, perhaps, secondary legislation did still lay down "conditions" under which the fundamental freedom to move and reside had to be exercised, but making clear at the same time that no member state which, in any case, does not invoke those limitations in order to end an EU citizen's residence on its territory, cannot rely on those conditions in order to take that EU citizen's situation out of the ambit of EU law.[412] In other words, any EU citizen residing in another member state while being subject to no expulsion measures resided there *legally* and *under EU law*. The Court then proceeded to state the precondition for Spanish nationals of having a certain type of residence permit constituted unjustified discrimination on grounds of nationality.[413]
The logic of the Court's ruling in *Martínez Sala*, particularly as to the subsidiary character of the protection EU citizenship as such entails in relation to the other fundamental freedoms, has led to a persistent presumption that EU citizenship is simply a status which EU nationals wishing to reside for non-economic reasons can rely on.[414] For workers, those seeking to be self-employed, students etc. this appears to have been advantageous, since the general conditions for residence imposed under EU citizenship have not been applied to them; yet, for the value which was to be attached to the citizenship of the Union it may indeed have meant a set-back, since, for obvious reasons, the Court would have to take extra care exactly in those cases which it would be bound to decide under the citizenship alone.

Deepening the reach of EU law?

Still, could the fact of persons having become citizens also improve the Court's assessment of their claims under the general free-movement provisions? Could it, in other words, shine

[408] Ibid. par. 47
[409] Opinion of A-G La Pergola in Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [01-07-1997] ECR 1998 p. I-02691, par. 17
[410] Ibid. par. 15
[411] Ibid.
[412] Ibid. par. 19; ECJ Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [12-05-1998] ECR 1998 p. I-02691, par. 60 and 61
[413] ECJ Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [12-05-1998] ECR 1998 p. I-02691, par. 6
[414] The Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000), for instance, does not mention EU citizenship as a ground for residence at all, focusing instead on the "worker", the "student" and the "economically inactive EU subject"; see: rule B-10 3 and B-10 4

through in the Court's dealing with those claims, that they were now lodged by citizens and no longer by the beneficiaries of a free-trade bloc's legislation? Although 1997 thus proved to be too early for a complete reappraisal of the wholly internal situations doctrine, the Court of Justice still, gradually, had to answer the question what EU citizenship did entail, as the member states' explicit choice to include it certainly could not be held to mean nothing at all. In *Konstantinidis*, although strictly predating the adoption of EU citizenship, the Court was given the chance to assess whether the status of being "a citizen of Europe" avant la letter, could perhaps deepen the reach of EU law, ensuring that some fundamental values would be protected as a matter of principle, regardless of their economic effects.

The facts of this case, to begin with, clearly fell within the classic "scope ratione materiae" of EU law; a Greek national had established himself in Germany, where he worked as a self-employed masseur and assistant hydro-therapist.[415] The case provides a wonderful example of classic German red tape. The cause for the proceedings arose on the 1st of July 1983; on that date, Mr. Christos Konstantinidis was married in Altensteig, on the occasion of which his surname was incorrectly entered in the marriage register as "Konstadinidis".[416] When on the 31st of October 1990 he tried to have this corrected, stating that his passport showed his name as "Christos Konstantinidis" in Roman characters, the Amtsgericht in Tübingen decided of its own motion that the names in the marriage registry should correspond to persons' birth certificates (rather than to their passports), to which end it ordered the original Greek birth certificate to be transcribed using ISO transliteration standards; in the end, Mr. Konstantinidis' full name ended up being spelt "Hréstos Kónstantinidés", which was more than the applicant could have hoped for.[417]

Although, as said, all of these facts took place shortly before the actual adoption of EU citizenship, this did not prevent Advocate – General Jacobs from delivering a compelling (and belatedly quite influential) opinion on the 9th of December 1992.[418] After having spent a few paragraphs on the phonetic or systematic translation of names, concluding that, in principle, it would not be for the Court of Justice to principally favour one or another way of transcribing the Greek alphabet into the Latin, the A-G still urged the Court to consider the practical effects of using the ISO-standard of transliteration generally because "Community law does not regard the migrant worker (or the self-employed migrant) purely as an economic agent and a factor of production entitled to the same salary and working conditions as nationals of the host State; it regards him as a human being who is entitled to live in that State "in freedom and dignity"".[419]

Debating many of the member states' constitutions, as well as various international documents on the protection to fundamental rights, the Advocate-General reached the unsurprising conclusion that the member states shared clear and deep-rooted traditions according to which persons are fundamentally entitled to "dignity", "moral integrity" and/or "a sense of personal identity". It was through this reasoning that the A-G was able to lift the entire case above all arguments put forward by the parties, who had debated the possible economic effects an obligatory transliteration might entail for Mr. Konstantinidis' business in Germany – whether he would be legally obliged to also use the name "Hréstos Kónstantinidés" for commercial purposes, whether confusion by clients would likely occur,

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[415] ECJ Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*, [30-03-1993] ECR 1993 p. I-01191, par. 3

[416] Ibid. par. 4

[417] Ibid. par. 5; A-G Jacobs noted even that the applicant found this transliteration "intensely distasteful"; see: Opinion of A-G Jacobs in Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*, [09-12-1992] ECR 1993 p. I-01191, par. 4

[418] Opinion of A-G Jacobs in Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*, [09-12-1992] ECR 1993 p. I-01191

[419] Ibid. par. 24

the ensuing loss of profit, etc.[420] Instead, A-G Jacobs' opinion turned into a diametrically opposite direction.

> A person's right to his name is fundamental in every sense of the word. After all, what are we without our name? It is our name that distinguishes each of us from the rest of humanity. It is our name that gives us a sense of identity, dignity and self-esteem. To strip a person of his rightful name is the ultimate degradation, as is evidenced by the common practice of repressive penal regimes which consists in substituting a number for the prisoner's name. In the case of Mr. Konstantinidis the violation of his moral rights, if he is compelled to bear the name "Hréstos" instead of "Christos", is particularly great; not only is his ethnic origin disguised, since "Hréstos" does not look or sound like a Greek name and has a vaguely Slavonic flavour, but in addition his religious sentiments are offended, since the Christian character of his name is destroyed.[421]

Regardless of any economic effects having to be calculated in response to the host states' conduct as regards EU migrants, the Advocate – General held clearly, EU citizens are, as a matter of EU law, entitled to precisely that sense of identity which human rights – and in particular the integrity of one's name – strive to protect.

> In my opinion, a Community national who goes to another member state as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights.[422]

"Civis europeus sum" – I am a *citizen* of Europe.[423] With implied reference to the ancient Roman phrase "civis Romanus sum" the Advocate – General remarked, even a year prior to the formal inclusion of EU citizenship into the European *acquis*, that to be a citizen of the Union should mean to be protected under *European* fundamental rights – or should we say *civil* rights – in any member state of the Union; this cannot have been an accident. After the Advocate – General's insightful remarks, compelling the Court to move away from mere economic analysis, the Court's own ruling certainly came as a disappointment; in its final ruling it held that, since nothing in the Treaty prevented the transcription of Greek names into languages using the Roman alphabet, the obligation to adopt the necessary legislative or administrative measures regulating this lies in principle with the member states.[424] Moreover, these measures would *only* run counter to the freedom of establishment "insofar as their application [caused] such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment", which would be the case if "a Greek national [were]

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[420] Ibid. par. 19 et seq.
[421] Ibid. par. 40
[422] Ibid. par. 46
[423] The A-G's reference might be to par. LXII of Cicero's fifth Verrine oration, see: M.T. Cicero & C.D. Yonge, *Orations and essays of Marcus Tullius Cicero*, New York: Appleton 1900
[424] ECJ Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*, [30-03-1993] ECR 1993 p. I-01191, par. 3

obliged by the legislation of the state in which he is established to use, in the pursuit of his occupation, a spelling of his name derived from the transliteration used in the registers of civil status if that spelling is such as to modify its pronunciation and if the resulting distortion exposes him to the risk that potential clients may confuse him with other persons".[425] Instead of calling out "I am a citizen of Europe", the Court can justifiably be said to have meant, the subjects of EU law should plead "I cannot attain my full economic use" in their defense.
Why is this important from the perspective of family migration? As was already seen in Chapter 1, the right to live as a family, just like the right to the integrity of one's name, has widely been declared to form part of the "freedom and dignity" to which EU citizens are entitled under, for instance, Directive 2004/38.[426] In Chapter 2 it was seen the Dutch immigration policies and jurisprudence regarding the Court of Justice's ruling in *Carpenter* assume, in parallel to the Court's abovementioned logic in *Konstantinidis*, that this part of "freedom and dignity" should only be preserved under EU law so long as its denial would actually cause the EU citizen a loss in *economic* productivity. Combined with the Court's initial unwillingness to expand the scope of application of EU law to intrude upon the wholly internal situations doctrine *because its subjects were now citizens*, the two cases, *Uecker* and *Konstantinidis* together form a good example of what was expected of EU citizenship, of what was initially not granted with it, but also of what arguments were to be used in subsequent debates. EU law of course remains a growing thing.

Conclusion: little had changed

Despite its solemn introduction, the first years in which the nationals of the member states could rightfully call themselves citizens of the European Union showed that status stood for little worth; in particular, in the field of family migration or the protection of human rights more generally, almost nothing was added to the existing European *acquis*. EU citizenship, on the one hand, was not meant to alter "the scope ratione materiae" of EU law in any way, and, as the Court refused to take an excellent opportunity to deepen its scrutiny within the existing "scope ratione materiae" either, the question irresistibly arose in the late 1990's as to how fundamental the special status of citizenship actually was. Had it in fact not been excessive to impart on that status the title of "citizenship"? Why should anyone, frankly, be surprised that EU citizenship failed (and continues to fail) in every way to elicit any genuine sense of European identity, when even the integrity of a *citizen*'s name – the A-G correctly made out that "it is our name that gives us a sense of identity" – were protected *by that citizenship* only after a citizen of Europe crossed some internal frontier and only insofar as his economic output warranted an effective protection of the integrity of that name (or his sense of identity). One could as well have granted citizenship of the World Trade Organization, if citizenship could indeed be given away that cheaply.

3.2 The new millennium

A deepened, more fundamental status within the ambit of EU law?

On the 20th of September 2001, the Court of Justice, for the first time, explicitly – and in fact quite enigmatically – acknowledged that "Union citizenship is destined to be the fundamental

[425] Ibid. par. 16 and 17
[426] Recital 5 of the preamble to Directive 2004/38

status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for".[427] The case concerned Mr. Rudy Grzelczyk, a French national who had moved to reside in Belgium for his studies at Leuven University. Catholic University of Leuven.[428] As he applied for income support, the question arose in a national dispute whether he could qualify as a worker; during the first three years of his studies, the judgment shows after all, Mr. Grzelczyk had merely "defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities".[429] Rather than going into the question whether he could indeed qualify as a worker in order to claim a non-discriminatory access to social advantages under what used to be Regulation 1612/68 – something which, as shown in Chapter 2, the Court certainly would have done in the 1980's – it now went on to make quite a different move. Holding famously – and correctly – that Citizenship of the Union had indeed been destined to be the fundamental status of the nationals of the member states, it decided to neglect the difference between workers and other *citizens*, and to grant Mr. Grzelczyk the same non-discriminatory access to social advantages under the general non-discrimination clause of what is now article 18 TFEU, which states that "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".[430]

The Court's ruling provoked a mixed response, as could have been expected.[431] Some argued the Court of Justice perhaps had rendered the distinction between economically active and inactive migrants quite meaningless.[432] This may arguably be the case for EU migrants themselves if they wish to claim certain social advantages in their host states; for family migration purposes the distinction still remains more than relevant. Not only does an inactive EU citizen, despite the fundamental nature of his status, still need to deliver a different kind of proof before his or her family members can join him or her in a host state; moreover, while certain of the EU's fundamental freedoms may be exercised *from the territory of one's home state*, the same cannot – or could not, at the time – be said of the right to move and reside which EU citizens enjoy under what is now article 20 TFEU.[433] Still, as to strict *host state* situations, the Court's ruling in *Grzelczyk*, which, afterwards, was followed up by more cases like *D'Hoop*, *Baumbast*, *Collins*, *Trojani* (in which, as was seen in Chapter 2, the Court delimited the worker's definition, but then proceeded to grant protection under the citizenship provisions), and *Bidar*, may certainly be said to have shown an increasing convergence between the economically active and the inactive EU citizens' situations.[434]

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[427] ECJ Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [20-09-2001] ECR 2001 p. I-06193, par. 31

[428] Ibid. par. 10

[429] Ibid.

[430] Ibid. par. 46

[431] D. Martin, "A big step forward for Union citizens, but a step backwards for legal coherence", *European journal of migration and law* 2002, vol. 4, iss. 1 p. 136 – 144; H. Staples, "Een zwaluw maakt nog geen zomer. Is burgerschap van de Unie de juiste grondslag voor een recht op bestaansminimum?", *Nederlands tijdschrift voor Europees recht* 2002, vol. 8, iss. 1-2 p. 8 – 13; see also: C. Barnard, "Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills, judgment of the Court (Grand Chamber) 15 March 2005, not yet reported", *Common Market Law Review* 2005, vol.

[432] D. Martin, "A big step forward for Union citizens, but a step backwards for legal coherence", *European journal of migration and law* 2002, vol. 4, iss. 1 p. 136 – 144

[433] For a thorough review taking recent events into account, see: D. Kochenov & R. Plender, "EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text", *European Law Review* 2012, vol 37, iss. 4 p. 369 – 397

[434] ECJ Case 224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, [11-07-2002] ECR 2002 p. I-06191; ECJ Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, [17-09-2002] ECR 2002

For now, it is fairly unnecessary, however, to go into this case-law in detail, since this Chapter's central question is not to define the exact depth of the protection afforded to EU citizens (and their family members) claiming social rights in their host states, but to establish when and under what conditions they are in fact able to claim a derived right of residence for their (third country national) family member to reside with them. As has been emphasized sufficiently, these conditions are generally given by Directive 2004/38 as far as the home state is concerned; the directive may, in this field, be regarded as a (near) complete harmonization of the member states' laws. The reason why the case-law, despite the fact that it has not granted any additional family rights, is still mentioned, is that it cannot be overlooked – not in any argument on European citizenship – that the Court has gone to great lengths in the first years of the new millennium, to *deepen* the substance of what citizenship may actually entail. It may be concluded safely that the Court, were it to decide on *Konstantinidis* again, would probably not have limited itself anymore to give judgment on a person's right to his name only insofar as that right supports his economic use in the host state.

Closing in on the wholly internal situation?

Did the new millennium also expand the scope ratione materiae of EU law closer to the member states' internal affairs? For a meaningful answer to this question it is expedient to look into the Court's rulings in *Garcia Avello*, *Chen* and *Rottman*.[435] The first case, that of Mr. Carlos Garcia Avello and Mrs. Isabelle Weber and their two children Esmeralda and Diego, concerned the latter children's names – again, A-G Jacobs was assigned to address the issue in an opinion.[436] Esmeralda and Diego had been born in 1988 and 1992 of a marriage between a Spanish father and a Belgian mother; in accordance with Belgian family law, they had been registered in the Belgian birth register as having the surname "Garcia Avello" – their father's name. They were also registered with the consular section of the Spanish Embassy in Brussels; yet, here, their name had been entered in accordance with Spanish law, as "Garcia Weber".[437] When the parents requested the Belgian authorities to alter their children's name in order to bring it into conformity with the way they were known in Spain, they argued that "the Spanish system of surnames was deeply rooted in Spanish law, tradition and custom to which the children felt more intimately related" and that, "for the children to bear the surname of Garcia Avello suggested, under that system, that they were siblings rather than children of their father"; moreover, their Belgian surname "deprived them of any link by name to their mother".[438] Needless to say their request was denied; the Belgian Ministry for Justice supported its denial stating that "any request for the mother's surname to

p. I-07091; ECJ Case C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*, [23-03-2004] ECR 2004 p. I-02703; ECJ Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)*, [07-09-2004] ECR 2004 p. I-07573; ECJ Case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, [15-03-2005] ECR 2005 p. I-02119

[435] ECJ Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613; ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925; ECJ Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [02-03-2010] ECR 2010 p. I-01449

[436] Opinion of A-G Jacobs in Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613

[437] Ibid. par. 37

[438] Ibid. par. 38

be added to the father's, for a child, is usually refused on the ground that, in Belgium, children bear their father's surname".[439] *Lex dura sed lex*, in short.
Despite all the remarks one could make – and which were made in abundance – about member states being bound to accept each other's systems of name registration, encroaching on their sovereign powers to regulate family law themselves, it is, for our purposes, more interesting to note why the Commission, the Advocate – General, and the Court itself deemed this situation to come within the scope of EU law at all. Esmeralda and Diego were born in Belgium after all, and they never had resided anywhere else, although it must be said they had dual Spanish and Belgian nationality.[440] According to Advocate – General Jacobs' description of the proceedings, the Belgian, Dutch and Danish government had maintained the matter was wholly internal because it was clearly the *children's* names which were at stake, rather than that of their father.[441] The Commission and the A-G himself, to the contrary, maintained that "the issue [was] not the choice of a surname for the children viewed independently but the way in which the surname borne by one generation [was] to be determined by the name or names borne by the previous generation", so that Mr. Carlos Garcia Avello's move from Spain to Belgium could bring the matter concerning his children's names within the ambit of EU law ratione materiae.[442] Secondly, A-G Jacobs considered that, notwithstanding the fact of the children having been born Belgians in Belgium and having always resided in that same country, their situation simply had to be deemed sufficiently cross-border in nature simply because of their Spanish nationality.[443] The Court itself began by citing its earlier rulings in *Grzelczyk* and *D'Hoop*, and went on by declaring that a "link" with EU law existed in any case where "nationals of one member state (are) lawfully resident in the territory of another member state", so that the children were able to claim protection under EU law.[444]
The case of *Chen* has already been discussed in Chapter 1, particularly with regard to the multiple nationalities problem raised there.[445] In the context of EU citizenship closing in on the member states' room for maneuver in EU citizens' family migration, the ruling shows, again, a remarkably quick acceptance of the cross-border link classically required for the application of EU free-movement law – to which citizenship, as *Uecker* showed, meant not to introduce an extension. Recalling the facts briefly, a Chinese couple, Mrs. Chen and – presumably – Mr. Zhu, had had a child in the People's Republic of China, Huixiang Zhu, but wished to have a second child without having to face the dissuasive policies the Chinese authorities enact in that regard.[446] On the 16th of September 2000, therefore, their second child, Kunqian Catherine Zhu, was born in Belfast, the United Kingdom.[447] Due to what A-G Tizzano validly called a "particular feature of Irish law", Catherine, although having been

[439] Ibid. par. 39
[440] ECJ Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613, par. 13
[441] Opinion of A-G Jacobs in Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613, par. 47
[442] Ibid. par. 50
[443] Ibid. par. 52
[444] ECJ Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613, par. 27; also noted by De Groot, see: G.-R. de Groot, "Towards European conflict rules in matters of personal status", *Maastricht Journal of European and Comparative Law* 2004, vol. 11 iss. 2 p. 115 – 119, particularly p. 116; it is noteworthy the Court, however, expressly abandoned this position in *McCarthy*, see: ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Departmen*t, [05-05-2011] (not yet published in the Reports), par. 46 and 51
[445] ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925
[446] Opinion of A-G Tizzano in Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [18-05-2004] ECR 2004 p. I-09925, par. 10
[447] Ibid. par. 12

born of two Chinese parents on the territory of the United Kingdom, was granted Irish nationality by birth because her place of birth had been on the island of Ireland.[448] She thus was an EU citizen residing in a member state of which she was no national; yet, she never had lived, nor was she planning to live in the only country of her nationality – Catherine, to be sure, was not Chinese.
Was this case "wholly internal"? When comparing Catherine's life with that of other migrants' children born in the United Kingdom, their situations really are strikingly similar; moreover, Catherine had never *done* anything for which the European Economic Community had been called into existence. Moreover, the parents, despite having come to the European Union, certainly had brought along a grain of birth control; the place of Belfast had after all been chosen very deliberately so that Catherine would be granted Irish nationality while residing in the United Kingdom, (which the latter's government claimed was an abuse of law).[449] Neither Advocate – General Tizzano, nor the Court of Justice itself, however, followed this logic; the Court even brushed aside the argument as a matter of routine, stating that the preliminary contention on Catherine being unable to rely on her citizenship "simply because [she] never moved from one member state to another member state must be rejected at the outset".[450] The Court appears to find the United Kingdom's position quite absurd; yet, it may be recalled at this point how the same Court of Justice had held twenty years earlier, in *Morson and Jhanjan* that EU law relating to the freedom of movement for workers (EU *citizenship* was not there yet) could not be applied to cases which have no factor linking them with any of the situations governed by EU law, which, then, had been "undoubtedly the case with workers who [had] never exercised the right to freedom of movement".[451] A shift, not only as regards the depth of the EU's scrutiny, but also as regards the "scope ratione materiae of EU law" is therefore evident, albeit the Court did not expressly admit it.
The Court's more recent judgment in the *Rottman* case is even more striking.[452] Mr. Janko Rottman was born an Austrian national in Graz and, by virtue of the Republic of Austria acceding to the vernal European Union on the 1st of January 1995, as of that date he counted as a citizen of the Union as well.[453] Citizen or not, however, little over seven months later, in July 1995, Mr. Rottman was examined by the Landesgericht für Strafsachen in Graz as accused of serious fraud, a claim which he himself denied.[454] In order to elude the criminal charges, Mr. Rottman moved his residence to Munich, where, in February 1999, he applied for naturalization, concealing the fact that he was the subject of criminal proceedings in Austria.[455] A certificate of naturalization was issued to Mr. Rottman on the 5th of February 1999, as a result of which, according to Austrian nationality law, he lost his Austrian nationality.[456] In August 1999 the municipal authorities of Munich were informed by those of Graz about the criminal proceedings which were still pending against Mr. Rottman, and which he had concealed in his naturalization request, as a consequence of which the German authorities decided on the 4th of July 2000 to withdraw Mr. Rottman's naturalization –

[448] Ibid. par. 13
[449] Ibid. par. 28
[450] ECJ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, [19-10-2004] ECR 2004 p. I-09925 par. 18
[451] ECJ Joined cases 35/82 and 36/82, *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v. State of the Netherlands*, [27-10-1982] ECR 1982 p. 03723
[452] ECJ Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [02-03-2010] ECR 2010 p. I-01449
[453] Opinion of A-G Poiarez Maduro in Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [30-09-2009] ECR 2010 p. I-01449, par. 2
[454] Ibid. par. 3
[455] Ibid. par. 3 and 4
[456] Ibid. par. 4

incidentally depriving him of his citizenship of the Union (Mr. Rottman became, or would become a stateless person).[457]
Was this case wholly internal? It is true Mr. Rottman moved from Austria to Germany, but did that *move* have anything to do, even remotely, with the way the German authorities should assess the revocation of his EU citizenship? Advocate – General Poiares Maduro seems to have been of this opinion. Addressing the objection raised by no less than eight governments, the A-G remarked the case could not be regarded wholly internal simply because Mr. Rottman did not have Austrian nationality anymore; such reasoning, according to the A-G, would clearly ignore the origins of Mr. Rottman's situation.[458] "It was by making use of the freedom of movement and residence associated with Union citizenship which he enjoyed as an Austrian national that Mr. Rottman went to Germany and established his residence there in 1995", the A-G explained, completely in line with the Court's previous jurisprudence.[459]
The result of this approach, however, would have been highly illogical and would certainly not enhance a popular perception of EU citizenship, which can be shown with reference to three Dutch rulings on the case.[460] The District Court in Den Haag, in all these three judgments, refuted the applicants' claims relating to *Rottman*, not only by stating that, unlike Mr. Rottman, they had never even *become* Dutch and thereby EU citizens (which is still a valid point, given *Rottman*), but additionally by stating that *Rottman* had concerned a person who had first possessed Austrian and later German nationality and that the case had thereby concerned, first, the loss of the Austrian nationality through the German naturalization, and subsequently the revocation of that naturalization, with the ensuing loss of *rights* appertaining to the citizenship of the European Union.[461] It appears somewhat as if the District Court would not even apply EU law (granting enhanced protection) in cases where Dutch citizenship *had indisputably been there*, but in which a person having committed fraud in obtaining it had not first had a second EU nationality (or otherwise a connection to a second member state). This would immediately raise the obvious question, to which no reasonable answer exists, what valid point there would actually be in differentiating between cases of fraud on the singular basis of a widened notion of intra-Community trade having or not having been established. Frankly, neither a person's past holidays, nor the services he may happen to have provided, nor in fact the nationality he may have had in the past or the place of establishment of some of a person's professional customers should in any way determine the outcome of allegations of fraud during naturalization proceedings, and any system of law determining the consequences of such fraud on a basis like that should expect to be ridiculed at best.
The Court of Justice must have felt the same dilemma.[462] On the one hand, Mr. Rottman had clearly come to Germany while he was still an Austrian national and had thus made clear *use* of his European citizenship in the classic (cross-border) sense of the term. Were the Court, therefore, now to allow the German argument, stating Mr. Rottman's case had *become* wholly internal again simply because he had lost his Austrian nationality upon gaining the German,

[457] Ibid. par. 5
[458] Ibid. par. 11
[459] Ibid.
[460] District Court Den Haag, Case no. 324446, [07-04-2011] LJN: BQ0863; District Court Den Haag, Case no. 401442, [04-10-2012] LJN: BY0139; District Court Den Haag, Case no. 413884, [20-12-2012] LJN: BY7552
[461] District Court Den Haag, Case no. 324446, [07-04-2011] LJN: BQ0863, par. 3.4; District Court Den Haag, Case no. 401442, [04-10-2012] LJN: BY0139, par. 5.3; District Court Den Haag, Case no. 413884, [20-12-2012] LJN: BY7552, par. 4.5
[462] See also, for a sharp review of this case and its dilemmas: D. Kochenov, "Where is EU citizenship going? The fraudulent Dr. Rottmann and the State of the Union in Europe", *in:* L.S. Talani, *Globalisation, migration, and the future of Europe. Insiders and outsiders*, London: Routledge 2012 p. 240 – 253

this would have meant a straight set-back as to most of its earlier achievements with EU citizenship. On the other hand, if the Court had followed A-G Poiares Maduro, stressing explicitly the ties which Mr. Rottman had had to Austria in the past, its ruling would have had unwelcome implications too. EU citizenship, it would then be presumed, only warranted EU protection after it had involved at least two member states. The result would have resembled a marriage which under English law remains voidable until it is consummated.[463] As to that, while having sex for the first time unquestionably is much like crossing a border, it is less obvious why crossing a border should also warrant an analogy with having sex. The Court of Justice, thus faced with an apparent dilemma, presumably feeling compelled on the one hand to actually do it for the first time, while on the other still being too hesitant to explicitly admit it, decided prudently not to make it too clear whether it really did intrude into the member states' internal affairs.[464]

Conclusion – A citizenship that sometimes really means something

In a string of rulings the Court of Justice, during the first decade of this century, has both deepened the meaning of EU citizenship, making it into something persons can really rely on in order to derive social equality rights from it, or the right to be known in Europe by only a single name, etc. As regards the widening of the reach of EU law, the Court certainly has not been idle either. The rulings in *Garcia Avello*, *Chen* and, most of all, *Rottman*, show an increasing ease with which cross-border links, classically triggering EU free-movement law (including EU citizenship according to *Uecker*). A second nationality, a second state of birth, perhaps a father who had moved across a border, it all began to make sense to the Court. At this point, the *Carpenter* ruling may also be recalled; even though that ruling was delivered under the freedom to provide services, it did form an important precedent by which the Court paid less and less heed to its old dogma regarding the wholly internal situation.
At the same time, because of the increased meaning of EU citizenship abroad, and perhaps because of the common-sense argument that any sensible citizenship obviously must count from the moment it is given, the Court's work put an increasing strain on its own logic. The *Rottman* case provides a razor-sharp example of the illogical outcomes which would have been reached if EU citizenship had indeed been given a substantially increased protection under EU law, while the emphasis on the general application of EU law, triggering that protection, had remained on the existence of cross-border elements. The Court was manifestly faced with a simple dilemma. It had said on the one hand the introduction of EU citizenship had not been meant to alter the sphere of application of EU law – this, the member states, after all, had expressly laid down. On the other hand, the Court had also said that EU citizenship was destined to be fundamental in nature – this, the member states had *also* expressly laid down. Trying to reconcile both of the member states' demands as regards the status they had so ceremoniously created, it increasingly found that that was simply not possible. The Court may have tried, then, to extend the Treaty's scope of application without extending it – in fact, it applied the Treaty more broadly, while stating in its rulings it did not – but it must have felt all the same that not all things can be explained by myriads of subtle differentiations. The Court would have to explain soon, and in the language of citizens, what their citizenship of the Union was actually meant to be.

[463] For details, see: Section 12 of the Matrimonial Causes Act 1973
[464] ECJ Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [02-03-2010] ECR 2010 p. I-01449, par. 42 – 49

3.3 The Court's ruling in *Ruiz Zambrano*

The facts

On the 26th of January 2009, the Court of Justice received a reference from the Brussels Tribunal de Travail, which would turn out to be exactly the sort of case it needed in order to alleviate the tension it had gradually increased on EU citizenship and the scope of application of the Treaty.[465] The facts are indeed complex; yet, it is of some importance to look at them in detail. The applicant, Mr. Ruiz Zambrano, was a Colombian national who had arrived in Belgium on the 7th of April 1999 in the company of his wife, Mrs. Moreno López, and their first child.[466] The family had settled in Belgium after Mr. Ruiz Zambrano had applied for asylum, claiming, according to A-G Sharpston, that he had fled from Colombia after having been repeatedly threatened and extorted by private militias, witnessing assaults on his brother and suffering the abduction of his three-year old son.[467] His asylum request having been denied by decision of the 11th of September 2000, Mr. Ruiz Zambrano and his family were only allowed to stay in Belgium because of a "non-refoulement clause" by which the Belgian authorities deemed it impossible to send them back to Colombia, given "the critical situation there".[468] Thus, the family's members, as might be inferred from the ruling, had continuously had no access to legal employment from the year 2000 onwards, even though they continued to lodge applications for regular residence permits and appealed against all rejections issued by the Belgian authorities.[469]

Nevertheless, Mr. Ruiz Zambrano did find employment with Plastoria, a workshop established in Brussels; here, he worked full-time (albeit without a permit) from October 2001 until October 2005, when he was temporarily dismissed for economic reasons.[470] Over these five years, as A-G Sharpston remarks, his employer had paid all the requisite social contributions and taxes.[471] After his temporary dismissal, Mr. Ruiz Zambrano lodged an application for unemployment benefits, which was refused for the lack of a work permit; he appealed against this refusal, even though the course of these proceedings he had already been employed again by Plastoria.[472] Mr. Ruiz Zambrano's action was maintained, leading eventually to the Court's famous ruling, presumably because he still disagreed, maintaining he either had had no need of a work permit, or he should have been issued with one – in any case, Mr. Ruiz Zambrano claimed to be entitled to social assistance over the period of his intermittent unemployment.[473]

A second claim also eventually was referred to the Court of Justice by the same Tribunal de Travail which assessed the abovementioned claim. Mr. Ruiz Zambrano's renewed employment, namely, did not last because the premises of Plastoria were visited by an official labour investigator on the 11th of October 2006, who ordered the immediate termination of the work. Plastoria, complied at once and the next day, Mr. Ruiz Zambrano may be expected to have been at home, with no compensation but a list indicating which levies Plastoria had

[465] OJ 2009/C 90/15 of the 18th of April 2009
[466] Opinion of A-G Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [30-09-2010] ECR 2011 p. I-01177 par. 18
[467] Ibid. par. 19
[468] Ibid. par. 20
[469] Ibid. par. 21 – 24
[470] Ibid. par. 23 and 28
[471] Ibid. par. 23
[472] Ibid. par. 28
[473] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 33

ever paid on his behalf.[474] Having thus been made unemployed again, Mr. Ruiz Zambrano applied again for social assistance, which, again, was refused (presumably still for lack of a work permit).[475] Again, Mr. Ruiz Zambrano appealed, claiming, in short, that he should have been allowed to work and, therefore, was now entitled to seek assistance (or, preferably as may be presumed, to continue working).[476]

If these had been the facts, it would have been difficult indeed for the Court to say anything at all about EU citizenship – as an inquisitive mind would do well to ask where the Union citizens actually are in the above description of the facts. This question leads to the happier part of the case, as on the 1st of September 2003, Mrs. Moreno López gave birth to their second child, Diego (it seems to be a lucky name [477]), while their third child, Jessica, was born on the 26th of August 2005.[478] Both Diego and Jessica became Belgian nationals at birth, because Colombian law does not recognize Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognized, while article 10, par. 1 of the Belgian nationality code, at the time – the clause has been amended[479] – provided for any child born in Belgium to be given Belgian nationality if that child would otherwise have become stateless at any time before becoming of full age.[480] These two children, Diego and Jessica, are the only two Union citizens in question and, in spite of all the Court of Justice's earlier endeavors regarding EU citizenship, it still was a long shot whether the Court could derive a right to social assistance *for their father* from their citizenship of the Union. First of all, the Court had never before had occasion to award social advantages to *family members* on the sole basis of their relatives' citizenship of the Union.[481] Secondly, the whole affair seemed, at least to eight intervening governments with the European Commission at their side, to be a somewhat internal in nature.[482]

A final remark on the facts must be that, sometimes, – in fact too often – it is presumed the proceedings concerned primarily the legality of Mr. Ruiz Zambrano's *residence* in Belgium; occasionally, it is even presumed the family was actually threatened with *expulsion*.[483] As said, even though Mr. Ruiz Zambrano's asylum request had been denied and an expulsion order had been issued against him on the 11th of September 2000, actual expulsion had been postponed for an indefinite period due to a "non-refoulement" clause.[484] Since nothing in the

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[474] Opinion of A-G Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [30-09-2010] ECR 2011 p. I-01177 par. 29

[475] Ibid. par. 31

[476] Ibid. par.

[477] As may be recalled, the son of Carlos Garcia Avello and Isabelle Weber, whose family name will be Garcia Weber by now, was also called Diego.

[478] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 19 – 22

[479] See: article 380 of the Belgian Act containing several provisions (Wet houdende diverse bepalingen) of the 27th of December 2006 (no. 2006021363, Belgisch Staatsblad 28-12-2006, p. 75266), which came into force the 7th of January 2007

[480] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 4 and 19

[481] With workers, that is a different matter, since

[482] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 37

[483] P. Boeles, "Spannende tijden", *Asiel & Migrantenrecht* 2010, vol. 1, iss. 8 p. 429 and 430; E. Steyger, "Een "waarlijk" Europees burgerschap? In afwachting van het arrest in zak C-34/09 (Zambrano)", *Nederlands juristenblad* 2011, vol. 86, iss. 1 p. 38 – 40; E. Pataut, "Citoyenneté de l'Union européenne 2011. La citoyenneté et les frontières du droit de l'Union européenne", *Revue Trimestrielle de droit européenne* 2011, vol. 29, iss. 3 p. 561 – 576

[484] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 15

judgment indicates anything further and the referring court was a labour tribunal not even competent either to annul Mr. Ruiz Zambrano's expulsion decision or to order its activation, the presumption that the family was actually threatened with expulsion is indeed only hypothetical, which A-G Sharpston acknowledged, even though she then proceeded on the premise that even the "potential breach of (Mr. Ruiz Zambrano's) children's fundamental right to family life" could warrant the application of EU law even in spite of their residence in Belgium.

Admittedly, at the time of the proceedings such details might not have seemed of such grave importance; yet, given the ensuing case-law it cannot be stressed enough that neither A-G Sharpston's detailed account of the facts, nor the Grand Chamber's own equally detailed version indicates the family was actually ordered out of Belgium or had concrete reasons to fear such an order save for the Court's intervention. Confusion on this point must have arisen because of the theoretical or, in Sharpston's words, the "hypothetical" leaving of the territory of the Union becoming of *legal* significance in the Court's reasoning.[485] As to the facts, however, D'Oliveira must be said to have reported those correctly in a short note on the *Ruiz Zambrano* ruling, stating the family was not at all threatened with expulsion and that the proceedings concerned their eligibility to social benefits pursuant to their claim that Mr. Ruiz Zambrano's *employment* had been legal.[486] The legality of his *residence* under EU law, thus, was only an incidental question to which a positive answer was required to even get to the main point.[487]

This version of the facts is indeed not only accessible in the Court of Justice's ruling itself, but is described in various (inter)national journals of law as well.[488] It is therefore important to keep the following facts straight; the Ruiz Zambrano family, first of all, was *not* threatened with expulsion, nor was the legality of their *residence* at stake save in an incidental way; the Court of Justice states explicitly that "in its written observations lodged before the Court, the Belgian Government [stated] that, since 30 April 2009, Mr Ruiz Zambrano [had] had a provisional and renewable residence permit" and presumably would have been issued with a work permit as well.[489] This shows the family's aim in pursuing the proceedings probably did not even concern Mr. Ruiz Zambrano's continued access to work either – at the time of the Court's judgment, if we may believe the Belgian government, he had probably already been at legal work for nearly two years. Who knows, he may have been a long-term resident under Directive 2003/109; the judgment does not tell – and did not *need* to tell – as it was money, and more particularly a *right* to money, which was both asked and given in the *Ruiz Zambrano* case.

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[485] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 44

[486] H.U.J. d'Olivveira, "Unieburger in eigen land", *Asiel & Migrantenrecht* 2011, vol. 2, iss. 2 p. 78 and 79

[487] Opinion of A-G Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [30-09-2010] ECR 2011 p. I-01177 par. 40

[488] L.J. Ankersmit &W.W. Geursen, "Ruiz Zambrano. De interne situatie voorbij", *Asiel & Migrantenrecht* 2011, vol. 2, iss. 4 p. 156 – 164; P. van Elsuwege & D. Kochenov, "On the limits of judicial intervention. EU citizenhip and family reunification rights", *European journal of migration and law* 2011, vol. 13, iss. 4 p. 443 – 466; S. Platon, "Le champ d'application des droits du citoyen européen après les arrest Zambrano, McCarthy et Dereci", *Revue Trimestrielle de droit européenne* 2012, vol. 30, iss. 1 p. 23 – 53; K. Hailbronner & D. Thym, "Case C-34/09. Gerardo Ruiz Zambran v. Office national de l'emploi. Judgment f the Court of Justice (Grand Chamber) of 8 March 2011", *Commn Market Law Review* 2011, vol. 48, iss. 4, p. 1253 – 1270; P. van Elsuwege, "Shifting the boundaries? European Union citizenship and the scope of application of EU law", *Legal Issues of Economic Integration* 2011, vol. 38, p. 263 – 276

[489] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 32

The opinion of Advocate – General Sharpston

In the literature on the *Ruiz Zambran* case, it is difficult to find even a single contribution mentioning A-G Sharpston's conclusion without praise.[490] While it is undoubtedly true the *Garchia Avello*, *Chen* and *Rottman* cases had already paved the way towards the Court's landmark ruling in *Ruiz Zambrano*, the A-G must still have had a decisive impact in prompting the Grand Chamber to finally decide as it has, marking a turning point in the legal development of the European Union. Sharpston's remarkable disquisition indeed shows both the skill and deep understanding befitting an Oxford academic as well as the persuasiveness and eloquence one may attribute to a known barrister in London.[491] Her words, which have already been of sufficient influence to justify express attention, may indeed still prove to carry even beyond the *Ruiz Zambrano* case, guiding the Court towards a further, both logical and human conception of European Union citizenship.

Description of the problem

Sharpston starts out almost immediately by reducing the referring court's question to its most abstract origin, asking the simple question "what precisely does Union citizenship entail".[492] After then attending to the legal sources, the facts of the proceedings and some preliminary remarks on the admissibility of the claim, she went on to rearrange the three legal issues she discerned needed to be answered.[493] The first, and eventually most important matter she proffered concerned the question whether Diego and Jessica, the Union citizens in the case, could at all derive rights from their EU citizenship (particularly article 20 TFEU), even before having crossed an internal frontier and whether both a derived right of legal residence and of legal employment for their father counted among those rights.[494] Apart from this, the A-G also addressed the scope of application of article 18 TFEU in relation to the notion of "reverse discrimination" and also what she tellingly – and perhaps prophetically – named "the fundamental rights issue", which – as will be seen – would beleaguer the Court until the present day.[495] For the sake of brevity (and given the Court of Justice's ruling), however, this section will only assess what A-G Sharpston put forward with regard to the first of these issues – indeed, the A-G stated herself that, if this first question were to be addressed as she proposed, the other two would become redundant.[496]

Could Diego and Jessica enjoy rights *as EU citizens* being minor Belgian children living in Belgium? The answer given to this question by A-G Sharpston is simple: of course they could![497] One might already have forgotten about it – despite the Commission's persistent enthusiasm – but Diego and Jessica were undeniably entitled to petition the European parliament.[498] Moreover, Mr. Nikiforos Diamandouros, in his capacity as the European

[490] K. Hailbronner & D. Thym, "Case C-34/09. Gerardo Ruiz Zambran v. Office national de l'emploi. Judgment f the Court of Justice (Grand Chamber) of 8 March 2011", *Commn Market Law Review* 2011, vol. 48, iss. 4, p. 1253 – 1270; P. van Elsuwege, "Shifting the boundaries? European Union citizenship and the scope of application of EU law", *Legal Issues of Economic Integration* 2011, vol. 38, p. 263 – 276;
[491] P. Boeles, "Spannende tijden", *Asiel & Migrantenrecht* 2010, vol. 1, iss. 8 p. 429 and 430
[492] Opinion of A-G Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [30-09-2010] ECR 2011 p. I-01177 par. 2
[493] Ibid. par. 45 et seq.
[494] Ibid. par. 50
[495] Ibid. par. 52
[496] Ibid. par. 124 and 151
[497] Ibid. par. 79
[498] Article 20, par. 2, under d and article 227 TFEU

Ombudsman, would not have hesitated for a moment to assess any complaints which Diego and Jessica might have cared to lodge with him from Belgium.[499] Had the siblings and their family, next, left the EU (without so much as crossing an internal frontier), finding themselves in a third country with which Belgium would not keep relations, but with which France would (this is highly unlikely and would presumably require some uncoordinated recognitions) they would unquestionably have been granted consular protection at the hypothetical new French embassy in, for instance, the Sahrawi Arab Democratic Republic.[500] A-G Sharpston even contemplates such consular protection in Argentina (even though Belgium is represented there), counting on, for example, the German embassy personnel in Buenos Aires to not just refer them to their Belgian colleagues, declaring EU citizenship to be of only a subsidiary nature.[501] In short, she convincingly made it very clear that, since the adoption of the Maastricht Treaty, EU law itself no longer strictly abides by the cross-border elements doctrine, even though the member states were only able to abandon it explicitly in areas of little importance.

But how about the right to move and reside; could that right (or those rights) be invoked by Diego and Jessica as well, given they were merely Belgian children residing in Belgium? It was less clear; on the one hand, case-law on the classic freedoms unequivocally did require some kind of a cross-border element, as these provisions were explicitly included in the Treaty of Rome to address the liberalization of international trade.[502] On the other hand, with citizenship that same connector could not reasonably be inferred from the Treaty, apart from the *Uecker* decision stating that the introduction of citizenship had not been meant to expand the Court's jurisdiction.[503] Also, case-law showed no *emphasis* on cross-border connectors, which on occasion even appeared somewhat as pretexts to justify the Court's decision to claim jurisdiction. In *Rottman*, as already said, the Court, although noting the cross-border past of Mr. Rottman, failed to put any emphasis on it, regarding with more interest the applicant's future, affected by the loss of his EU citizenship.[504] Confronted with this state of affairs, A-G Sharpston naturally returned to base-camp, invoking a document one should almost forget about – the Treaty itself.[505] Looking at article 20, par. 2 TFEU, enumerating the EU citizens' primary rights, the A-G remarked that, in some lines, this provision expressly seemed to require a *move* across a border, while in others, (as she had already indicated) it equally explicitly did not.[506] For a good comparison, it is best to include the provision in full.

> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> a. the right to move and reside freely within the territory of the member states;
>
> b. the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their member state of residence, under the same conditions as nationals of that state;

[499] Article 20, par. 2, under d and article 228 TFEU
[500] Article 20. Par. 2, under c TFEU
[501] Opinion of A-G Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [30-09-2010] ECR 2011 p. I-01177 par. 87; again, see also: article 1 of Decision 95/553
[502] Ibid. par. 69 – 74
[503] Ibid. par. 75 – 78
[504] Ibid. par. 78
[505] Ibid. par. 79 et seq. See: D. Kochenov & R. Plender, "EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text", *European Law Review* 2012, vol 37, iss. 4 p. 369 – 397
[506] Opinion of A-G Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [30-09-2010] ECR 2011 p. I-01177 par. 79

c. the right to enjoy, in the territory of a third country in which the member state of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any member state on the same conditions as the nationals of that state;

d. the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

The Treaty article provides for four rights; the right to move and reside, the electoral rights, the right to consular protection and the right to petition the European Parliament and to lodge complaints with the European Ombudsman. A-G Sharpston inferred from the wordings of this provision that the electoral rights, strictly, seemed only to be available in another member state, but that the right of petition and that of consular protection is granted without reference to a move across an internal frontier.[507] With regard to what Sharpston described as "the "core" right", the right to move and reside freely within the territory of the member states, she could only conclude the Treaty was not clear on this account.[508] The rights granted by rticle 20, par. 2, under a (and article 21) TFEU could be read in several ways. "Is it a combined right (the right to 'move-and-reside')? A sequential right ('the right to move and, having moved at some stage in the past, to reside')? Or two independent rights ('the right to move' and 'the right to reside')?"[509] In other words, is there a right, flowing from article 20 TFEU, by which all EU citizens *reside*, even in their member state of nationality, under the protection of EU law?[510] Obviously, should the Court ever accept such a "disjunctive" or "free-standing" right to reside, that would effectively end the wholly internal situation altogether, at least for as far as EU citizenship rights – the right to "be there" and the conditions of "being there" – are concerned.
Sharpston, indeed, urged "that the Court now recognize the existence of [a] free-standing right of residence", closing the lid on the internal situation.[511] She convincingly did so by exploring the outcome of the alternative – implying a *move* would remain required in order to become entitled to a right of *residence* – and by demonstrating it would indeed be "difficult to avoid a sense of unease at such an outcome".[512] First, she explained how the *substance* of what may be claimed under EU citizenship had already clearly departed from the economic sphere – a good example was the right to be known by a single name only, which was granted in *Garcia Avello*. "The Union citizen exercising rights to freedom of movement can invoke the complete range of fundamental rights protected by EU law (whether or not they are connected with the economic work that he is moving between Member States to perform)".[513] Put differently, in the apparently prophetic words of A-G Jacobs (as Sharpston also recalled), to accept this had also implied "that an EU national who goes to another Member State is entitled to assume 'that, wherever he goes to earn his living in the EU, he will be treated in accordance with a common code of fundamental values … In other words, he is entitled to

[507] Ibid.
[508] Ibid. par. 80
[509] Ibid.
[510] Ibid. par. 81
[511] Ibid. par. 101
[512] Ibid. par. 88
[513] Ibid. par. 83

say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental freedoms'".[514]
Civis europeus sum – I am a citizen of Europe. When A-G Jacobs had initially proposed those words in order to establish a basis of fundamental values in a *host state* situation, his argument was not adopted entirely by the Court of Justice.[515] On the other hand, in subsequent case-law , for instance the ruling in *Garcia Avello*, the Court of Justice for good reasons did not inquire as to whether Diego Garcia Avello (or Garcia Weber) would suffer any *economic* detriment (confusion by customers etc.) from his being unable to register with a single name in all of Europe; that had simply become his *right* as a citizen.[516] Yet, as the case-law stood before *Ruiz Zambrano*, such a right presumably could only have been invoked after having had a connection – however simple – with a second member state. Were the words "civis europeus sum" now to pave the way towards accepting that the right to be *anywhere* in the Union implied the same basis of fundamental values applied in *home state* situations, and more particularly *wholly internal* ones as well?
Advocate – General Sharpston, arguing in favour, eloquently made clear why a negative response would have resulted in the application of EU law "being both strange and illogical" by giving the Court a few examples.[517] "Suppose a friendly neighbour had taken Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany. They would then have received services in another Member State. Were they to seek to claim rights arising from their 'movement' it could not be suggested that their situation was 'purely internal' to Belgium. Would one visit have sufficed? Two? Several? Would a day trip have been enough; or would they have had to stay over for a night or two in France?"[518] These examples are indeed telling of the state of EU law today. Suppose the family did go. Mr. Ruiz Zambrano, still, when afterwards applying for unemployment benefits, should expect at least a frown if, instead of a work permit, he should provide the Office national de l'emploi with a stack of copied entrance tickets for Parc Astérix, to be accompanied by a note saying "civis europeus sum". Should *that* make him entitled? Indeed, as A-G Sharpston put it, "lottery rather than logic would seem to be governing the exercise of EU citizenship rights".[519]

A-G Sharpston's solution

The solution to this problem seems simple – accept a disjunctive right of residence and endow that residence with the same substance it has already been granted in host states, doing away with the wholly internal situation altogether and giving EU citizenship an *unconditional* nature. Although A-G Sharpston clearly pleaded in favour of this approach, she also – perhaps bearing in mind that the Court might wish to let its case-law evolve gradually – offered a less far-reaching alternative by which the Court could also alleviate some of the tension, while also keeping some of the wholly internal situation intact for the time being.[520] In this, she relied heavily on the *Rottman* and *Chen* rulings, having described the difficulties

[514] Ibid.
[515] ECJ Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt*, [30-03-1993] ECR 1993 p. I-01191, par. 16 and 17
[516] ECJ Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613, par. 36
[517] Opinion of A-G Sharpston in Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi, [30-09-2010] ECR 2011 p. I-01177 par. 86
[518] Ibid.
[519] Ibid. par. 88
[520] Ibid. par. 103

which a strict cross-border application of those rulings would entail – and *presuming* the Court had not meant to trigger those results.[521] The Advocate – General stated as follows.

> In dealing (with *Rottman*, red.), the Court accepted the invitation to disregard Dr Rottmann's earlier exercise of his right to free movement (from Austria to Germany) and looked to the future, not the past. It pointed out, robustly, that even though the grant and withdrawal of nationality are matters that fall within the competence of the Member States, in situations covered by EU law the national rules concerned must nevertheless have regard to the latter. The Court concluded that, 'the situation of a citizen of the Union who ... is faced with a decision withdrawing his naturalisation ... and placing him ... in a position capable of causing him to lose his status conferred by Article 20 TFEU and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law'.
>
> It seems to me that the Court's reasoning in Rottmann, read in conjunction with its earlier ruling in Zhu and Chen, may readily be transposed to the present case. Here, the grant of Belgian nationality to Mr Ruiz Zambrano's children Diego and Jessica was a matter that fell within the competence of that Member State. Once that nationality was granted, however, the children became citizens of the Union and entitled to exercise the rights conferred on them as such citizens, concurrently with their rights as Belgian nationals. They have not yet moved outside their own Member State. Nor, following his naturalisation, had Dr Rottmann. If the parents do not have a derivative right of residence and are required to leave Belgium, the children will, in all probability, have to leave with them. That would, in practical terms, place Diego and Jessica in a 'position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto'. It follows – as it did for Dr Rottmann – that the children's situation 'falls, by reason of its nature and its consequences, within the ambit of EU law'.
>
> Moreover, like Catherine Zhu, Diego and Jessica cannot exercise their rights as Union citizens (specifically, their rights to move and to reside in any Member State) fully and effectively without the presence and support of their parents. Through operation of the same link that the Court accepted in Zhu and Chen (enabling a young child to exercise its citizenship rights effectively) it follows that Mr Ruiz Zambrano's situation is likewise not one that is 'purely internal' to the Member State. It too falls within the ambit of EU law. [522]

In other words, the Court of Justice should first explicate what it had left unsaid in *Rottman*, it should then apply the *Rottman* emphasis on *consequences* analogously to the *Ruiz Zambrano* facts in order to bring them into the realm of EU law, while applying a rather renewed appraisal of the older *Chen* judgment. As to the first point, it must be said the Court, in *Rottman*, did indeed put clear emphasis on "the future rather than the past"; yet, it did not really say beyond all doubt whether the withdrawal of *any* naturalization necessarily, that is, by reason of its consequences, does fall within the ambit of EU law. Indeed, the Court had only held that "the situation of a citizen of the Union who (...) is faced with a decision withdrawing his naturalisation (…) and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to

[521] Ibid. par. 93 et seq.
[522] Ibid. par. 94 – 96

lose the status (of EU citizenship, red.) *and the rights attaching thereto* (emphasis added) falls, by reason of its nature and its consequences, within the ambit of European Union law".[523] Someone of a more conservative mind than A-G Sharpston might have replied that, whereas Diego and Jessica indeed had been given Belgian (and thus EU) citizenship, they had never exercised any *rights attaching thereto* (this conservative mind presumably would not have "read article 20, par. 2, under a TFEU disjunctively"). On the other hand, as has already been explained sufficiently, the A-G can validly be followed in this – the loss of EU citizenship should, after all, really not hinge on free-movement rights.
Secondly, Sharpston infers from the *Chen* ruling that a derivative right for Catherine Zhu's mother had been granted, not because of the fact that the child was Irish rather than British (in other words, a cross-border element), but because of the fact that, if a derivative right of residence had been withheld to the mother, the child, being of *whatever* EU nationality, would presumably have had to live in the People's Republic of China, which, presumably, would have been tantamount to either the loss, not so much of her EU citizenship (she would have remained Irish) but of *the rights appertaining thereto*. Even if, in other words, article 20 would not entail a free-standing right to reside, the United Kingdom could still not have terminated Catherine's future *access* to the right "to move" which article 20 indisputably does entail. In this, *Chen*, *Rottman* and *Ruiz Zambrano*, essentially concerned the same thing.[524] In itself, this, too, sounds like a logical approach, even though the argument significantly extends even the explicated *Rottman* line of reasoning. Not only, after all, would the member states no longer be able to retrieve the *status* of Union citizenship from their own nationals (at least not without coming within the scope of the Treaty), they would likewise not be entitled any longer to do anything which might render the exercise of their nationals' *rights* pertaining to that status impossible or impractical (again, at least not without entering the jurisdiction of the Court).
The final step which remained would have been to apply this logic to the main action in *Ruiz Zambrano*, which, again, would significantly increase the Court's jurisdiction. In the main action, as said, the question of the legality of Mr. Ruiz Zambrano's *residence* in Belgium was only incidental; therefore, in order to give any useful answer to the Tribunal de travail, the *Rottman* logic would even have to be extended to cover claims regarding a right to *employment*. Mr. Ruiz Zambrano, after all, had claimed unemployment benefits, stating his employment, although carried out without a permit, should still be regarded as having been legal.[525] Thereby, with the stroke of a pen the Court of Justice would have to give a ruling stating that to deny the legal nature of a Union citizen's parent's employment would be tantamount, as a rule of principle, to deprive that parent's children of their effective *access* to any future cross-border movements they would wish to make. If a father does not work *legally* (presuming he does not work *illegally*, which, understandably, should not be required of him), his family, including the children, might be repelled from a member state's territory by means of economic marginalization. In spite of the fact that the family could, in that case, move to another member state (Parc Astérix), it could still not be excluded they would rather choose a third country, in which the children could not fully enjoy their EU citizenship rights. Remarkably enough, that question was not addressed by Sharpston at all.[526]

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[523] ECJ Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [02-03-2010] ECR 2010 p. I-01449, par. 42
[524] This view has also been expressed on a personal title by Koen Lenaerts, see: K. Lenaerts, "'Civis europeus sum'. From the cross-border link to the status of citizen of the union", *in*: P. Carbonnel, A. Rosas & P. Lindh, *Constitutionalizing the EU judicial system. Essays in honour of Pernilla Lindh*, Oxford: Hart 2012 p. 213 – 232; also published in Dutch, see: K. Lenaerts, "'Civis europeus sum'. Van grensoverschrijdende aanknoping naar status van burger van de Unie", *Tijdschrift voor Europees en Economisch Recht* 2012, vol. 60, iss. 1 p. 2 – 13
[525] Opinion of A-G Sharpston in Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi, [30-09-2010] ECR 2011 p. I-01177 par. 38 and 39
[526] Ibid. par.

As to citizenship (leaving aside the general non-discrimination rule and the fundamental rights issue), the Court was thus given three options. Either it could boldly go where it had not gone before, interpreting article 20, par. 2, under a TFEU in a "disjunctive" manner, imposing a right of residence for *all* European citizens in *all* member states, or it could insist on cross-border movement, holding it against the Ruiz Zambrano family they had not visited Parc Astérix, or it could decide that to refuse to recognize the legal nature of both Mr. Ruiz Zambrano's residence (as an incidental point) and employment should be seen in the light of *Rottman* as tantamount to deprive Mr. Zambrano's children – indirectly and hypothetically – of the effective use of whatever rights article 20 TFEU might someday have in store for them. There was one thing, however, it could not do; given the facts of the case, it could not remain as silent (or ambiguous) as it had been in *Rottman*.

Legal assessment of the Court of Justice

The Court of Justice's eventual ruling may safely be said to have been a choice for the middle option, postponing the question regarding the "disjunctive" nature of the right to reside which article 20 TFEU lays down, but confirming and extending the interpretation of *Rottman* proposed by A-G Sharpston. The ruling is remarkably short, especially compared to the Advocate – General's opinion. First, the Court recalled that Diego and Jessica had become Belgian nationals according to the laws of Belgium and had thereby acquired the status of citizens of the Union.[527] Then, the Court recalled it had already stated several times that "citizenship of the Union is intended to be the fundamental status of nationals of the member states".[528] Thirdly, *because* of the fundamental nature EU citizenship had been intended to have, "article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union", with which the Court importantly referred to *Rottman*.[529] Finally, the Court held that "a refusal to grant a right of *residence* (emphasis added) to a third country national with dependent minor children in the member state where those children are nationals and reside, and *also a refusal to grant such a person a work permit* (emphasis added), has such an effect".[530] The Court added that "it must be *assumed* (emphasis added) that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union".[531]
Thus, the Court entirely followed its Advocate – General, although it did not state whether Diego and Jessica could reside in Belgium on the basis of a right of residence provided for in

[527] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 40
[528] Ibid. par. 41
[529] Ibid. par. 42; a point of interest is that the Dutch language version of the ruling refers to the "most important rights deriving from the status of citizen of the Union" (de belangrijkste aan hun status van burger van de Unie ontleende rechten) rather than to the "substance of the rights conferred by virtue of their EU citizenship. The French (authentic) version rests somewhere in between, addressing "the essential of the rights" (l'essentiel des droits conférés par leur statut de citoyen de l'Union). This was also noted by the Dutch District Court Den Haag (residing in Den Bosch), Case no. Awb 10/26733, [08-07-2011] LJN: BR0795
[530] Ibid. par. 43
[531] Ibid. par. 44

article 20, par. 2, under b TFEU. It rather chose to elaborate on *Rottman*, granting immediate protection against the effective loss of (the genuine enjoyment of) EU citizenship even in wholly internal situations, and even if the loss of such genuine enjoyment must be inferred from an *assumption* of consequences. This was indeed more far-reaching than *Rottman*, where the Court had deemed it sufficient to state that, in the circumstances of that case, "it [was] for the Court to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status".[532] The Court had now made explicit that the loss of EU citizenship *always* is a matter of EU law; it had next stated that not only the loss of EU citizenship itself is *always* within the scope of the Court's jurisdiction, but that an effective foreclosure of the future exercise of the genuine enjoyment of the (future) exercise of citizenship rights also *necessarily* comes within the Court's jurisdiction. Any state measure which might involve that a citizen of the Union would leave the territory of the EU entails such a foreclosure, such as the refusal to recognize Mr. Ruiz Zambrano's employment with Plastoria as having been legal.

3.4 Subsequent jurisprudence

Since its *Ruiz Zambrano* ruling, the Court of Justice, as might have been expected, was given ample opportunity to elaborate on the manner in which EU law may be invoked even in wholly internal situations; in other words, while the question whether EU law could at all intrude on such situations had been answered affirmatively by *Ruiz Zambrano*, the question remained what part of EU citizenship intruded. This question, in fact, is dividable into two distinct questions. Firstly, the ruling in *Ruiz Zambrano* has not made it clear whether, to put it in A-G Sharpston's words, the Court would accept a "free-standing right of residence" which all EU citizens enjoy in all member states, including their own. If that question would be answered affirmatively, EU law would govern all EU citizens' claims to fundamental rights, as it already governs those of citizens having moved abroad. As long as that question, however, is not answered affirmatively, the second issue – the intermediate issue, one could say – remains how far its accepted protection of EU citizenship *as such* reaches in wholly internal situations. Loss of a person's last EU nationality, as was seen, is covered by EU law due to *Rottman*, having been made explicit in *Ruiz Zambrano*. The right of residence of a parent may also flow from the need to preserve EU citizenship in a practical manner; that much may be ascribed to *Ruiz Zambrano*. The right to work, then, as a means of earning a living, too, has been declared to be necessary for the preservation of EU citizenship and the rights appertaining thereto. Given this state of affairs, one inevitably begins to wonder how much further the Court would be willing to go. Family life as such? Non-discrimination on grounds of sex? Should EU citizenship, in other words, be preserved in a manner corresponding to human rights – and should it be EU law ensuring that?
In discussing the post-*Ruiz Zambrano* case-law, the rulings in *McCarthy* and *Dereci* are most often cited.[533] Besides these, the Court has recently had the opportunity to deliver judgment in the *Iida* and *O. S. and L.* judgements.[534] The first thing that must be stressed is that, in none

[532] ECJ Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [02-03-2010] ECR 2010 p. I-01449 par. 45
[533] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the Reports); ECJ Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, [15-11-2011] (not yet published in the Reports)
[534] ECJ Case C-40/11, *Yoshikazu Iida v. Stadt Ulm*, [08-11-2012] (not yet published in the Reports); ECJ Joined cases C-356/11 and C-357/11, *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.*, [06-12-2012] (not yet published in the reports)

of these rulings the Court accepted that EU citizenship gives equal protection in wholly internal situations; A-G Sharpston's question has not been answered yet whether the "right to move and reside" of article 20, par. 2, under a TFEU should be interpreted conjunctively (meaning EU citizens do not have a right to *reside* if they have not *moved*) or disjunctively (meaning they can and do). This means that, as the law stands, the EU citizen residing in his home state, is only protected against state measures threatening the *preservation* of his citizenship. Loss of nationality (if no other EU nationality remains) therefore seems to fall within the sphere of EU law, and, as *Ruiz Zambrano* showed, so do measures warranting the assumption that an EU citizen must move his residence outside the Union. The question is thus how far one has to go in assuming.

McCarthy

In *McCarthy*, which was delivered shortly after *Ruiz Zambrano*, the Court's Third Chamber was confronted with a case not even entirely internal – the ruling has already been the subject of this work several times.[535] Mrs. Shirley McCarthy had had two nationalities at birth because her Mother had been born a British national on Irish soil.[536] She had married a Jamaican national who was otherwise not eligible to reside in the United Kingdom.[537] Mrs. McCarthy had therefore applied for the residence document mentioned in article 10 of the Citizenship Directive, claiming a right to reside in her own country of nationality; she hoped, of course, that her husband, then, could also obtain a similar document as a family member.[538] The Court of Justice, having found that the Citizenship Directive did not apply to her, went on to assess whether, perhaps, primary EU law granted her a right of residence in her own country – and whether her husband could then claim a derivative right of residence.[539] He could not, the Court decided, because "no element of the situation of Mrs. McCarthy, as described by the national court, [indicated] that the national measure at issue in the main proceedings [had] the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the member states, in accordance with Article 21 TFEU".[540]
The Court's remarks leave a sense of bewilderment. Did Mrs. McCarthy not have a right to reside in the United Kingdom under article 20 or 21 TFEU given her Irish nationality? On the basis of very similar facts, the Court had, after all, deemed Diego and Esmeralda Garcia Avello (or Garcia Weber) to be beneficiaries of that provision, so that they could obtain the right to a single name.[541] In the *Garcia Avello* ruling the Court had simply and convincingly stated that, even though "citizenship of the Union (…) [had not been] intended to extend the scope ratione materiae of the Treaty", a sufficient "link with Community law [did] (…) exist in regard to persons in a situation such as that of the children of Mr. Garcia Avello, who [were] nationals of one member state lawfully resident in the territory of another member

[535] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the Reports)
[536] Opinion of A-G Kokott in Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [25-11-2010] (not yet published in the reports) par. 11
[537] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the Reports) par. 15
[538] Ibid. par. 17
[539] Ibid. par. 44 et seq.
[540] Ibid. par. 49
[541] ECJ Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [02-10-2003] ECR 2003 p. I-11613

state".[542] It would thus appear Mrs. McCarthy, like Diego and Esmeralda Garcia Avello, could derive the right to a single name from EU law, even while never having set foot outside the United Kingdom.
In the *McCarthy* ruling, the Court, evidently foreseeing this kind of criticism, remarked that the *Garcia Avello* case had in fact not at all rested on the application of a cross-border elements test; in that case, the Court told us now (seven and a half years after the delivery of the *Garcia Avello* ruling) the application of EU law had rather been necessary because of the effect of the Belgian measure in that case (refusal to alter the child's name).[543] Had Esmeralda and Diego not been given the right under EU law to have their names amended in Belgium, it would then have had to be "assumed" they would have different surnames under the two legal systems concerned, and that situation would have been "liable to cause serious inconvenience for them at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one member state of which they [were] nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other member state of which they [were] also nationals".[544]
What should be made of this? In the first place, the Court's ruling in *Garcia Avello* was clearly not this strict at all. In fact, where the Court in *Konstantinidis* still found that compulsory transliteration of a person's name only contravened EU law if the host state also required the official name to be used as regards customers, causing detriment to a person's economic output, this economic approach was already abandoned with *Garcia Avello*. As the Court now belatedly explained with *McCarthy*, the facts of *Garcia Avello* had in fact not been cross-border in nature, so that, in accordance with *Ruiz Zambrano* (*avant la lettre*), only those measures which were "liable to cause serious inconvenience at both professional and private levels" had been worth protecting under EU law. The right to bear a single name, then, was such a measure.
Reasoning in this way, the Court appears to have again expanded considerably the "genuine enjoyment test" it had developed in *Rottman* and *Ruiz Zambrano*, even though it then proceeded by stating that not having her husband with her was not "liable to cause serious inconvenience at both professional and private levels". The Court, it must be admitted, when denying Mrs. McCarthy her right to a family life, rephrased the "serious inconvenience" test that had apparently been applied in *Garcia Avello* a little, stated instead that "the fact that Mrs. McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a member state has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the member states".[545]
The difference, thus, between on the one hand the fundamental rights to work (giving a sense of personal identity) and to a name (also giving a sense of personal identity) and on the other hand the fundamental right to a family life (also giving a sense of personal identity) presumably lies in the fact that not having a single name causes administrative nuisances specifically in cross-border situations and not being able to work might drive a person off to a third country precluding him from crossing internal borders, whereas the right to live a family life is only of a strictly personal interest, with which the European Union, being primarily concerned with the cross-border movement of persons, logically has less affinity. *Logically*, therefore, the *McCarthy* ruling may be correct; the Court may be given due credit for having

[542] Ibid. par. 26 and 27
[543] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the Reports) par. 51
[544] Ibid.
[545] Ibid. par. 54

found the requisite loopholes between all its former decisions, but its outcome certainly does not aid in developing a common-sense definition of European citizenship. If indeed my EU citizenship is such as protecting my name from the day I became a citizen of Europe, not because of *me* but because I might move across a border, protects my access to employment from the day I became a citizen of Europe, not because of *me*, but because not having work might marginalize me into leaving the Union, and likewise protects my family life from the day I became a citizen of Europe, again, not because of *me* and only insofar as a refusal would preclude me from crossing borders, then suddenly starts protecting *all* my fundamental rights in full, finally because of *me* being a *citizen*, but only after I finally crossed a border, and then just as suddenly ceases to give me that full protection once I acquire my host state's nationality or decide to move back home, I really cannot help but losing track somewhere along the way about what kind of a citizen I actually did become. Being Dutch, to be sure, is easier.

Dereci

The *Dereci* ruling, unlike *McCarthy*, was delivered by the Court's Grand Chamber; for the rest, however, much of the facts and most of the legal assessments correspond between both rulings.[546] The Verwaltungsgerichtshof in Austria had decided the Court of Justice should elaborate on which third country nationals could actually claim a right of residence (work was not at issue in the case) under the *Ruiz Zambrano* case-law, having joined five individual cases of which the facts slightly differed, and requesting the Court to assess their situations under EU law.[547] Mr. Murat Dereci, a Turkish national, had married an Austrian national with whom he had had three children.[548] Mr. Maduike, a Nigerian national, had likewise married an Austrian national, but had no children the judgment speaks of.[549] Mrs. Heiml, a Sri Lankan national, had married an Austrian national before she came to Austria, had then immigrated to Austria, but had let her residence permit expire.[550] Mr. Kokollari, 29-years old, had entered Austria as an infant together with his Yugoslav parents and claimed still to be supported by his mother, who had become Austrian.[551] Finally, Mrs. Stevic, a Serbian national, had applied in Austria for family reunification with her father, who resided in Austria for many years and had become Austrian as well. She, too, claimed that her father would continue to support her.[552] The only two things all the facts had in common was the applicants' wish to lead a family life in Austria, the Austrian nationality of their relatives, and the fact that no second member state had been involved in any way.

These facts, indeed, could have been a gold mine for the Court of Justice, had it wished to push ahead. On the one hand, the Court could have claimed full jurisdiction on the basis of the Austrian nationals' free-standing right of residence, warranting full protection of their fundamental rights, but on the other could at once have given the necessary instructions as to the application and limitations of those fundamental rights, thereby lending an ear to the member states' inevitable floodgate arguments. The Greek government did propose analogous application of Directive 2004/38, although it found itself opposed in this by the

[546] ECJ Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, [15-11-2011] (not yet published in the Reports)
[547] Ibid. par. 22 and 23
[548] Ibid. par. 24
[549] Ibid.
[550] Ibid. par. 25
[551] Ibid. par. 26
[552] Ibid.

Austrian, Danish, German, Irish, Dutch, Polish and British governments – and the European Commission.[553] The Court, regrettably from the perspective of EU citizenship, went with the majority and declined to take the opportunity of seizing full jurisdiction over the citizenship of all Union citizens, following merely its *Ruiz Zambrano* and *McCarthy* lines of reasoning, and leaving the assessment of fundamental rights to the member states (insofar as no second member state was, as yet, involved).[554]

First, the Court reaffirmed its doctrine of the wholly internal situation, whereupon it remarked that, given the fundamental nature which the status of EU citizenship had been intended to carry as regards nationals of the member states, it also reaffirmed *Ruiz Zambrano*, stating that "article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status".[555] According to *Dereci*, the Grand Chamber in *Ruiz Zambrano* had only affirmed that the refusal both to grant a right of residence and a work permit to Mr. Ruiz Zambrano had been a measure "depriving" his children of "the genuine enjoyment of the substance of the rights conferred by virtue of their EU citizenship" because those children "would have [had] to leave the territory of the Union in order to accompany their parents" if their father had not had both legal residence and legal employment.[556] It followed, according to *Dereci*, that "the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status [referred] to situations in which the Union citizen has, in fact, to leave not only the territory of the member state of which he is a national, but also the territory of the Union as a whole".[557]

The Court, by these statements, denied all the "assumptions" it had made itself little more than half a year before. Mr. Ruiz Zambrano, after all, would not at all have had to leave Belgium or the European Union altogether; his residence was provisionally secure through the "non-refoulement clause" included with the rejection of his asylum request.[558] Moreover, the unemployment benefits he now claimed were not in the least necessary to secure his children's further residence in the Union, as the Belgian government had declared Mr. Ruiz Zambrano had already been given a work permit.[559] Thirdly, the family, for obvious reasons, could have moved to a *second* member state (which really seems to be what the Court invites EU citizens to do); in that case, even though the children would have had to leave the state of their nationality, could still have remained European citizens in Europe.[560] Yet, Mr. Ruiz Zambrano had not al all been given a right to reside and work with retroactive effect so he could claim unemployment benefits solely because his children would otherwise have had, "in fact, to leave not only the territory of the member state of which they were nationals, but also the territory of the Union altogether"; those rights were afforded to him because, as the Court explained, "a refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit" are measures which, due to their *assumed* consequences, come within the scope of EU law as a matter of principle.[561]

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[553] Ibid. par. 38 and 43
[554] Ibid. par.
[555] Ibid. par. 60 – 64
[556] Ibid. par. 65
[557] Ibid. par. 66
[558] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 15
[559] Ibid. par. 32
[560] In any "host member state" their situation would, after all, have perfectly resembled *Chen*, with minor EU children being dependent upon third-country nationals as parents.
[561] ECJ Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, [08-03-2011] ECR 2011 p. I-01177 par. 43 and 44

Had the line of approach, chosen in *Dereci,* therefore indeed been applied to the facts of the *Ruiz Zambrano* judgment, that judgment would presumably not have repeated itself. Secondly, even though the Court presented the "genuine enjoyment test" as being extraordinarily special as regards the circumstances to which it applied, the Court's *McCarthy* ruling should also be recalled, more particularly the rebuttal of Mrs. McCarthy's claim to *Garcia Avello*. In *McCarthy*, the Court had stated that, in *Garcia Avello* it had not been a cross-border test which had triggered the application of EU law, but a genuine enjoyment test *avant la lettre*.[562] But would Diego and Esmeralda Garcia Avello (or Garcia Weber) in fact have had to leave not only the territory of Belgium and Spain, but also of the Union as a whole merely because their registered *names* did not match? Of course they would not, but in *McCarthy*, the Court let slip that the mere finding of presumed "serious inconvenience at both professional and private levels" (in the exercise of free-movement rights) should suffice for the application of the *Ruiz Zambrano* test, even though a lack of family life could not be said to cause such serious inconvenience. Now, in *Dereci*, we are implicitly made to believe that, no, yes, in fact, the *Garcia Avello* ruling had indeed rested on a cross-border assessment because the children were not prone to leave Europe.[563] In that case, however, one begins to wonder why Mrs. McCarthy's family life was not protected properly in her host state. Indeed, if it had not shown so clearly on top of the three rulings, one could hardly imagine it was even the same court delivering both *Garcia Avello*, *McCarthy* and *Dereci*.

After this apparent exercise in judicial trick flying regarding the new genuine enjoyment test, the Court, in *Dereci*, ended up – dared end up, one is tempted to say – discussing the importance of fundamental rights.[564] It did so with reference to the Charter of Fundamental Rights, stating that "in so far as article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights".[565] Next, the Court remarked that "the provisions of the Charter are, according to Article 51(1) thereof, addressed to the member states only when they are implementing European Union law", clarifying that, "under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".[566] In short, while the member states are all bound by the European Convention on Human Rights, the Charter only ensures that the Union, too, respects the same principles, and that the member states can never plead in favour of EU law when contravening fundamental rights.[567]

The Court, then, did perhaps the most remarkable thing yet. It held that "in the present case, if the referring court [considered] (…) that the situation of the applicants in the main proceedings [were] covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in article 7 of the Charter", while "if it [took] the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the

[562] ECJ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [05-05-2011] (not yet published in the Reports) par. 51

[563] ECJ Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, [15-11-2011] (not yet published in the Reports) par. 66 and 67

[564] Ibid. par. 70 et seq.

[565] Ibid. par. 70

[566] Ibid. par. 71

[567] For a detailed analysis, see: M.J. van den Brink, "EU citizenship and EU fundamental rights. Taking EU citizenship rights seriously?", *Legal Issues of Economic Integration* 2012, vol. 39, iss. 2 p. 273 – 290

ECHR".[568] Should the national court consider that the facts of the main proceedings were covered by EU law, it should apply EU law. Presumably, the Verwaltungsgericht could have come to that conclusion itself; indeed, it most likely had referred the case in order to find out whether or not EU law covered the situations, not whether it would be bound to apply EU law if it did. Moreover, the Court of Justice had just deliberately made it quite clear that, in fact, EU law did not apply because family life was not important enough to trigger it; it seems quite unlikely, therefore, that the Verwaltungsgericht did indeed spare the Charter even a second glance after those evident remarks.

Iida

The *Iida* judgment provided a further opportunity for expanding the *Ruiz Zambrano* case-law, which, again, the Court did not take.[569] Mr. Iida, a Japanese national, had married Mrs. N.-I., a German national, while they lived in the United States.[570] Their daughter, born shortly after on the territory of the United States, accordingly, held both Japanese, American and German nationality.[571] In 2005 the family moved to Germany, where Mr. Iida obtained a residence permit and a well-paid job.[572] When Mr. Iida's spouse found work in Vienna, she and her daughter moved to reside there; the marriage relationship was first maintained as a distance relationship, but eventually the spouses decided to live apart permanently, although they did not divorce.[573] Mr. Iida's daughter attended school in Austria and maintained "excellent" family ties with both her father and mother.[574] The question was, could Germany be obliged to allow Mr. Iida's residence because of the right to a family life which his daughter was entitled to in Austria.[575]

The situation was as cross-border in nature as situations ever get, so that the application of the Charter should not have posed too many problems in this case. Instead of the Charter, the Court went on to assess Mr. Iida's situation under Directive 2003/86 and Directive 2003/109, even though he specifically had withdrawn his application for a long-term residence permit.[576] The Court of Justice was not very much amused, it would appear from its ruling, by the way Mr. Iida tried to obtain a derivative right of residence under article 20 TFEU even though he could well have applied for a long-term residence permit under Directive 2003/109.[577] Still, since third country nationals do have to apply in order to be granted a residence permit under that directive, the Court could only conclude Mr. Iida was not (yet) eligible under that directive. Secondly, since he did not "accompany or join" his wife and daughter, Directive 2004/38, likewise, did not apply.[578] Then, the Court, inevitably, reached the point where it had to assess the citizenship of Mr. Iida's wife and daughter, and the aspect of family life appertaining to that citizenship.

The Court started out stating that articles 20 and 21 TFEU did not grant any autonomous rights of residence to third country nationals – their residence could only be legalized under a

[568] ECJ Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, [15-11-2011] (not yet published in the Reports) par. 72
[569] ECJ Case C-40/11, *Yoshikazu Iida v. Stadt Ulm*, [08-11-2012] (not yet published in the Reports)
[570] Ibid. par. 23
[571] Ibid.
[572] Ibid. par. 24
[573] Ibid. par. 25
[574] Ibid. par. 26
[575] Ibid. par. 32
[576] Ibid. par. 31, 34 and 35
[577] Ibid. par. 36 – 48
[578] Ibid. par. 61

right derived from that of a Union citizen.[579] "The purpose and justification of those derived rights", the Court went on, "are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host member state".[580]
Recalling *Chen*, *Eind* and *Dereci*, the Court held that "the common element (in those cases) [had been] that, although they [had been] governed by legislation which [fell] a priori within the competence of the member states, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109 and 2004/38, they none the less [had] an intrinsic connection with the freedom of movement of a Union citizen which [prevented] the right of entry and residence from being refused to those nationals in the member state of residence of that citizen, in order not to interfere with that freedom".[581] For three reasons, then, the Court considered Mr. Iida's situation did not share that "common element". In the first place, he had chosen to reside in a different member state than his European family members.[582] Secondly, his residence had always been secure under national law, so that his daughter or his spouse could not be assumed to have been deterred in any way in going to Austria.[583] Thirdly, Mr. Iida had a prima facie prospect of obtaining a long-term residence permit under Directive 2003/109.[584] "In those circumstances", the Court held, "it [could not] validly be argued that the decision at issue in the main proceedings [had been] liable to deny Mr. Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the member states".[585]
Finally, the Court took the opportunity of assessing the application of the Charter of Fundamental Rights, although it did so very quickly.[586] Stressing the ancillary nature of that document, the Court found that in order "to determine whether the German authorities' refusal to grant Mr. Iida a 'residence card of a family member of a Union citizen' [fell] within the implementation of European Union law within the meaning of Article 51 of the Charter, it [had to] be ascertained among other things whether the national legislation at issue [was] intended to implement a provision of European Union law, what the character of that legislation [was], and whether it [pursued] objectives other than those covered by European Union law, even if it [were] capable of indirectly affecting that law, and also whether there [were] specific rules of European Union law on the matter or capable of affecting it".[587] Finding that Mr. Iida's situation did not fall within the scope of *secondary* EU law, the Court swiftly went on to decline the applicability of the Charter.[588]
The ruling signifies a worrisome development whereby the Court of Justice now has begun to alleviate its scrutiny as regards fundamental rights even in clear cross-border cases. Does this mean the case-law has retreated twenty years, meaning Mr. Konstantinidis, again, may only assume protection of his name insofar as that is warranted by the interest of his economic output? Mr. Iida's residence certainly seems only to be secured insofar as the refusal to allow him would actually *hinder* his family members in "doing the European thing", moving across borders. The simple fact that Mr. Iida's daughter, as a *citizen* may feel entitled under EU law to have a parent with her in the Union is not seriously addressed by the Court; national law

[579] Ibid. par. 66 and 67
[580] Ibid. par. 68
[581] Ibid. par. 72
[582] Ibid. par. 73
[583] Ibid. par. 74
[584] Ibid. par. 75
[585] Ibid. par. 76
[586] Ibid. par. 78
[587] Ibid. par. 79
[588] Ibid. par. 81

fixed the immediate problems, so the European judicature should not be any more principled about it, or so much the ruling means to say. It thereby remains the case that EU citizenship still has a goal and all rights appertaining thereto remain tied only to that goal and are there because of those persons.

O. S. and L.

The ruling in O. S. and L. was delivered shortly after the *Iida* judgment, and its content comes as some solace after *McCarthy*, *Dereci* and *Iida*.[589] The facts were more akin to *Ruiz Zambrano* than those of both *McCarthy* and *Iida* had been. Mrs. S. a Ghanaian national resident permanently in Finland, had had two marriages; first, she had been married to a Finish man from 2001 until 2005, from which marriage a son was born on the 11th of July 2003.[590] Mrs. S. had had sole custody of the child since it was two years old, and had remarried Mr. O. who was a national of Côte d'Ivoire.[591] There was another child, of Ghanaian nationality, but its father took care of both Mrs. S.'s children.[592] Mr. O's application for a residence permit was refused because of a lack of sufficient means of support, after which the question arose whether Mr. O could claim a derived right of residence because his stepson was a Union citizen and an infant.[593]
Mrs. L., and Algerian national, had resided in Finland since 2003 and had obtained a permanent residence permit there, due to her marriage to a Finnish national.[594] Mrs. L., too, had had a child of dual Finnish and Algerian nationality; when she divorced in 2004, Mrs. L. was given the sole custody of the child.[595] In 2006, Mrs. L. married Mr. M., an Algerian national who had applied for asylum, but had been refused and repatriated shortly after the marriage.[596] A few months after his repatriation, however, his son was born in Finland.[597] Unlike Mrs. S., Mrs. L., according to the Court's ruling, had not been gainfully employed and her income derived from various social advantages.[598] Again, the Court was asked to resolve the issue.
The Court of Justice rephrased the national reference, stating that "the referring court [asked] whether the fact that the applicant for a residence permit lives together with his spouse, is not the biological father of the child who is a Union citizen, and does not have custody of the child may affect the interpretation to be given to the provisions on citizenship of the Union", which, indeed, may be said to be the point.[599] It then recited its earlier case-law, notably *Ruiz Zambrano*, *McCarthy* and *Dereci*, coming to the conclusion that "the criterion of the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union referred, in the *Ruiz Zambrano* and *Dereci* cases, to situations characterised by the circumstance that the Union citizen had, in fact, to leave not only the territory of the member state of which he was a national but also that of the European Union as a whole".[600] The

[589] ECJ Joined cases C-356/11 and C-357/11, *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.*, [06-12-2012] (not yet published in the reports)
[590] Ibid. par. 18
[591] Ibid. par. 20
[592] Ibid.
[593] Ibid. par. 22 – 24
[594] Ibid. par. 25
[595] Ibid. par. 25
[596] Ibid. par. 26
[597] Ibid. par. 28
[598] Ibid. par. 29
[599] Ibid. par. 36
[600] Ibid. par. 47

assessment whether or not the refusal to allow residence for Mr. O and Mr. M would entail, for the children of Mrs. S. and Mrs. L. a denial of the genuine enjoyment of their citizenship of the Union, the Court then referred back to the national court, while stressing that court should, "when making that assessment, [take] into account that the mothers of the Union citizens hold permanent residence permits in the member state in question, so that, in law, there is no obligation either for them or for the Union citizens dependent on them to leave the territory of that member state or of the European Union as a whole".[601]
The national court should also take into account "the fact that the children are part of reconstituted families", that "since Mrs. S. and Mrs. L. [had] sole custody of the Union citizens concerned who [were] minors, a decision by them to leave the territory of the member state of which those children [were] nationals, in order to preserve the family unit, would have [had] the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present".[602] "Secondly", the Court went on, "any decision to stay in the territory of that member state in order to preserve the relationship, if any, of the Union citizens who [were] minors with their biological fathers would have the effect of harming the relationship of the other children, who [were] third country nationals, with their biological fathers".[603] Indeed, the national court was requested to "examine all the circumstances of the case in order to determine whether, in fact, the decisions refusing residence permits at issue in the main proceedings are liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizens concerned".[604]
There was more coming. The Court held it was "not decisive" whether or not the spouses had actually resided together, "since it [could not] be ruled out that some family members who are the subject of an application for family reunification may arrive in the member state concerned separately from the rest of the family".[605] Next, while admitting that the *Ruiz Zambrano* case-law applied only in exceptional circumstances, the Court nevertheless held that, "it [did] not follow from the Court's case-law that [its] application is confined to situations in which there is a blood relationship between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived".[606] Rather than choosing a strict course as to legal family ties, the Court emphasized the degree of dependency, since that, allegedly, had been what had prompted the Court in *Ruiz Zambrano*.[607]

3.5 Reception in the Netherlands

The Dutch legislator, government, immigration authorities and employment service seem not to have welcomed the Court's *Rottman* and *Ruiz Zambrano* rulings with great enthusiasm. The Dutch executive waited until the 21st of December 2012 to implement the latter ruling (without mentioning it) in the Dutch Immigration Circular 2000.[608] This rather late implementation, although it takes account of further relevant jurisprudence of both the Court of Justice (the cases *McCarthy* and *Dereci*), and of the Council of State, still may be

[601] Ibid. par. 50
[602] Ibid. par. 51
[603] Ibid.
[604] Ibid. par. 53
[605] Ibid. par. 54
[606] Ibid. par. 55
[607] Ibid. par. 56
[608] Decision no. WBV 2012/26 by the Secretary of State for Security and Justice dated the 17th of December 2012, published in the Staatscourant 2012 no. 26248 of the 21st of December 2012

criticized on a few accounts.[609] In the first place, the rules implementing the *Ruiz Zambrano* decision have been laid down in the Circular's Chapter 2, which deals with family reunification, rather than in Chapter 10 on EU-law. The difference may seem of little importance; yet, it should be remembered the facts of *Ruiz Zambrano* clearly make out it is possible to rely on the Court's logic in order to have past residence enjoyed without a permit declared afterwards still to have been legal with retroactive effect.[610] Secondly, there is always the issue of administrative dues.

Both policy and jurisprudence in the Netherlands, thirdly, maintain a test as to the likelihood of young Dutch EU citizens being deprived of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union, which is distinctively more restrictive than that which the Court of Justice itself carried out. In particular, where a Dutch child would have the option of residing with one parent, the other parent presumably cannot claim a right under *Ruiz Zambrano* because, in that case, it need not be "assumed", to use the Court of Justice's choice of words, the child would have to follow that parent leaving the territory of the Union.[611] An intermediate divorce does not appear to alter the outcome.[612] The Council of State accepts to "assume" deprivation of a Dutch child's genuine enjoyment of his EU citizenship only if such an EU citizen is dependent upon a third country national to such an extent as to leave him no choice, due to the decision making, but to follow that third country national outside of the EU.[613] This is not the case, for instance, if a Dutch child still has a parent residing in another member state of the Union – such a child, presumably, could be transferred there.[614]

In sum, the Dutch reception of the *Ruiz Zambrano* ruling has on the one hand been strict as expected, but on the other hand shows how the Grand Chamber's ruling, which was a principled one, cannot in the end remain determinant of the sphere of application of EU law. Would Diego and Jessica Ruiz Zambrano have had no choice but to leave the Union if their father's employment would not have been declared to have been legal even in spite of his lack of a work permit? Could they not have travelled, perhaps together with their parents, to another EU member state in order to avoid having to leave the Union? Certainly, they could. A-G Sharpston did propose a trip to the seaside of Brittany, where the children, presumably, would have been more than welcome. In any case, had the family travelled to a second member state, their situation would have perfectly resembled *Chen*, with minor EU children of a non-host-state nationality being accompanied by two third-country nationals as parents. The ruling in *Ruiz Zambrano*, it should not be overlooked, was meant to diminish EU citizens' dependence on the crossing of borders, not to drive them from their own states of nationality.

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[609] According to a letter by minister Leers for Immigration (Kamerstukken 19 637 no. 1561)

[610] This view was not accepted by the District Court Den Haag (residing in Den Haag), Case nos. Awb 12/4849 and Awb 12/4850, [22-06-2012] LJN: BX2782. It was confirmed, however, by the District Court Den Haag (residing in Utrecht), Case no. Awb 11/33403, [21-06-2012] LJN: BX0174 and by the District Court Den Haag (residing in Den Bosch), Case no. Awb 12 / 18256, [10-01-2013] LJN: BY8363

[611] Dutch Immigration Circular 2000 (Vreemdelingencirculaire 2000) rule B-2 10.1; see also, for instance: District Court Den Haag (residing in Amsterdam), Case nos. Awb 11/14125 and Awb 11/14145, [07-09-2011] LJN: BT2711; District Court Den Haag (residing in Groningen), Case no. Awb 11/25895, [20-12-2011] LJN: BV8421; District Court Den Haag (residing in Assen), Case no. AWB 11/16471, [03-01-2012] LJN: BV0504

[612] District Court Den Haag (residing in Haarlem), Case nos. Awb 10 / 12844 and Awb 08 / 42013, [26-04-2011] LJN: BQ5774; District Court Den Haag (residing in Utrecht), Case nos. Awb 10/34857 , Awb 10/34859 and Awb 10/34860, [01-06-2011] LJN: BQ7068; District Court Den Haag (residing in Den Haag), Case no. Awb 11/7377, [05-10-2011] LJN: BW2306

[613] Council of State, Case no. 201108763/1/V2 , [07-03-2012] LJN: BW8619; Council of State, Case no. 201103346/1/V1, [24-04-2012] LJN: BW4298; Council of State, Case no. 201200988/1/V3, [02-05-2012] LJN: BW4921; Council of State, Case no. 201201455/1/V1, [06-08-2012] LJN: BX5044

[614] Council of State, Case no. 201200988/1/V3, [02-05-2012] LJN: BW4921;

The jurisprudence, especially as regards "the second parent", also shows how difficult it would be, in the end, not to abolish the wholly internal situation altogether. This is so because the Dutch approach is indeed logically sound. The Court of Justice indeed did not protect *family life* in *Ruiz Zambrano*, it merely protected a *citizenship* it was not eager to define. Of course, while it was nice of the Court to accept that small children are "dependent" upon their parents, they really are dependent upon only one – that is, if fundamental rights are not taken account of. If indeed EU law, as jurisprudence suggests, only cares whether, as regards wholly internal situations, EU citizenship itself and the possibility of someday crossing one of those internal frontiers were preserved, then frankly the Council of State may be said to assume too much by not taking account of the options orphanages still hold. Of course, it may be that placing children there might contravene some fundamental rights, but that would be a national problem and it would not be for the Union to care.
The recent *O. S. and L.* ruling indicates the Court, too, feels somewhat uneasy with this outcome. In ten lengthy deliberations, the Court can almost be seen to require a full-fledged assessment as regards family life in order even to assess whether EU law applies by virtue of the *Ruiz Zambrano* case-law. The criteria described in that case (no blood relationship, dependency, the legal requirement of the other parent to leave the Union, the family ties with other relatives in the EU) could well form the basis for further developments. In the mean time, Mr. Ruiz Zambrano appears just to have been lucky, having been given unemployment benefits which the Union presently would presumably not give away again.

Conclusion

Citizenship of the Union was introduced in 1993 in order to further a sense of European belonging; yet, in achieving that aim, it has been painfully unsuccessful, which many studies show. The entire burden of giving substance to the bones of EU citizenship has rested, from the moment it was laid down in the Treaty, with the Court of Justice alone. The European Commission merely presumes EU citizens should be given education about what little rights their citizenship entails, while pleading with the member states in many cases before the Court, thereby furthering only more fragmentation as regards the definition of European citizenship.
In the early years, the Court of Justice, too, has achieved little with the new status, about which it stated only in the new millennium that it was even "destined to be the fundamental nature of the nationals of the member states". In the late 20th century, A-G Jacobs did deliver an important opinion, claiming EU citizens should be regarded as individuals, and that EU law should be there to ensure that wherever they travel in the territory of the Union, they remain protected by a common basis of fundamental values; in other words, they should be entitled to say "civis europeus sum" and, in such a defense, be successful in ensuring the member states' abidance by fundamental rights.
In the new millennium, the Court of Justice had both broadened the sphere of application of EU law in the name of citizenship, and deepened its reach. Whereas in *Konstantinidis* a person's name only had to be protected insofar as a change of name was liable to cause economic detriment, in *Garcia Avello* that logic was abandoned, making place for a more principled one under which EU citizens because of their status being of a fundamental nature, were entitled simply to be known by a single name in Europe. In *Chen* and *Carpenter*, the rights of family members, even those having third country nationalities, were appraised in a manner showing respect for the fact that citizens do not enjoy family relations as a *means* but as a *right*. Given the fact that EU citizenship, apparently, had to be interpreted as something eliciting a European sense of identity, the Court also seriously broadened its reach, granting

protection even in cases in which Union citizens had not moved between member states, of which *Garcia Avello* and *Chen* are the most exemplary.
The *Rottman* judgment marked a turning point in the Court's approach as regards the application of EU citizenship rights; in this case, the Court was confronted with a person's naturalization being withdrawn. Instead of emphasizing the fact that the EU citizen in question had moved across an internal frontier in the past, the Court attached to the consequences of the loss of EU citizenship. The question thus arose whether EU citizenship may already count in wholly internal situations. That answer was provided with the *Ruiz Zambrano* judgment, in which the Court famously held that EU citizens, wherever they are, are entitled to "the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens". For that reason, a Colombian father who had had no residence permit and no work permit in Belgium, was still provided with a retroactive right of legal residence and of legal employment because, if he had not taken up employment, he presumably could not have supported his children, being EU citizens.
The member states have been most eager, after the delivery of the *Ruiz Zambrano* ruling, in curbing its impact. In *McCarthy*, *Dereci*, *Iida* and *O. S. and L.*, they have, aided by the European Commission, successfully precluded the Court from giving any real *substance* to "the genuine enjoyment" of EU citizenship. Certainly, the Court has made it clear that the fundamental right to a family life does not, as such, belong to the status of being a citizen of Europe – that right is protected in the Union only under the European Convention of Human Rights and, by extension, the Charter.
In the *Iida* judgment, the Court even retreated on its case-law as regards the substance of EU law in cases clearly coming within the classic scope "ratione materiae" of EU law. The residence of the father of a minor Union citizen, apparently does not come within the scope of EU law even if that Union citizen has moved across an internal frontier because that father is a Union citizen's father (in other words, because that Union citizen is entitled to family life in her host state) but only because of and insofar as his residence is *necessary* to let her reside in a host state. That ruling, therefore, paints a rather grim picture; it seems as if nothing happened since *Konstantinidis*, save the fact that, now, the home state, too, must ensure its nationals are not hindered in moving abroad.
It really cannot be predicted where the Court's case-law will turn next. On the one hand, the Court seems uneasy with its new "genuine enjoyment test", wishing not to interfere too much with the member states' affairs – while on the other it must admit the genuine enjoyment test was included for good reasons, because EU citizenship should be given a meaning all can understand. Crossing borders, in that sense, is less obvious a distinctive factor than "genuine enjoyment". But if EU citizenship is indeed destined to be something all Europe's nationals can relate to, it should indeed have more regard for the fact that not all European citizens cross borders, and that "being European" should not require that and should therefore not even relate to that. Simply residing as a citizen in Europe should be enough to be given something bearing the title "citizenship" with reason. As to family life, the fundamental right to live as a family should not be regarded merely as a means for crossing borders or retaining the possibility to cross borders, it should be a basic right falling within the Union's sphere of protection for citizens' sakes.

Conclusion – Towards an unconditional citizenship?

What does it mean to be a citizen of Europe? In trying to define the citizenship of the European Union as examined expediently in this work, a strange degree of meritocracy cannot be denied the status which, according to the Court of Justice, has been "destined to become the fundamental status of the nationals of the member states". EU citizens must, after all, *do something* before they gain enhanced protection under EU law; the Union thereby favours migrants over those wishing to remain in their home states. While much may be said for systems of citizenship based on some measure of meritocracy, it is mostly the case that meritocratic systems mean to favour intellect or other merit by an express choice, implying it would be for the benefit of the group if those who rule or who hold most rights have gained their positions through proving their aptitude. Migration as such, however, seems to be a rather strange kind of benchmark in this regard, nor can it be said that migration as a meritocratic prerequisite for enhanced protection has ever been deliberately chosen. The "wholly internal situation" simply has all this as its corollary, and nobody has ever cared to abandon the wholly internal situations doctrine.

In the first chapter of this work, Directive 2004/38 was assessed in detail, particularly insofar as it grants citizens of the Union the right to live together with certain family members. It was seen, however, that only those EU citizens who move to or reside in a member state other than the one of which they are nationals can benefit from the Citizenship Directive. What this entails exactly is not yet entirely clear. (Is it necessary to *move* and to *reside* in a member state other than one's own, and how must multiple nationalities be assessed?) The Court of Justice's rulings in *Chen* and *McCarthy* seem to be at odds with one another on this point, but the Dutch Council of State has recently referred a case on frontier workers to the Court of Justice, which will enable it to bring at least some clarity. The Citizenship Directive grants residence rights to EU citizens and certain of their family members only in "another member state" or a "host state" – the terms appear to be used interchangeably. But what is a host state, and must that necessarily be a state of which an EU citizen does not hold the nationality? Such an outcome would generate illogical results, particularly with regard to persons holding multiple nationalities. Also for frontier workers, who definitely *do something* for which the European Economic Community was originally founded – a narrow definition of "host state" appears detrimental. Again, the Court of Justice is bound to provide the necessary clarity in the foreseeable future.

In Chapter 2 the primary law on free movement was assessed, including the worker's definition, and important rulings such as *Singh*, *Eind* and *Carpenter*. The Court of Justice has often used the primary provisions on free movement to complement what shortcomings it found in secondary law. By doing so, the Court has importantly helped shape all the free movement law into a coherent body of law, the aim of which is to broaden and facilitate in every way possible the economic interaction between the different peoples of Europe. Family members, and particularly the right for persons to be accompanied by their families, the Court has considered as of paramount importance, urging the member states to grant a sufficient degree of security to their own and each other's nationals. In *Singh*, the Court addressed the question whether persons who had had established family ties while being employed in a second member state could without trouble return home, taking along their family members under the same conditions which had applied in their host state. The member states, to be sure, have vehemently tried to oppose this development; yet, the Court of Justice has, as might be expected of a Court given the task of interpreting a decidedly integrationist Treaty, taken the interests of individuals as a starting point. Without the security of being able to

return home, going abroad would be too much of a risk. In *Eind*, this point was further developed, again, against great opposition by the member states.
Carpenter shows a different logic. Here, the Court of Justice has on the one hand tried to emphasize the importance of family rights not only in secondary EU law, but also in primary free movement provisions of the Treaty (in the case, the freedom to provide services was concerned). Secondly, the Court of Justice let go the traditional emphasis on the member state in which EU citizens reside being either a home or a host state – whatever that is – but has stressed that EU citizens who reside in their home state, while still selling services abroad, still cannot be said to do nothing for which the European Economic Community had ever been intended. One can thus activate EU law from the comfort of one's own chair when selling advertisements on the internet to customers visiting particular web pages from computers established in other member states. Also on this point, the recently referred case of the frontier workers provides a great opportunity for further development, although the member states may be expected to oppose.
The third chapter showed why the Court of Justice has come to face its early *Morson and Jhanjan* judgment when deciding on the merits of EU citizenship. If the citizenship of the European Union is indeed a citizenship to which all Europe's nationals may refer and relate in their personal sense of identity, then can such a citizenship still allow for particular fields of life being beyond any aspect for which EU law has been designed? At first, the Court of Justice was seen not to be too willing to either broaden or deepen the impact of European citizenship. Advocate – General Jacobs did deliver a compelling opinion in *Konstantinidis*, but the Court was not yet to follow. It was then seen how EU citizenship did receive some more substance in the new millennium, and also how the wholly internal situation was made considerably smaller in rulings like *Chen* and *Garcia Avello*. The Court, in the latter ruling, decidedly did what A-G Jacobs had asked it to do in *Konstantinidis*, maintaining citizens' right to a name not because of economic reasons but because of that citizen's right to bear a particular identity – and a single identity – in Europe. The *Rottman* case came very close to infringing on the wholly internal situation explicitly, albeit the facts were not such as to make that absolutely necessary. The case concerned the loss of EU citizenship, while the applicant in thecase had moved from Austria to Germany, where he had acquired German nationality, losing the Austrian. In determining the outcome of a revocation of EU citizenship, it appears to be very illogical to continue emphasizing on cross-border movement or economic activity, but the Court did not yet close the lid on its *Morson and Jhanjan* ruling.
The landmark case of *Ruiz Zambrano*, then, finally, did take that step. The Advocate – General, Mrs. Eleanor Sharpston, had urged the Court of Justice to accept a free-standing right of residence for all citizens in all member states, regardless of how many nationalities particular EU citizens might hold (although at least one). Had the Court followed this approach, it would have been able not only to prevent EU citizens from being compelled to leave EU territory without at least having a say in such matters (the application of EU law does not entail absolute rights, of course), but it would then also have decided *Morson and Jhanjan* finally obsolete, at least as far as *citizenship* would be concerned. Citizens would, if it were up to A-G Sharpston, be entitled to claim their citizenship, invoking EU protection, under all circumstances and in all member states, regardless of past movements, regardless of economic activity and regardless of which second or third nationalities they might happen to hold. That vision as to EU citizenship would indeed be readily explainable to anyone, it would be something all could understand, and such a citizenship could also genuinely elicit a sense of European belonging.
Instead, the Court of Justice chose a different path, taking an important step forward; yet, still reluctantly refusing to declare *Morson and Jhanjan* a thing of the past entirely. With a reference to its earlier *Rottman* ruling, the Court held that "article 20 TFEU precludes

national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union"? What did that mean? According to *Ruiz Zambrano*, "a refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect" because "it must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents" and, similarly, "if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union".

So that is the state of the law at present. Whereas EU citizens are currently eligible to invoke *full citizenship* as against their host states – and also against their home states insofar as they exercise their fundamental freedoms from those, they still remain unable to invoke the same full-fledged citizenship in a case which, classically, would have been termed "wholly internal". On the other hand, even in such situations, no member state may – at least without triggering the application of EU law – either revoke their nationals' EU citizenship or, alternatively, take measures which would result in their nationals having to leave the territory of the Union. Subsequent case-law shows that the existence of young children, considering their general dependency, is an important aspect in determining whether particular expulsion measures or refusals to deem certain periods of employment as having been legal may, because of their prospective effects, fall within the ambit of EU law.

The ruling, which on principled grounds – and more particularly in the interest of a more readily conceivable EU citizenship – must be welcomed with open arms, will, however, still prove to be unsatisfactory as a final stop. First of all, the problems which Advocate – General Sharpston described, the clear sense of unease which one begets from a prolonged reliance on cross-border connectors, will not go away unless the wholly internal situation doctrine would become history definitively. EU law still urges its citizens (except the French) to visit Parc Astérix from time to time, merely in order to enable them to keep their citizenship "active" in a strange sort of way. Admittedly, due to *Ruzi Zambrano*, that incentive now presents itself less for married couples of asylum seekers with minor EU citizens for children, but it is quire obvious why this does not really make EU citizenship as such more comprehensible and more robust. The simple question with which this work thus ends is one of priority. Which of the following two interests, after all, should in the end prevail: the interest on the one hand with which member states protect their competences in wholly internal situations based on a philosophy which became outdated the moment the EU became anything more than a trade organization, or the interest lying with the Union itself in securing that the *citizenship* it grants will in the near future indeed begin to be felt by the general public as something fundamental. Considering the reluctance which the Union's political institutions show in debating "the future of Europe", the answer must be expected to come from where answers often come; it will likely be the Court of Justice to decide.