Universiteit Utrecht

EU Citizenship: Destined to be the uncomfortable status of minor EU citizens?

A research into the meaning of the EU citizenship status for minor EU citizens, and their right to family life

---

Anne (A.E.W.) van Heijst

3652130

Master Thesis European Law

June 2016

Supervisor

Prof. mr. S.A. de Vries

Second supervisor

Mr. dr. H. van Eijken

Index

1. Introduction
    1.1. Context & Research Question
    1.2. Method & Scope
2. Children's rights in the European Union
    2.1. Introduction
    2.2. EU Policies
    2.3. EU Law
        2.3.1. Scope of EU Law
        2.3.2. Definition of the Child in EU law
        2.3.3. Children's Rights in the Treaty of Lisbon
        2.3.4. Role of the Charter in the Protection of Children's Rights
            2.3.4.1. Origin
            2.3.4.2. Children's Rights in the Charter
                2.3.4.2.1. Scope of application, Substance & the Level of Protection
                2.3.4.2.2. Children's Rights
    2.4. International Influences
        2.4.1. The UN Convention on the Rights of the Child
            2.4.1.1. Children's Rights in the CRC
                2.4.1.1.1. Definition of the Child
                2.4.1.1.2. Rights of the Child
                2.4.1.1.3. Influence on EU Policy
                2.4.1.1.4. Influence on EU Law
        2.4.2. The European Convention on Human Rights
            2.4.2.1. Children's Rights in the ECHR
                2.4.2.1.1. Definition of the Child
                2.4.2.1.2. Rights of the Child
                2.4.2.1.3. Influence on EU Policy
                2.4.2.1.4. Influence on EU Law
    2.5. The Child's EU Right to Family Life
        2.5.1. Scope of Application
        2.5.2. Relationship with the ECHR
        2.5.3. General Analysis
3. EU Citizenship and Children
    3.1. Introduction
    3.2. The Relationship between EU Citizenship and Minor EU Citizens
    3.3. Moving Minor EU Citizens and their Families – Route A
        3.3.1. Directive 2004/38
            3.3.1.1. Personal Scope
            3.3.1.2. Material Scope
        3.3.2. EU Case Law on Route A
        3.3.3. Assessment

3.4. Static Minor EU Citizens and Their Families – Route B
3.4.1. Cases on Dual Nationality
3.4.1.1. Assessment
3.4.2. Cases on Primary Carer(s)
3.4.2.1. Assessment
4. Dependency
4.1. Introduction
4.2. 'Dependency' in Route A
4.3. 'Dependency' in Route B
4.4. Assessment
5. How 'Fundamental' is EU citizenship for Minor EU Citizens?
5.1. Introduction
5.2. Starting Point: *Zambrano*
5.3. The 'Substance of the Rights' of EU Citizenship
5.4. Should 'Substance' of the Rights entail the Right to Family Life?
5.5. Routes to Enhanced Fundamental Rights Protection of Minor EU Citizens
5.6. Assessment
5.7. H.C. Chavez and Others v. The Netherlands (C-133/15)
5.7.1. Preliminary Questions referred by the Dutch National Court
5.7.2. Position of the Applicants
5.7.2.1. Argument 1: Forced to leave the Territory of the EU
5.7.2.2. Argument 2: Genuine Enjoyment of EU Citizenship Rights
5.7.2.3. Conclusion
5.7.3. Position of the Netherlands
5.7.3.1. Argument 1: Forced to leave the Territory of the EU
5.7.3.2. Argument 2: Genuine Enjoyment of EU Citizenship Rights
5.7.3.3. Conclusion
5.7.4. Implications of the Case
6. Conclusion
6.1. Introduction
6.2. Recap
6.3. Conclusion
7. Bibliography
8. Table of Cases

1. INTRODUCTION

1.1. Context & Research Question

"*Protection and promotion of the rights of the child is one of the objectives of the European Union. All policies and actions with an impact on children must be designed, implemented and monitored in line with the best interests of the child.*"[1]

The European Commission (Commission) makes it clear that the European Union (EU) is concerned with the well-being of its youngest citizens. It has taken a long time however, for children to become included in the fabric of the EU. Originally, the EU was primarily concerned with the establishment of the internal market. In the past decades however, the EU has expanded not only physically, but also legally and politically. The growing focus of the EU on social policy and fundamental rights protection has enhanced the legitimacy and value of EU action in the interests of children.

The provisions on the free movement of persons provide an important frame of reference in which children's entitlement to rights at the EU level has been explicitly referred to and developed. EU citizenship as a status has become almost synonymous to the free movement of persons, as its entitlement originally has been largely confined to persons who have exercised their rights in order to carry out economic activities. In *Grzelczyk* however, the European Court of Justice (ECJ) stated that: "*Union citizenship is destined to be the fundamental status of nationals of the Member States*."[2] At the time, the ECJ did not explain what it meant with 'fundamental', leaving EU legal scholars and practitioners wondering about the implications of this statement.

Citizenship is a legal and political expression of the relationship between the citizen and the state.[3] In the EU, national and European citizenship co-exist and express different types of "membership" to a certain community.[4] Whilst national citizenship couples nationhood and membership to a political community, EU citizenship decouples the two. By granting access for all citizens in the EU to each national Member State, it defines members in the EU not only as members of their national communities, but also to an 'overarching' European community.[5] Citizenship as a status includes those defined as citizens as equal members of the community.

The expression of EU citizenship being the 'fundamental status' has become famous in the case law of the ECJ. It has even been included in the preamble of the Treaty on the European Union (TEU) and the Charter of Fundamental Rights of the European Union (Charter). The latter emphasises that the individual is placed at the heart of the activities of the Union, referring to EU citizenship and the creation of the Area of Freedom, Security and Justice (AFSJ).[6] The growing emphasis on the individual EU citizen, implies that this fundamental status entails certain guarantees and (fundamental) rights protection. It seems however uncomfortable if such guarantees would only be granted to citizens who have exercised their cross-border rights in order to carry out economic

[1] See http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm.
[2] C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31.
[3] E.g. Brubaker 1992; Magnette 2005.
[4] Welge (2015), p. 56.
[5] Welge (2013).
[6] Van Eijken (2014), p. 4.

activities. Imagine the uncomfortable situation in which in a given community only certain status holders would enjoy certain rights or protection, and others are excluded. It could therefore be argued that if EU citizenship is really destined to be the fundamental status of Member State nationals, all Member State nationals, including children, should feel the effect of that status.

Article 20 of the Treaty of the Functioning of the European Union (TFEU) lays down the status of EU citizenship. In recent case law the judicial interpretation of this provision has provided the ECJ with a means to develop a route in which rights are conferred directly on minor EU citizen and their family members. However, a strict interpretation of the exceptional circumstances under which these rights are granted by the ECJ has led to situations in which the families of these minor EU citizen have been torn apart. This is striking, considering that the right to family life is one of the most basic and fundamental rights children enjoy. The case *Chavez*, which is currently pending for the ECJ, offers new opportunities for the ECJ to clarify the scope of the EU citizenship status - and its potential meaning for minor EU citizen.[7]

In the light of the aforementioned context, the research question this research seeks to answer the following question:

Should EU citizenship accommodate the fundamental rights of minor EU citizens?

[7] C-133/15, *H.C. Chavez Vilchez et o.* (not published yet).

1.2. Method & Scope

Key position in this research is taken by, obviously, the minor EU citizen. In this research a minor EU citizen should be understood as being a citizen with the nationality of a Member State who is under the age of 21.[8]

This research will investigate the current legal position of minor EU citizen in the EU. This will be done by first exploring the current EU policy and EU law framework of children's rights. Also, the most important international influencers – the United Nations Convention on the Rights of the Child (CRC) and the European Charter of Human Rights (ECHR) - will be discussed. Secondly, the notion of EU citizenship will be discussed, and the ways it currently confers rights and affects the legal position of minor EU citizens. Thirdly, the research will zoom in on an important criterion that often serves as a condition for family members of minor EU citizens to be able to legally reside with their minor EU citizen child. Fourthly, the link between EU citizenship as a status and fundamental rights protection will be elaborated on. Also, future possibilities in the context of the pending *Chavez* case will be discussed.[9] Lastly, a conclusion will be drawn as to whether (1) EU citizenship currently accommodates the fundamental rights of minor EU citizen; and (2) whether it should.

The meaning of EU citizenship will be assessed using relevant EU law provisions. Also, the most important EU citizenship case law of the ECJ in the context of minor EU citizen will be discussed. EU citizenship, like national citizenship, has an important political dimension. For purposes of conciseness however, this dimension has been left out of scope.

Throughout the research the focus will be on the fundamental right to family life, which is the most basic and fundamental right children have. The context of transnational families has seen very explicit and far-reaching EU legal interventions. In fact, as will be elaborated on this research, the right to family life has in EU case law often been at odds with the interpretation of EU citizenship provisions. In that context, it has to be emphasized that this research will focus purely on the possibilities for family reunification offered by means of EU citizenship. Possibilities offered by other instruments, such as the Family Reunification Directive and the Reception Directive, have not been included in the scope of this research.

[8] Conform Art 2(2) Directive 2004/38 on the right of EU citizens of the Union and their family to move and reside freely within the territory of the Member States [2004] OJ L158/77.
[9] C-133/15, *H.C. Chavez Vilchez et o.* (not published yet).

2. CHILDREN'S RIGHTS IN THE EUROPEAN UNION

2.1. Introduction

This chapter provides an overview of the children's rights landscape in the EU. First, the most important EU policy developments in the area of children's rights will be explored. These developments reveal the intentions with which the European legal framework is designed and are therefore necessary to understand the ways in which children's rights are currently protected. Secondly, the legal framework that exists in the European Union, as well as the two most important influencers of that framework, the CRC and the ECHR, will be discussed. Thirdly, the EU children's right to family life will be discussed. This subparagraph demonstrates the different levels of protection (international/ECHR/EU) children enjoy. It is in particular relevant, because tension exists between the right to family life and recent developments in EU citizenship law. An understanding of the substance of the right is necessary to be able to answer the research question at a later stage. The chapter will be concluded with a few concluding remarks.

2.2. EU Policies

Since its establishment, the EU has been primarily concerned with strengthening the economic ties between the Member States. EU citizens were granted a number of rights related to the creation of a well-functioning internal market. The interests of children in the EU were protected only in the slipstream of this so-called 'market citizenship'. For a long time, children's rights – like many other areas - had not been on the EU agenda as an autonomous area of law. But as the European project progressively integrated, leading to changes in the constitutional, legal and institutional make-up of the EU, a swift in focus became visible. Integration created a necessity to engage in broader social and rights-related issues, including those affecting children. The European Social Agenda for example, was introduced after signalling that early interventions in the social exclusion of children could lead to the reduction of poverty. The introduction of the Charter and the affirmation of the protection of children as one of the objectives of the European Union in the Treaty of Lisbon have finally elevated children's rights to a formal EU fundamental right.[10]

Up until recently, there was no expert or institution at the EU level appointed with the task of representing children's rights. The judges of the ECJ also denied having any expertise on the international children's rights standards to which the EU must adhere in interpreting and applying EU law.[11] From 2011 onwards, a number of initiatives that seek attention for children have emerged. A partnership between the European Parliament, UNICEF and several international NGO's established for example the European Parliament Alliance for Children, which has issued a number of recommendations and declarations aimed at strengthening the legal position of children in the EU. Another institutional development that reveals the new child focus of the EU is the EU Agency for Fundamental Rights (FRA).[12] This agency, which advises the EU on fundamental rights protection, has adopted 'children rights' as one of its key themes.

[10] Art 3(3) Treaty on the European Union (TEU).
[11] Stalford (2012), p. 11.
[12] Regulation 168/2007 of 15 February 2007 Establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

In 2015 it published a Handbook on children's rights in Europe, which has served as one of the key sources for this chapter. Although aforementioned bodies and initiatives lack decision-making powers, they have made an important contribution in the attitude of the EU towards children's rights.

Within the European Commission, some Directorate-Generals (DG) dealt with children's rights, albeit in a very fragmented and mutually exclusive manner.[13] Ever since it issued the communication 'Towards an EU Strategy on the Rights of the Child' in which it proposed the establishment of a EU policy to promote and safeguard the rights of the child,[14] it has however been the most important policy driver at the EU level. The preparations of a new Communication on the Rights of the Child for the period 2011-2014[15] led to the adoption of the 'EU Agenda on the rights of the child.'[16] This is currently still the most important policy document on children's rights at the EU level. It sets out key priorities for the development of children's rights law and policy across the EU Member States. Progress on the different priorities is tracked and documented.[17]

While the Agenda is not legally binding, it is significant as it establishes the blueprint for the EU's normative and methodological approach to children's rights law.[18] The Commission oversees adoption of this approach by helping '*to protect, promote and fulfill the rights of the child in all internal and external EU actions and policies with an impact on them.*'[19] DG Justice has a coordinating role on the rights of the child among the Commission's services. It cooperates with other services of the Commission to make sure that the rights of the child take a prominent role in all relevant policies and actions.

2.3. EU Law

The aforementioned policy initiatives have for most part been translated into new child-focused instruments or new provisions within the existing EU legal framework. In this paragraph, the scope of EU law action, the EU definition of a child and the children's right in the Treaty of Lisbon and the Charter will be discussed.

2.3.1. Scope of EU Law

The extent to which the EU can deal with children's rights issues is limited. The EU can enact legal measures only within the limits of the competences conferred upon it by the Member States. These competences are laid down in the Treaties and specify the areas in which the EU can act and the process by which the action must be performed.[20] With regard to children's rights, the TEU states that "[*The Union] shall .. promote*

---

[13] See Grugel and Iusmen (2012) and Stalford and Drywood (2009).

[14] 'Towards an EU Strategy on the Rights of the Child', COM(2006) 367 final. On December 10th 2007, the Council adopted the 'EU Guidelines for the promotion and protection of the rights of the child.'

[15] This was initiated at the conference of the Stockholm Programme in 2009, which provided a roadmap for EU work in the area of justice, freedom and security for the period 2010-14. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF

[16] 'The EU Agenda on the Rights of the Child' COM(2011) 60 final.

[17] The last state of play was at 13 September 2015 and can be found here: http://ec.europa.eu/justice/fundamental-rights/files/agenda_child_state_of_play_en.pdf

[18] Fundamental Rights Agency (2015), p. 12.

[19] DG Justice on 'Rights of the Child', see: http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm.

[20] Art 3(6) TEU.

protection of the rights of the child.“[21] The provision does not confer any specific legislative powers, but merely contains a declaration of the EU’s basic values and objectives.[22] The TFEU contains a few specific references to children, which enable the EU to enact legislative measures aimed at combating sexual exploitation and human trafficking.[23] The lack of provisions in EU primary legislation however, affirms that the prerogative for enforcing children’s rights lies with the Member States.

The extent to which the EU can legislate in the area of children’s rights is limited. After determination of the legal basis, EU action is assessed by reference to the principles of subsidiarity and proportionality. The principle of subsidiarity dictates that the EU can only enact legislation on a specific matter when this would be more effective than when action would be taken at the national level. Furthermore, the principle of proportionality dictates that even if EU action in relation to a particular EU children’s rights issue is more appropriate and effective than Member State action alone, the EU must not go beyond what is necessary to achieve its objectives.[24] Satisfying this test is more difficult in some areas than others. Usually, the child-related issues that clearly cross national borders require a supra-national approach and thus satisfy these tests. Child abduction and immigration are such examples. When it comes to issues with a less clear cross-border dimension, such as child poverty and violence, EU action is often reduced to more subtle interventions.

The most important human rights catalogue of the EU, the Charter, lastly, contains a number of provisions on children and will be discussed more in depth later on in paragraph 2.3.4. For now, it suffices to state that the applicability of the Charter is rather limited. It applies only to Member State action when the Member States are in the course of ‘implementing EU law.’[25]

2.3.2. Definition of the Child in EU law

DG Justice of the European Commission defines the child on the website of DG Justice: ‘*As laid down in the UN Convention on the Rights of the Child, a child is any human being below the age of 18.*’[26] Although this might seem like a straightforward definition, such an established definition of ‘child’ under EU law does not exist. In fact, the definition of the child varies considerably under EU law, depending on the regulatory context.

In some areas of law, it has deferred the question of who constitutes a child to national law. In other areas of law, EU law does provide a definition. It usually confers rights to children according to their age. In the context of the free movement provisions ‘children’ are defined as “*direct descendants who are under the age of 21 or are dependent*.”[27] Sometimes even, the same instrument ascribes different entitlement according to the age of the child, for example in EU law governing family reunification rights of third country nationals who are lawfully resident in the EU.[28] This legislation

[21] Art 3(3) TEU.
[22] Craig and De Burca (2015) p. 391.
[23] Art 79(2)(d) and Article 83(1) TFEU.
[24] Craig and De Burca (2015) p. 551.
[25] Art 5(1) & (2) Charter.
[26] DG Justice on ‘Right of the Child’ see: http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm.
[27] Art 2(2)(c) Directive 2004/38.
[28] Directive 2003/86 on the right to family reunification [2003] OJ L 251/12.

contains a general definition of a child, being someone that has not reached the age of majority in the law of the host Member State.[29] However, a child over the age of 12 is obliged to satisfy an integration test whenever he arrives independently of the family.[30]

Besides age, other factors exist in EU law that determine who is to be considered a child. Firstly, some EU legislation requires the establishment of a biological link. The ECJ clarified in several free movement cases that children are direct descendant of '*either the [EU citizen's] spouse or partner*.'[31] This implies that children without a direct biological link, such as step or adopted children, are considered children too. Secondly, the existence of a relationship of dependency on a primary carer has been a way for EU children to derive rights. The notion of 'dependency' is of particular importance in free movement and immigration cases. Considering the relevance for this research, this criterion will be dealt with in depth in Chapter 4.

2.3.3. Children's Rights in the Treaty of Lisbon

As previously stated, the EU has not been awarded with a competence for the general promotion of children's rights in the TFEU. Whilst the founders of the EU did not find the impact of the creation of EU integration on children sufficiently evident to include such provision in the Treaties, the institutions have increasingly acknowledged this impact. In the 'EU Agenda on the Rights of the Child' the Commission created an inventory of areas with a direct impact on children, including asylum and migration; child health, safety and welfare; child poverty and social exclusion; child labour; children's participation; civil justice and family law; education; environment; media and internet; non-discrimination; and violence against children. These are areas in which children increasingly have been addressed directly, despite a generic competence base.[32]

Children are referred to in the TFEU only in the very specific context of the 'Area of Freedom, Security and Justice' (AFSJ) within Europe, which comprises policies on judicial cooperation on asylum, immigration, cross-border civil and criminal law.[33] Judicial cooperation in civil matters has led to EU rules on jurisdiction, recognition and enforcement of divorce and parental responsibility.[34] In the context of EU criminal and immigration law, EU law recognizes children as a group of 'vulnerable victims' that needs special protection in criminal proceedings.[35] In addition, several other pieces of EU secondary legislation deal with the protection of children in relation to specific

---

[29] Art 4 Directive 2003/86.
[30] Art 4(1) Directive 2003/86.
[31] Art 2(2)(c) Directive 2004/38. See also McGlynn (2002).
[32] Lamont (2014), p. 663.
[33] Articles 79(2)(d) and 83(1) TFEU. Lamont (2014), p. 662.
[34]Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338 ('Brussels II Revised').
[35] Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, replacing Framework Decision 2001/220 JHA [2012] OJ L315/57 ('The Victim's Directive').

crimes.[36] Lastly, EU asylum law grants extensive protection for third country national children, especially unaccompanied minors with/without refugee status.[37]

The few references in the Treaties do not mean however, that the EU is limited to enact child-related measures in the area of sexual exploitation and human trafficking, and more general the AFSJ. The broad formulation of many treaty provisions enable to establish some link with children's rights. EU labour law and social policy for example, directly regulates children as economic actors.[38] The Directive on the protection of young people in work regulates the age at which children can enter into work, and in which conditions.[39] Children also benefit indirectly from social rights granted to adult workers. EU parental leave measures for example, encourage the parent's presence and care following birth and adoption.[40]

With regard to the creation of the internal market, the institutions have realised that children are affected by both the regulation of the internal market and the exercise of the fundamental freedoms. With regard to the first, internal market law has increasingly protected the interest of children by providing for trading standards and protection of their interests as consumers.[41] But besides consumers, children are now considered subjects of the EU law on the free movement of persons too.[42] The first right of residence awarded to dependent children has been called 'parasitic' on the worker's right of residence.[43] Ever since the Maastricht Treaty however, minor EU citizen derive an autonomous right of residence. The effective meaning of this right for children will be further elaborated on in the next Chapter 3.

2.3.4. Role of the Charter in the Protection of Children's Rights

2.3.4.1. Origin

The Charter of Fundamental Rights of the European Union is the most important source of human rights at the EU level. It contains the first detailed references to children's rights at the EU constitutional level.[44] In doing so, the Charter marks a departure from the derivative set of rights that children historically had been entitled to on account of the EU citizenship status of their (economically active) parents. Instead, it acknowledges children's needs for autonomous rights, which are distinct from EU adult

---

[36] Directive 2011/36 on preventing and combating trafficking human beings and protecting its victims [2011] OJ L101/1; Framework Decision on the European arrest warrant and surrender procedures between the Member States [2002] OJ L190/1.
[37] Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.
[38] Lamont (2014), p. 665.
[39] Directive 94/33 on the protection of young people in work [1994] OJ L216/12. The Directive was based on Art 118a EEC (now Art 154 TFEU).
[40] Directive 2010/18 implementing the revised Framework Agreement on parental leave [2010] OJ L68. Based on Art 153 TFEU.
[41] F.e. Directive 2009/48 on the safety of toys [2009] OJ L170/1. Based on Art 95 EC (now Art 114 TFEU); and Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L49/22 ('The Unfair commercial practices directive'). Based on art 95 EC (now Art 114 TFEU).
[42] Article 2(2) Directive 2004/38
[43] Lamont (2014), p. 663. That right was awarded in art 10(1)(a) Regulation 1612/68, now art 2(2)(c) Directive 2004/38.
[44] Fundamental Rights Agency (2015), p. 27.

citizen or family rights.[45] This is significant especially since the adoption of the Treaty of Lisbon. Whilst the Charter was originally intended as a declaratory, interpretative guide without any legally binding effects, it currently has equal legal force to the Treaties.[46] This means that both the EU institutions and the Member States must respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers.[47]

2.3.4.2. Scope of application, Substance & the Level of Protection

Scope of application

Titel VII of the Charter deals with the interpretation and application of the Charter provisions. As to the field of application, the Charter sets out first, that the Charter addresses '*institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'*.[48] In *Akerberg Fransson* the ECJ clarified the scope of the obligations referred to Member States. It should be interpreted as meaning that the fundamental rights by the Charter must be complied with where national legislation "*falls within the scope of EU law*".[49] This obligation extends to situations where Member States apply, implement/transpose or derogate from a regulation or directive, execute a decision of the EU or a judgement of the ECJ.[50] Article 51(2) furthermore states that '*the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union as conferred on it in the Treaties'*.[51] In situations that do not fall within the scope of EU law, national courts and authorities thus remain free to apply national standards of protection of fundamental rights.[52]

The scope of EU law determines EU jurisdiction on fundamental rights, and not the reverse. Despite the detailed child-related provisions that are included, the Charter does not extend the ability of the EU to incorporate children's rights. Protection thus *prima facie* heavily depends on the EU measures that are already in place. From a children's perspective this would be a rather unsatisfying situation, considering the absence of specific provisions on children's rights. In the absence of such provisions, the EU legislator can however, use existing provisions to actively promote certain fundamental rights in the EU. In the *Tobacco* case for example, the EU judiciary demonstrated that the EU legislator can rely on fundamental rights considerations when adopting measures on the basis of Article 114 TFEU. This provision allows for the harmonisation of national laws designed to protect public interests of fundamental rights, but constituting an obstacle to free movement, even when the Treaty limits or excludes legislative powers in certain fields.[53]

---

[45] McGlynn (2002) p. 387 and Stalford (2005), p. 53.
[46] Art 6(1) TEU. See also Hickman (2011), p. 113.
[47] Craig and De Burca (2015), p. 415.
[48] Article 51(1) Charter.
[49] C-617/10, *Akerberg Fransson* [2013] ECR I-280, see also 'The Explanations Relating to the Charter of Fundamental Rights' [2007] OJ 303/17.
[50] Arestis (2013), p. 6.
[51] Article 51(2) CFR & art 6(1) TEU.
[52] C-399/11, *Melloni v Ministerio Fiscal* [2013] ECR I-107.
[53] De Vries (2015), p. 253.

In the *Tobacco* case Germany sought the annulment of two articles of the Directive on the approximation of the laws, on advertising and sponsorship of tobacco products prohibiting the advertising of tobacco products in the press and other printed publications, in information society services and in radio broadcasts and the sponsorship of radio programmes by tobacco companies.[54] The ECJ however, upheld the articles aimed at the protection of the public health. The Court considered that as long as the conditions of Article 114 TFEU are fulfilled, the EU legislator cannot be prevented from relying on that legal basis on the ground that public health is a decisive factor in the choices to be made. Not only does the EU legislator enjoy a wide discretion, but it is also under an obligation to ensure a high level of human health protection.[55]

The EU legislator has used Article 114 TFEU as a legal basis in recent years to adopt measures to secure certain fundamental rights for which no specific legal basis existed. An example of an area in which Article 114 TFEU has been used to strengthen the protection of EU citizen's rights is the area of procedural private law: the Directive on injunctions for the protection of consumers' interests (2009/22), the Directive on enforcement of IP rights (2004/48) and the ODR (online dispute resolution) Directive (524/2013). It has to be noted that Article 114 TFEU does not confer a general competence to regulate *any* aspect of the functioning of the internal market. EU legislation can only be adopted when a genuine link is established between the adopted measure and the removal of existing obstacles in the internal market. The adoption of the – by now annulled - Data Retention Directive[56] reveals how the EU legislator has to find a 'market angle' to frame its motifs to use Article 114 TFEU as a legal basis.[57] The Directive sought to ensure the protection of the right to privacy in operations in which large amounts of personal data are processed. The Commission stated that the diverse regulatory and technical national provisions concerning the retention of traffic data subjected service providers to different requirements regarding the types of data to be retained and the conditions of retention. Consequently, the directive was necessary to protect the internal market against obstacles caused by such legal diversity in the Member States. Unfortunately, the EU legislator has so far not used Article 114 TFEU to adopted measures, which promote the protection of children's rights.

Substance

Once the Charter is found to be applicable in a particular case, article 52 of the Charter deals with the scope and interpretation of the rights and principles laid down therein. Although the Charter grants a number of rights to children, these are not granted unlimited protection. Article 52 allows for limitations on the exercise of rights, as long as they are provided for by law, respect the essence of the rights in question and are proportionate and necessary to protect the rights of others or the general interest.[58] Rights recognised by the Charter for which provision is made in the Treaties have to be

[54] C-380/03, *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573 (Tobacco Advertising II) & Directive 2003/33 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ 152.
[55] C-380/03, *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573 (Tobacco Advertising II), par. 145.
[56] C-301/06, *Ireland v. European Parliament and European Council*, [2009] ECR I-593.
[57] Marin (2015), p. 4.
[58] Article 52(1) Charter.

exercised under the conditions and within the limits defined by those Treaties.[59] As a result, the judiciary has to undertake a balancing exercise in which the objectives of the measure in question, which implements EU law, are weighed against the alleged violation of fundamental rights.

In recent case law, the ECJ has elaborated on these principles and the obligations they create for the EU legislator. In *Schecke* for example, the ECJ annulled EU rules that sought to publish the names of beneficiaries of several European agriculture funds and the amounts they received.[60] The ECJ recognised that in a democratic society, tax-payers have the right to be informed of the use made of public funds, but considered that the proposal of the Commission exceeded the limits of proportionality in balancing the right to transparency and the right to protection of personal data. The ECJ held that derogations from the rights to privacy and data protection as specified in Article 7 and 8 of the Charter must apply only where strictly necessary.

In *Digital Rights Ireland*, the ECJ annulled the earlier mentioned Data Retention Directive. It held that this legislation violated the principle of proportionality when limiting the rights laid down in Article 7 and 8 of the Charter.[61] The Directive sought to ensure that data on traffic, location and the identity of users were made available to use in the prevention, detection and prosecution of serious crime, such as organised crime and terrorism. The ECJ ruled that although the retention of data required by the Directive may be considered appropriate to attain the objectives it pursues, the wide-ranging and particularly serious interference with the fundamental rights at issue were not sufficiently specified that that interference was limited to strict necessity. By applying this strict proportionality test, the discretion of the EU legislator was seriously reduced.[62]

The ruling of the ECJ has been confirmed recently in *Google Spain*,[63] and marks a new trend of the ECJ to put both Member States and the EU legislator to a strict test when fundamental rights as laid down in the Charter could be interfered with. The obligation of the EU legislator to not only protect, but to actively promote fundamental rights reveals a shift from the EU as a single market to a Union in which fundamental rights are as important as the economic freedoms. Up until now, these cases have been primarily concerned with data protection and the possible infringement of Article 7 and 8 of the Charter. It is not at all unimaginable however, that the ECJ would apply a similar strict test when rights of children, and especially the right to family life, are restricted.

As to the external influences on the substance of the Charter, the Charter provides guidance on the interplay between different sources of fundamental rights protection. In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR. This does not, however, prevent EU law from providing more extensive protection.[64] With regard to national constitutional practices the Charter furthermore confirms that fundamental rights must be interpreted in harmony with the constitutional

[59] Article 52(2) Charter.
[60] C-92/09 and C-93/09, *Schecke* [2010] ECR I-11063.
[61] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] OJ C175/6.
[62] Ferraro and Carmona (2015), p. 21.
[63] C-131/12, *Google Spain* [2014] ECR I-317.
[64] Article 52(4) Charter.

traditions common to the Member States, with full account taken of national laws and practices.[65] By referring to fundamental rights, the ECJ has acted as a bridge between these different sources and overall strengthened fundamental rights protection in the EU. It has been argued however, that is has also led to a set of rights which is anything but uniform, both in scope and substance.[66]

Level of protection

As to the level of protection provided for by the Charter lastly, Article 53 clearly states that the Charter cannot restrict or adversely affect the level of protection of fundamental rights already provided by Union law, international law and the Member States' constitutions.[67] It confirms that where an EU legal act calls for national implementing measures, national authorities and courts may apply national standards of fundamental rights protection, provided that the level of protection granted by the Charter and the primacy, unity and effectiveness of EU law are thereby not compromised.[68]

2.3.4.3. Children's Rights

Unlike the Treaty of Lisbon, the Charter addresses children directly. Provisions on children's rights include: the right to receive free compulsory education (Article 14(2)); the prohibition of discrimination on grounds of age (Article 21) and the prohibition of exploitative child labour (Article 32). Provisions targeting the family unit are also of relevance to children such as the right to respect for private and family life, home and communications (Article 7) and the right to enjoy legal, economic and social protection (Article 33). Some more age-neutral provisions can also be construed in favour of children in line with parallel ECHR interpretations.[69]

Article 24 however, takes a central position. It formulates three key rights for children: the right to express their views freely in accordance with their age and maturity (Article 24(1)), the right to have their best interests taken as a primary consideration in all actions relating to them (Article 24(2)); and the right to maintain on a regular basis a personal relationship and direct contact with both parents (Article 24(3)).[70] The Article does not adopt the exact wording of the underlying provisions of the CRC, but reformulates the rights contained in Articles 3, 9 and 12 CRC.

It has been argued that Article 24 has the potential to become very important for the protection of children.[71] This was demonstrated in the case of *Dynamic Medien*, which concerned German rules which required the examination of imported videos for their suitability to be viewed by children.[72] The measures had the equivalent effect to a quantitative restriction, which is prohibited by Article 34 TFEU. The ECJ however, considered that the restriction sought to ensure the protection of young persons (as protected by the CRC, ECHR and the Charter). It held that the measure could "*correspond to a conception shared by all Member States as regards the level of*

---

[65] Article 52(4) and (6) Charter.
[66] Fabbrini (2014), p. 12.
[67] Art 53 Charter.
[68] Von Bogdandy (2012), p. 493.
[69] Stalford (2012), p. 41.
[70] See also 'The Explanations Relating to the Charter of Fundamental Rights' [2007] OJ 303/17: Art 24 of the Charter is underpinned by Art 3, 9, 12 and 13 of the CRC.
[71] Lamont (2014), p. 681.
[72] C-244/06, *Dynamic Medien* [2008] ECR I-505.

protection and the detailed rules relating to it." It held that the restriction was justified, stating that "*as that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion*.[73] In its assessment the ECJ relied on Article 24 of the Charter. In concluded that the protection of children is a legitimate aim and that the measures were a proportionate response to protect that aim.[74]

In *Dynamic Medien* the fundamental rights laid down in Article 24 were used to justify a restriction on the free movement of goods. The ECJ underlined the protective element of Article 24(1), the protection and care that is necessary to the child's wellbeing, and the protective obligation of Member States towards children. But although *Dynamic Medien* is significant in the case law on children's rights, so far it is a rather unique case. The potential of Article 24 has not been realised just yet, as several elements of the provision are still unexamined. Furthermore, the ECJ only occasionally refers to Article 24 of the Charter explicitly.[75]

Parliament v Council was the first case in which the ECJ referred to Article 24 of the Charter.[76] The European Parliament sought the annulment of Directive 2003/86/EC on the right to family reunification. The ECJ was asked to rule on whether the distinction that the Directive draws between the rights of children to family reunification at different ages was legitimate.[77] The ECJ found no breach and the measure was upheld. In its reasoning, the ECJ referred to Article 24, but instead of analysing the meaning and content of the rights, it focussed on the relevance of the rights to family reunification.[78] It furthermore established that Member States have a significant margin of appreciation when interpreting Article 24, which has been confirmed in subsequent case law.[79]

Although the inclusion of children's rights in Article 24 of the Charter represents a significant development in the area of children's rights protection at the EU level, it has been argued that case law thus far reveals a "*lack of close engagement*" of the ECJ. *Dynamic Medien* shows the potential of this provision, and indeed, to some extent, the narrative of the ECJ has been altered. However, so far it has not provided an alternative basis for analysis, but it has been merely used as an additional support. References to the CRC and – to a lesser extent – the ECHR show that the ECJ is aware of its role within an international framework on children's rights. The international influences on the EU framework will be discussed in the following paragraph.

2.4. International Influences

Fundamental rights have been part of the EU for almost as long as the EU existed. Before introduction of the Charter, they existed within the EU legal framework as 'general principles of law'. These written and unwritten principles are drawn from both the national constitutional traditions of the Member States and their obligations under

[73] C-244/06, *Dynamic Medien* [2008] ECR I-505, par. 44.
[74] C-244/06, *Dynamic Medien* [2008] ECR I-505, par. 53.
[75] For example C-540/03, *Parliament v Council* [2006] ECR I-5769.
[76] C-540/03, *Parliament v Council* [2006] ECR I-5769.
[77] The case especially concerned art 4(1) of the Directive, which permits a Member State to assess the level of "integration" of a child over the age of 12 into the Member State before permitting family reunification.
[78] C-244/06, *Dynamic Medien* [2008] ECR I-505, par. 58.
[79] Joined cases C-356/11 & C-357/11, *O, S & L* [2012] ECR I-0776.

international human rights treaties to which they are signatories.[80] The general principles of the Member States currently still supplement and guide interpretation of the Treaty of Lisbon.[81]

The two most important international sources of children's rights are the CRC and the ECHR, which have been ratified by all EU Member States. As a result these treaties have been of great influence to the development of children's rights in the national legal orders of the Member States.[82] Because the EU is (not yet) a Member of the UN and the ECHR however, the EU (and its institutions) are not necessarily bound to adhere to the principles and provisions enshrined therein.[83] In *Kadi* for example, the ECJ annulled Council Regulation 881/2002 which sought to give effect to a resolution of the UN Security Council. The Court found however a breach of fundamental rights and in doing so, it sent a strong bottom-up message to the UN Security Council to change its policy towards fundamental rights.[84]

The *Kadi* judgment shows that the EU not simply adheres to other sources of international law. Ever since the coming into force of the Treaty of Lisbon, the EU has its own binding fundamental rights Treaty to which it increasingly refers: the Charter. However, the EU relies on 'general principles of law' (written and unwritten principles drawn from the common, constitutional traditions of the Member States) and other sources to supplement and guide interpretations of the EU Treaties.[85] Both provisions and the case law of the ECJ show that the EU often draws inspiration from such other sources. A good example is Article 24 of the Charter, which is heavily inspired by several provision of the CRC.[86] The way EU children's rights have been influenced by the CRC and the ECHR will be elaborated on in this paragraph.

2.4.1. The UN Convention on the Rights of the Child

Although the UN Universal Declaration of Human Rights (UNDHR) of 1948 stressed that "*motherhood and childhood are entitled to special care and protection*"[87], it took over 40 years for the rights of the child to become legally binding on UN Member States. In 1979, the General Assembly of the UN declared the Year of the Child, which set a working group in motion to draft a legally binding Convention on the Rights of the Child. The CRC eventually came into force in 1990.

The CRC is designed specifically to protect children's rights and interests and is celebrated for two reasons. Firstly, it comprises the most exhaustive, detailed catalogue of children's rights and is therefore considered as one of the 'building blocks' for the children's rights legal framework.[88] Secondly, with 193 state parties, it is the most widely ratified human rights treaty.[89] Somalia and the United States have not yet ratified

---

[80] C-7/73 *Nold v Commission* [1974] ECR I-491, par. 13.
[81] Craig and De Burca (2015), p. 550.
[82] Note: the EU itself is not a party, which means that the EU institutions are not bound by the international treaties.
[83] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECR I-2454.
[84] Joined Cases C-402/05 P and C-415/05, P. *Kadi* [2008] ECR I-6351.
[85] Fundamental Rights Agency (2015), p. 27.
[86] 'The Explanations Relating to the Charter of Fundamental Rights' [2007] OJ 303/17.
[87] Art 25(2) UNDHR.
[88] 'The EU Agenda on the Rights of the Child' COM(2011) 60 final, p. 3.
[89] Unicef, 'The path to the CRC" See: http://www.unicef.org/crc/index_30197.html.

the Convention but have signed it, indicating their support. This success is to a great extent determined by the discretion the CRC leaves to the State Parties. The vague wordings of the provisions require significant interpretation and implementation at the national level to be effective.

2.4.1.1. Children's Rights in the CRC

2.4.1.1.1. Definition of the Child

Article 1 of the CRC establishes the legal definition of a child: "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." The CRC thus clearly uses a notion of minority to establish who is a child.

2.4.1.1.2. Rights of the Child

The CRC binds all State Parties to '*respect and ensure the rights set forth in [the Convention] to each child within their jurisdiction*'[90] and to take '*all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention*'[91] and consists of three parts. Part one establishes the three general principles, which underpin the interpretation and application of the other articles that award rights to children. These principles are that (1) all children should enjoy equal enjoyment of their rights,[92] (2) that Member States should take the best interests of the children as their primary consideration[93] and (3) that children should be awarded full participation in legal proceedings that affect them.[94] The CRC establishes a catalogue of children's civil, political, economic, social and cultural rights. Some of these rights reflect rights of more general human rights instruments but in a child-specific version. Other provisions recognize rights which are completely new.

Many of these 'new' rights concern provisions, which relate to the family life of the child. The UN believes that "*the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community*."[95] Article 5 CRC for example, states that "*States Parties shall respect the responsibilities, rights and duties of parents .. to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention*." Article 8 clarifies that "*States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference*." Article 9 CRC states that "*States Parties shall ensure that a child shall not be separated from his or her parents against their will except when .. such separation is necessary for the best interests of the child*."

[90] Art 2 CRC.
[91] Art 4 CRC.
[92] Art 2 CRC.
[93] Art 3 CRC.
[94] Art 12 CRC.
[95] Preamble CRC.

In the second part of the CRC a Committee on the Rights of the Child is established.[96] This Committee consists of ten experts "*of high moral standing and recognized competence in the field covered by this Convention*."[97] These experts are responsible for fostering the effective implementation of the CRC and encouraging international cooperation in the field covered by the CRC. Member States have to submit reports to the Committee on the measures of implementation and on the progress made within two years of the entry into force of the Convention in the State concerned; and every five years thereafter.[98] The Convention does not have a system of enforcement to allow for the reception of complaints of individual children. In the absence of national legislation implementing the CRC no sanctions imposed on failing states. Rather, the Committee serves as a watchdog to monitor the benchmarks of the CRC that test Member States on the promotion and protection of children's rights.

Part three contains procedural provisions on *inter alia* signature and ratification.

2.4.1.1.3. Influence on EU Policy

Although the EU cannot become a Party to the CRC,[99] EU policy on children's rights is influenced by it. The most important policy on the EU level constitutes the EU Agenda on the Right's of the Child, which explicitly refers to the CRC as being the most important guidance for "*EU policy and actions that affect the rights of the child*."[100] Albeit this reference is of a symbolic nature, it does reflect the intention of the EU to supplement the rather vague references to children in the EU Treaties. The Agenda furthermore expresses its ambitions, in which the provisions of the CRC play a key role. It states that "*In the future, EU policies that directly or indirectly affect children should be designed, implemented, and monitored taking into account the principle of the best interests of the child enshrined in the EU Charter of Fundamental Rights and the UNCRC*."[101]

Moreover, it has been argued that this reference adds a new legitimacy to the EU children's rights agenda "*by providing a specific normative context, as well as a language with which international stakeholders are familiar and which can frame their discussions with key EU protagonists*."[102] The UN Committee on the Rights of the Child has provided guidance too, especially in interpreting and implementing provisions of the CRC with their monitoring reports, recommendations and general comments.[103] Lastly, these reports have served as a source of inspiration for the development of new legislative and policy initiatives.

[96] Art 43 CRC.
[97] Art 43(2) CRC.
[98] Art 44(1) CRC.
[99] The EU is not a state, and there is no legal mechanism within the CRC to allow entities other than states to accede to it.
[100] 'The EU Agenda on the Rights of the Child' COM(2011) 60 final, p. 3.
[101] 'The EU Agenda on the Rights of the Child' COM(2011) 60 final, p. 4.
[102] Stalford (2012), p. 33.
[103] For example. General Comment, 'General Measures of Implementation of the Convention on the Rights of the Child' CRC/GC/2003/5, 27 November 2003.

2.4.1.1.4. Influence on EU Law

The CRC is increasingly becoming a point of reference in EU legislation.[104] In fact, all child-related legislative instruments endorse explicitly or implicitly the CRC. A good example is Article 24 of the Charter, which is directly inspired by CRC provisions. It has been argued however, that the CRC could do more than providing just guidance for interpretation and implementation. Embedding the CRC into EU legal texts could potentially create a much stronger legal force for the CRC. However, as mentioned before, the EU is very limited in its possibilities to impose specific obligations on the national children's rights and measures of Member States.

The case law of the ECJ reflects these limitations: only a small number of child-related cases have been brought before the ECJ. Most of these cases are in the context of free movement and citizenship – areas in which the EU has enjoyed a long-standing competence.[105] There is only one case in which the ECJ has directly used the CRC to determine how EU law should be interpreted in relation to children.[106] But as explained earlier, the ECJ did not attach much weight to it. In other cases, the ECJ has adverted to general children's rights principles to inform its judgments.[107] The little reference to the CRC by the ECJ reflects the general reluctance of the Court to attach weight to international provisions, particularly in more politically sensitive areas.[108] The ECJ pays some attention to the international provisions, but in the end prefers to attach most weight to its own, autonomic legal order. Since the adoption of the Charter, the ECJ refers to its articles on children's rights, which often resonate with references to the CRC, given the similarity between provisions.

Fortunately, it is not only through reference to the CRC that children's rights at EU level are respected. The ECHR is another important driver of children's rights.

2.4.2. The European Convention on Human Rights

2.4.2.1. Children's Rights in the ECHR

2.4.2.1.1. Definition of the Child

The ECHR states that Convention rights should be secured to "everyone" within their jurisdiction, but does not contain a definition of a child. In its jurisprudence it has accepted the CRC definition of a child, endorsing the 'below the age of 18 years' notion.[109] The ECtHR has however accepted applications by and on behalf of children irrespective of their age.[110]

[104] Stalford and Drywood (2011), p. 205.
[105] Fundamental Rights Agency (2015), p. 29.
[106] Case C-244/06, *Dynamic Medien* [2008] ECRI-505.
[107] For example C-491/10 PPU *Joseba Andoni Aguirre Zarraga v. Simone Pelz* [2010] ECR I-14247.
[108] See also Joined Cases C-402/05 P and C-415/05, P. *Kadi* [2008] ECR I-6351.
[109] Art 1 CRC.
[110] ECtHR, *Marckx v. Belgium,* 1979, Application number 6833/74.

2.4.2.1.2. Rights of the Child

Children's rights are essentially absent from the ECHR.[111] The only articles in the ECHR relating specifically to children are the articles that provide for the lawful detention of a child,[112] the restriction of a right to a fair and public hearing where this is in the interest of juveniles[113] and the right to education.[114] All the other general provisions of the ECHR are applicable to everyone, including children. The ECHR is silent on any social or economic rights, and tends to consider children's rights as synonymous with other group or individuals' rights (such as the family or their parents).[115]

The fact that violations of children's rights are usually confined to the private, family life, makes direct enforcement of the ECHR problematic. The ECHR obliges public authorities to act in accordance with the right to private life of individuals. A state can be held accountable for failure to adopt the appropriate legal and policy measures to prevent such breaches. But a duty to intervene in an individual's private, family life is difficult to establish as it could potentially be in breach with the right to private and family life as enshrined in Article 8 ECHR.[116]

Over the years however, the ECHR has become relevant in the context of children's rights protection, despite the lack of provisions and enforcement. In the absence of any common ground on children's rights, Member States of the ECHR enjoy a margin of appreciation when they take legislative, administrative or judicial action.[117] Their discretion is limited however, where their approach touches upon commonly accepted standards and norms within the Council of Europe.[118] In applying the Convention in the 'new' context of children's rights, the ECtHR has, in order to establish such common ground, increasingly drawn from both regional and international human rights sources.

The ECtHR has for example increasingly used the CRC as an interpretative guide when applying the provisions of the ECHR to cases involving children.[119] The broad ECHR provisions are not only well suited for an expansive and imaginative interpretation, the ECtHR has furthermore established that the ECHR exists as a 'living document', meaning it must evolve so as to maintain relevant to current legal and social conditions.[120] The use of interpretative approaches that focus on the positive obligations inherent in the ECHR provisions, has led the ECtHR to develop a large body of case law dealing with children's rights.

The ECtHR analyses applications on a case-by-case basis and therefore does not offer a comprehensive overview of children's rights under the ECHR.[121] Cases on children's rights before the ECtHR seek to enforce *inter alia* the right of access to a court,[122] the

[111] Kilkelly (1999), p. 16.
[112] Article 5(1)(d) ECHR.
[113] Article 6(1) ECHR.
[114] Article 2 of Protocol No. 1 ECHR.
[115] Stalford (2012), p. 37.
[116] Stalford (2012), p. 38.
[117] Lavender (1997), p. 380.
[118] Kilkelly (2001), p. 313.
[119] The ECtHR did that for the first time in ECtHR, *Marckx v. Belgium*.
[120] Letsas (2015), p. 106.
[121] Fundamental Rights Agency (2015), p. 23.
[122] Art 6 ECHR.

right to respect private and family life,[123] the freedom of thought, conscience and religion,[124] freedom of expression,[125] prohibition of discrimination,[126] protection of property[127] and the right to education.[128] Cases on these rights cover a whole range of different types of cases. In the context of the right to family life for example, the ECtHR has not only dealt with cases on the annulment of adoption, the legal recognition for children born as a result of surrogacy treatment and the quashing of legal recognition of paternity, but also the right to know one's origins and family reunification.

The cases on family reunification are of particular relevance for this research. They concern third country nationals that seek to reunite with their close family members by claiming a temporary or permanent right of residence in the state in which the latter are living. In these cases, the ECJ found violations when national courts failed to properly take into account the amount of time spend in the country during childhood,[129] the level of linguistic and cultural integration in their home environment and the place of residence of siblings.[130] The right to family life in the international and European context will be dealt with more extensively in the following paragraph.

2.4.2.1.3. Influence on EU Policy

Like in the EU, the Council of Europe has in the past decade increasingly sought to include children in their policy initiatives. In 2006 the Council of Europe launched a programme called 'Building a Europe for and with Children.' The principle aim of the programme was to support implementation of international standards in the field of children's rights, especially the CRC and its key principles.[131] This plan of action for addressing children's rights issues included the adoption of standard setting instruments across a range of areas. It was updated with the Council of Europe's Strategy for the Rights of the Child 2012-2015.[132] Current priorities are the promotion of child-friendly services and systems; the elimination of all forms of violence against children; the guaranteeing of the rights of children in vulnerable situations; and the promotion of child participation.

As part of its activities, the Council of Europe has developed Guidelines on Child-Friendly Justice.[133] The Commission has identified these Guidelines as a key aspect of its Agenda of the Rights of the Child. The Council of Europe also participated in the consultation, which was held to gather input for the development of that Agenda.[134] In doing so, the Council of Europe has directly influenced EU policy on EU children's rights. It has been argued that these developments "*means there is likely to be an*

[123] Art 8 ECHR.
[124] Art 9 ECHR.
[125] Art 10 ECHR.
[126] Art 14 ECHR.
[127] Art 1 of Protocol No. 1 to the ECHR.
[128] Art 2 of Protocol No. 1 to the ECHR.
[129] ECtHR, *Osman v Denmark,* 2011, Application number 38058/09.
[130] ECtHR, *Sen v the Netherlands,* 2001, Application number 31465/96.
[131] Fundamental Rights Agency (2015), p. 25.
[132] 'Council of Europe Strategy for the Rights of the Child (2012–2015)' COM(2011)171 final. See: http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/StrategyCME.pdf.
[133] See: http://www.coe.int/en/web/children/child-friendly-justice.
[134] Eurobarometer Qualitative study on the Rights of the Child, October 2010, available at: http://ec.europa.eu/public_opinion/archives/quali/ql_right_child_sum_en.pdf.

ongoing exchange of expertise and engagement between the institutions between both bodies to promote children's rights across Europe."[135]

All members of the Council of Europe are members of the European Union, which should mean that the programme 'Building a Europe for and with Children' has supported implementation of children's rights in the EU. Unfortunately, membership does not necessarily mean that these are effectively respected. Only recently for example, the Dutch Children's Ombudsman warned that children's rights are being compromised in the Dutch asylum centres.[136] Accession of the EU could function as a catalyst for the effective protection of children's rights, and will be dealt with in the following paragraph.

2.4.2.1.4. Influence on EU Law

Despite the fact that the EU is not (yet) a party to the ECHR, the influence of the ECHR and the case law of the ECtHR on children's protection in the EU has been significant. As stated earlier, EU (case) law contains only very limited references to children's rights. Whilst the ECHR does not expressly refer to children either, the ECtHR has accepted claims of children and by doing so, has established a large body of case law on children's rights. The ECJ is obliged to take into account rights established under ECHR law as follows from Article 6(3) TEU and Article 52 of the Charter, and has in effect, increasingly turned to ECtHR case law for enlightenment on children's rights issues.

Such case law does not exist in relation to the CRC. ECHR case law however, draws heavily on the CRC.[137] The ECHR in this respect thus serves as a channel through which the CRC provisions become meaningful within the EU. Commentators have welcomed this 'cross-fertilising' of human rights instruments to redress the gap in child-specific provisions in the ECHR and to enhance the legal force of the CRC.[138] It has been argued that these increasing international influences have the potential to align the EU children's rights framework with that of international human rights bodies.[139] The obligations as established by the ECHR have however, not always sat comfortable with those under the EU Treaties. In fact, Member States have been able to circumvent their obligations under the ECHR by relying on the EU legal order.[140]

Article 6(2) TEU and Protocol 14 of the ECHR now allow for the accession of the EU to the ECHR. Once acceded, individuals would be able to bring the EU not just for the ECJ, but also before the ECtHR for failure to observe the ECHR.[141] In 2013, however,

---

[135] Lamont (2014), p. 673.

[136] De Kinderombudsman, "Rechten asielkinderen in noodopvang onder druk." 24th February 2016, << http://www.dekinderombudsman.nl/70/ouders-professionals/nieuws/rechten-asielkinderen-in-noodopvang-onder-druk/?id=619 >> Last accessed on 14th March 2016.

[137] The ECtHR does not always refer to the CRC explicitly. It has however, often referred to the substance of the CRC provisions, such as the 'best interest'-principle. In ECtHR, *Neulinger and Shuruk/Switzerland* (2010, Application number 4161/07) the ECtHR even considered that in custody cases, the best interest of children should be 'the paramount consideration'.

[138] Kilkelly (2000), p. 87.

[139] Stalford (2012), p. 39.

[140] The ECtHR has however in several cases been able to reaffirm its authority when the EU attempted to undermine the ECHR. See f.e. ECtHR, *Bosphorous v Ireland* (2005, Application umber 45036/98) and ECtHR, *MSS v Belgium and Greece* (2011, Application number 30696/09).

[141] Council of Europe 'Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human

the ECJ delivered an opinion on whether the Accession Agreement drafted by the EU and Council of Europe Member States was in accordance with EU Law.[142] The ECJ found that the draft agreement had failed to take sufficiently into account the specific nature of the EU, finding that in many ways the Accession Agreement would violate the autonomy of the EU legal order.[143] The ECJ believes that it is fully capable of conducting adequate human rights review within its internal legal order, without the need for external oversight of the ECtHR.[144] The Opinion reflects the attitude of the ECJ towards other human rights sources: it is willing to draw inspiration from them, but remains reluctant to rely heavily upon them, even though they seem to be more orientated in the specific area of children's rights. Instead, it has been increasingly highlighting the autonomy of the EU legal order and relying on the Charter as an autonomous source of rights.[145]

Whether accession would actually create possibilities for the further strengthening of children's rights, has been questioned. Some critics doubt these possibilities due to the lack of provisions that specifically target children, and the limited possibilities for children to bring a claim.[146] The EU furthermore already offers an equivalent level of protection within its own legal order.[147] Academics in favour of the accession furthermore stress the important symbolic and political nature of the act, as it sends the message that the ECJ itself is also willing to assume binding obligations under Europe's key human rights instrument.[148] They furthermore argue that accession would help to rectify the gaps within the current EU legal order, especially considering the growing willingness of the ECtHR to interpret the ECHR in a more child-focused way by referencing to the CRC.[149]

The way the different international levels of protection work out in practice will be discussed in the context of the right to family life in the next paragraph.

2.5. The Child's EU Right to Family Life

One of the most important fundamental rights at the European level for children is the right to respect for his or her private and family life, home and communications as provided for in Article 7 of the Charter. The concept of 'family life' in EU law has

---

Rights.' Strasbourg, 10 June 2013. Available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf.

[142] Art 218(11) TFEU.

[143] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECR I-2454.

[144] Odermatt (2015), p. 16.

[145] This has especially been the case regarding agreements, which involve dispute resolution procedures, such as in Opinion 1/09 (EU:C:2011:123.) on the European and Community Patents Court. In Opinion 1/09 the Court found that there is in principle no legal problem with the EU joining a treaty that would allow the EU to be involved in a dispute resolution mechanism, as log as the 'autonomy' of the EU legal order must be preserved. The problem is that 'autonomy' is a notoriously vague and ill-defined concept and can be applied in a narrow or open fashion.

[146] See Fortin (2009).

[147] ECtHR, *Bosphorus Airways v. Ireland*, 2006, Application number 45036/98, para. 165: "the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" ... to that of the Convention system."

[148] Odermatt (2015), p. 10.

[149] ECtHR, *Sahin v Germany*, 2003, Application number 30943/96 and ECtHR, *Sommerfield v Germany*, 2003, Application number 31871/96.

been evolving on an ad hoc basis and in a number of overlapping areas of EU law. This evolvement has taken place without a formal competence in the field of family law or, so it seems, without the intention of introducing EU family-related provisions.[150] Instead, these rights have emerged only as a subsidiary, inevitable consequence of the successful functioning of the internal market. The creation of both 'positive' (such as admitting family members for purposes of family reunification) and 'negative' obligations (precluding deportation of an individual) has led to an overall strengthening of the regulation of families and therefore family life in the EU, by means of an incomprehensive and incoherent body of soft law and binding measures.[151]

Consequently, the right may overlap with several provisions, such as Article 24 of the Charter, which grants children an individual claim to family life. If such claim conflicts with the claim of another family member or the State, a balance must be struck between the different interests. This balancing exercise should take the best interests of the child into account.[152]

2.5.1. Scope of Application

As clarified in paragraph 2.3.4 the Charter is applicable when States are *implementing EU law*.[153] Article 7 addresses the protection of the right to family life within the EU, and as such has general application in any field of EU law where family life may be affected. Despite the somewhat incidental development of EU law regulating family life, the potential reach of Article 7 in the context of children is wide-ranging. Provisions on family life in this regard have proved to be relevant, especially in the area of children's rights on the one hand and immigration, asylum and free movement on the other hand.

The right to family life is - similar to children's rights – only little referenced to and has developed incidental to other policy aims. Currently, EU legislation deals with the regulation of cross-border family law and jurisdiction and enforcement of judgements in family law matters.[154] With regard to immigration secondly, the right to family reunification has enabled immigrants to enjoy family life within the EU.[155] In the context of asylum, several measures define 'family members' and are thus of potential relevance for application of Article 7 of the Charter.[156] Lastly, the Charter protects family life in the area of EU citizenship. This status grants EU citizen and their family members a right to move and reside in all Member States.[157] Considering the relevance of EU citizenship for this research, these provisions will be dealt with more extensively in the next chapter.

---

[150] Choudhry (2014), p. 184.
[151] Stalford (2012), p. 61.
[152] Art 24 Charter.
[153] Art 51(1) Charter.
[154] Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338; Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1; and Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.
[155] Directive 2003/86 allows legally residing non-EU nationals that can bring their spouse, under-age children and the children of their spouse to the EU state in which they are residing.
[156] Directive 2013/32/EU [2013] OJ L180/60; Directive 2011/95/EU and The Dublin Regulation 343/2003.
[157] Art 20 and 21 TFEU.

2.5.2. Relationship with the ECHR

The Explanatory Note of the Article states that Article 7 Charter corresponds with the rights guaranteed in Article 8 ECHR. In accordance with Article 52(3), the meaning and the scope of Article 7 are the same as those of Article 8 of the ECHR. Consequently, the limitations, which may legitimately be imposed are the same as those followed by Article 8 of the ECHR.[158] Article 7 of the Charter thus replicates Article 8 of the ECHR, which has led to an increase in the influence of the ECtHR's case law in the legal order of the EU. The ECJ has on a number of occasions referred to ECtHR case law, for example to emphasize the obligation of national authorities to take the right to family life and respect of proportionality into account,[159] or to emphasize that Article 7 should be interpreted the same way as Article 8 ECHR.[160] The ECtHR on its turn has drawn inspiration from the case law of the ECJ when deciding on cases that concern Article 8 ECHR claims.[161]

2.5.3. General Analysis

Scope of family life

The definition of family life, and who is included within it, are questions that have arisen within a variety of different contexts within EU law. An analysis of legislation and case law within the area of migration and immigration however, provides a fairly representative image of how the EU deals with such matters. Commentators have argued the existence of certain privileging of the traditional, married and heterosexual family.[162] The introduction of Directive 2000/78, which prohibits such discrimination on the grounds of sexual orientation, has removed some obstacles that previously existed for same-sex couples. Co-habitants however, are still treated less favourably than traditional families, because unregistered partners (opposite & same-sex) are under an obligation to provide evidence of a 'durable' relationship before being able to join their EU citizen partner in the host State.[163] No obligation under EU law furthermore exists for Member States to allow or recognise registered partnerships.[164] This leaves the co-habitants in an uncertain situation in which they have to provide evidence of the durability of their relationship. The assessment is left to the discretion of the Member States, which means that each Member States can choose how to appreciate the evidence. Most Member States require a minimum period of living together and evidence of the intention to live together permanently.

[158] This means that interference with this right by a public authority shall be prohibited, unless it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others conform Art 8(2) ECHR.

[159] C-60/00 *Carpenter* [2002] ECR I-6279; C-109/01 *Alkrich* [2003] ECR I-9607; Joined cases C-482/01 and 493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; and C-127/08 *Metock* [2008] ECR I-6241.

[160] C-400/10 J *McB v LE* [2010] ECR I-8965 and Joined Cases C-92/09 and C-93/09 *Schecke* [2010] ECR I-11063.

[161] See ECtHR, *Goodwin v UK*, 1996, Application number 28957/95, in which the ECtHR referred to the ECJ's judgment in C-13/94 *P v S and Cornwall Country Council* [1996] ECR I-2143.

[162] Choudhry (2014), p. 207.

[163] Art 3(2) Directive 2004/38.

[164] Choudhry (2014), p. 209.

It is imaginable that the unfavourable treatment of co-habitants on the right to family life has an effect on children, especially with regard to legal certainty. This is undesirable in a modern society in which less and less people live in families of the traditional kind, the latter of which the EU seems to privilege. For children to grow up with co-habitant parents, which are not married or registered as a couple, will furthermore in principle not affect the strength of the family ties. It would also not be unimaginable that the ECJ would view the existence of a child as evidence of such durable relationship. Unfortunately, it seems that the approach of the ECJ is in line with the approach of the ECtHR. That Court has even accorded marriage a special status by virtue of it being sufficient evidence alone of the requisite level of stability of a couple and their intention to remain together.[165] The ECtHR is however, of very valuable guidance too, especially on which steps to take once Article 7 of the Charter is found to be applicable.

Qualified nature

Article 7 of the Charter, like Article 8 of the ECtHR, is a qualified right. This means that once the applicability of the article has been established, the Court must examine whether the limitations set out in Article 8(2) ECHR are applicable.

Under EU law, persons are treated differently when seeking protection from a refusal to enter or remain or expulsion according to their nationality/citizenship status. These differences itself have not been challenged under Article 7, but the ECJ has reiterated the need to consider the impact upon the right to family life when Member States wish to rely on the limitations provided for in the provision. The ECJ has furthermore applied the case law on Article 8 ECHR in numerous judgments concerning the status of family members of EU citizens to emphasize the obligation on national authorities to take into account the right to family life and respect of proportionality.[166]

In the Opinion of the Advocate General (AG) in *Rahman*, a case which concerned the admittance of extended family members as provided for in Article 3(2) of the Directive 2004/38, it was held that Member States enjoy a margin of discretion when upholding limitations on the right to enter and reside, which is limited in two ways.[167] Firstly, the national measure at issue must not have the effect of unjustifiably impeding the exercise of the EU citizen to enjoy his right to free movement within the EU territory. Secondly, by the obligation to respect the rights enshrined in Article 7 of the Charter. As a result, "*The combination of the right of residence and attached to EU citizenship and protection of private and family life, as implemented by EU law, may therefore effectively establish a right of residence for members of the family of the EU citizen.*"[168]

Aforementioned quote by Rahman does not only demonstrate that the margin of discretion enjoyed by Member States when restricting free movement rights is limited by Article 7 of the Charter, but also by the interplay between the different areas of the free movements, EU citizenship and the right to family life. EU law has granted the family members of EU citizens, when exercising their free movement rights, rights to accompany them in the host State. In doing so, EU law has been able to strengthen their

[165] Choudhry (2014), p. 211.
[166] C-60/00 *Carpenter* [2002] ECR I-6279; C-109/01 *Alkrich* [2003] ECR I-9607; Joined cases C-482/01 and 493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; and C-127/08 *Metock* [2008] ECR I-6241.
[167] C-83/11, *Rahman*, 2012, 3 CMLR 55; 2013, QB 249.
[168] C-83/11, *Rahman*, 2012, 3 CMLR 55; 2013, QB 249, par. 74.

family life, whilst the family life of static EU citizens has been subject to international and national fundamental rights protection. In recent case law concerning minor EU citizens however, the scope of EU law has been extended. Although aimed at strengthening the position of the EU citizen, the family life of these minor EU citizens has been put under pressure. The meaning of EU citizenship for children will be dealt with in Chapter 3, the relation between that status and the protection of the right to family life of these minor EU citizen will be dealt with in Chapter 5.

3. EU CITIZENSHIP AND CHILDREN

3.1. Introduction

In *Grzelczyk* the ECJ held that: "*Union citizenship is destined to be the fundamental status of nationals of the Member States*."[169] The normative basis for and the exact content of EU citizenship however, have remained ambiguous.[170] Historically, EU citizenship has been linked with the exercise of the economic free movement rights and was not meant to give rights to more citizens, but rather to open future options for more rights for nationals of the Member States.[171] If EU citizenship is however, destined to be the fundamental status of Member State nationals, it could be argued that all Member State nationals, including children, should feel the effect of that status, regardless whether cross-border mobility rights have been exercised in order to carry out economic activities.[172]

The core rights of EU citizens can be found in the TFEU and should be seen as comprising two different regimes. Article 21 TFEU provides that "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*"[173] The scope of EU law is triggered whenever a EU citizen has exercised his economic freedoms. When he has actually done so, his family and him are entitled to a set of EU rights, which are laid down in Directive 2004/38. This first regime through which EU citizen are entitled to rights will be referred to as Route A.

Another regime through which EU citizen in more recent years have derived rights is Article 20 TFEU. The provision lays down what EU citizenship as a status entails, by stating: "*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*"[174] Whilst previously the exercise of free movement rights was a precondition for EU citizens to derive rights from their status, case law of the ECJ has taken a turn in granting rights to citizens, which haven't moved – 'static' citizen – solely based on Article 20(1) TFEU. This development has potentially great consequences for minor EU citizen, as they will often not exercise their free movement rights independently. This second regime through which EU citizen are entitled to rights will be referred to as Route B.

This chapter seeks to establish in which ways the EU citizenship status has so far influenced the legal position of minor EU citizen. It will do so by exploring the relationship between the EU citizenship status and minor EU citizens. The analysis will then continue with a discussion of the two aforementioned regimes.

---

[169] C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31.

[170] Eleftheriadis (2014), p. 782.

[171] Art 8 (e) of the Treaty of Maastricht laid down the possibility for the Council to adopt legislation 'to strengthen or to add to' these rights (OJ 1992 C 191).

[172] Currie (2009), p. 366.

[173] Article 21(1) TFEU. With regard to the limitations: The clause refers to the Treaty limitations on the one hand (Member States can adopt restrictive measures on grounds of public policy, security and health), and the conditions imposed by implementing legislation on the other hand (such as Art 7(1)(b)-(d) of Directive 2004/38).

[174] Article 20(1) TFEU.

3.2. The Relationship between EU Citizenship and Minor EU Citizens

Any person holding the nationality of a EU member State qualifies for EU citizenship. Although the concept of EU citizenship challenges certain dimensions of national law (such as aspects of dual nationality), EU citizenship has not taken the key position of national citizenship. The Member States have explicitly made EU citizenship '*additional to*' national citizenship.[175] Because the loss or revocation of Member State nationality leads to the loss of the status of a EU citizen and its accompanying rights, the ECJ has however ruled that this matter falls within the scope of EU law.[176]

The core rights granted to EU citizens by means of their status are laid down in Articles 18-25 TFEU. In addition to these specific rights, EU citizen enjoy a number of other rights. The Lisbon Treaty has for example introduced the 'European Citizens Initiative' (ECI), which enables one million EU citizens from at least one quarter of the EU Member States to invite the European Commission to bring forward proposals for legal acts in areas where the Commission has the power to do so.[177] The Charter also reinforces the position of EU citizen. Title V (Articles 39-46) deals with 'Citizen's Rights' and adds a number of rights to the EU citizen's portfolio, including the right to vote and stand as a candidate at the EP elections (Article 39) and the right to petition the European Parliament (Article 44).

The ability of EU citizenship to confer rights on EU citizens in situations, which had not (yet) been covered by legislation, was explored for the first time in *Baumbast*.[178] The ECJ held that Article 21 TFEU lays down a right that is sufficiently precise and clear to be directly effective. The ECJ furthermore ruled that the limitations and conditions accepted by the Treaty on the rights of movement and residence must be interpreted in a proportionate way. The ruling in *Baumbast* was confirmed in *Chen*, in which the ECJ held that the rights of movement and residence deriving from EU citizenship are directly effective, autonomous, and do not depend on the possession of any previously existing EU category.[179]

But whilst the rights accompanied by EU citizenship are directly effective, the extent to which the concept of EU citizenship is of meaningful relevance to children is not so evident. The notion of national citizenship grew out of the individual's political rights. This is opposed to EU citizenship, which has evolved on the basis of free movement and to a large extent has become synonymous with the free movement of persons. Given that children do not, for the most part, migrate independently, they can only benefit from the rights associated with free movement as a consequence of their parent's decision to live and work in another Member State. The rights of these moving minor EU citizens will be discussed in the following paragraph.

3.3. Moving Minor EU Citizens and their Families – Route A

The ECJ has included children by interpreting 'family members' and aspects of family

---

[175] Art 20(1) TFEU.
[176] C-135/08, *Rottmann* [2010] ECR I-1449.
[177] Art 24 TFEU. The rules and procedures governing the ECI are set out in Reg. (EU) No. 211/2011 of the European Parliament and Council of 16 February 2011 on the Citizens' Initiative, OJ L65/1.
[178] C-413/99, *Baumbast* [2002] ECR I-07091.
[179] C-200/02, *Chen* [2004] ECR I-09925.

policy as the key to facilitating the mobility of (parent) workers. The rights of these moving minor EU citizens are laid down in Directive 2004/38, which has directly implemented Article 21 TFEU and consolidated almost all pre-existing secondary legislation on the free movement of persons within the context of citizenship. Because it lays down the fundamental Treaty-based right of residence for citizen, it is of crucial importance when looking at the rights awarded via Route A.[180] Before assessing the particular meaning of EU citizenship for moving children, the most important provisions of the Directive will be discussed first.

3.3.1. Directive 2004/38

3.3.1.1. Personal Scope

The Directive grants a number of rights to EU citizen and their family members. Article 2(1) defines a EU citizen as "*any person having the nationality of a Member State*." Article 2(2) defines a family member as "*The spouse; Their partner with whom they have contracted a registered partnership (provided that such partnership is recognized by the legislation of the host Member State); Any biological children of either the EU migrant or his or her spouse or partner, provided they are under the age of 21 or are 'dependent'; And the dependent direct relatives in the ascending line and those of the spouse or partner*."[181] Article 3(2) lists other categories of family members ('extended family members'). Whilst Member States must admit those family members falling within the scope of Article 2(2) to their territory, they have a certain degree of discretion on whether to admit those listed in Article 3(2). Of particular relevance for this research is Article 2(2)(c), which includes children, grandchildren and stepchildren.[182] The Commission has pointed out in its 2009 guideline on the interpretation of the Directive,[183] that the provision should be interpreted broadly. This means that the Article includes adopted children, minors in custody of a permanent legal guardian, and foster children, depending on the strength of the ties.

3.3.1.2. Material Scope

The Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizen and their family members; the right of permanent residence in the territory of the Member States for Union citizens and their family members; and the limits placed on these rights on grounds of public policy, public security and public health.[184] During their stay in the host State, all EU citizens and family members enjoy a right to be treated equally as the nationals of the host State.[185] Family members with a third country nationality are eligible for the right to equal treatment once they have obtained a right of residence or permanent residence.

---

[180] Craig and De Burca (2015), p. 857.
[181] Art 2(2) Directive 2004/38.
[182] C-413/99, *Baumbast* [2002] ECR I-7091, par. 57.
[183] 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM(2009) 313.
[184] Art 1 Directive 2004/38.
[185] Art 24 Directive 2004/38.

Article 6 lays down the right of residence in a EU host State for three months for EU citizens and their family members that hold a valid passport. The right of residence for three months is subject to one condition: persons cannot become an unreasonable burden on the social assistance scheme of the host State.[186] After three months, they have to fulfil the 'resources requirement'. This is laid down in Article 7, which states that temporary residents should have a sickness insurance cover and sufficient resources to support themselves.[187] This requirement is subject to two limitations: Member States cannot lay down a fixed amount, and the amount cannot be higher than the eligibility threshold for social assistance or the minimum social security pension of that State. Furthermore, the personal situation of the persons concerned must be taken into account when assessing whether he fulfils the criteria.[188] Article 8 stipulates that EU citizens and their families may be required to register with the host State authorities, to receive a certificate of registration as evidence of their right of residence. Family members that have the nationality of a third country must also apply for a residence card.[189]

The Directive grants permanent residence to EU citizens and their families who have resided lawfully in the host State for a period of five years.[190] In the event of the death of the EU citizen,[191] or in the event of divorce, annulment or termination of a registered partnership, family is allowed to remain in the host State provided that they do not become a burden on the social assistance system of the host State. This means that family members should either be workers or self-employed, or continue to meet the 'sufficient resources' condition laid down in Article 7(1) and Article 8(4).[192] Third country national family members can have their right of residence extended, provided that they have been residing in the host State for at least one year before the EU citizen's death.[193] Such family members retain their right of residence "*exclusively on a personal basis.*"[194] With regard to children, lastly, the Directive grants in the case of the EU citizen's departure or death a right of residence to his children or to the parent who has actual custody of the children (irrespective of nationality) if the children reside in the host Member State and are enrolled in an educational programme until the completion of their studies.[195]

It must be borne in mind that satisfaction of aforementioned formalities is not a precondition to be granted the right to reside in the host State.[196] Member States may revoke a right of residence, but not automatically.[197] According to the ECJ, penalizing failure to fulfil administrative formalities with deportation, refusal of entry or revocation of the right of residence would be disproportionate.[198] Instead, a number of

---

[186] Art 14 Directive 2004/38.
[187] This means the family members have sufficient resources, so that they do not become a burden on the social assistance system of the host state. They must furthermore have the possession of sickness insurance cover.
[188] C-408/03, *Commission v Belgium* [2006] ECR I-2647.
[189] Art 6(2), 9 and 10 Directive 2004/38.
[190] Art 16 Directive 2004/38. Articles 16-18 indicate the conditions under which EU citizens may enjoy this right.
[191] Art 12 Directive 2004/38.
[192] Art 13 Directive 2004/38.
[193] Art 12(2) Directive 2004/38.
[194] Art 12(2) & 13(2) Directive 2004/38.
[195] Art 12(3) Directive 2004/38.
[196] C-48/75, *Royer* [1976] ECR I-497.
[197] C-456/02, *Trojani* [2004] ECR I-07573, now laid down in article 14(3) Directive 2004/38.
[198] C-459/99, *MRAX v Belgium* [2002] ECR I-6591 and C-215/03, *Oulane* [2005] ECR I-1215.

provisions in the Directive mention the possibilities for states to impose proportionate and non-discriminatory penalties for non-satisfaction of the formal requirements.[199] Member States may however, adopt measures to refuse, terminate or withdraw any right conferred by the Directive '*in the case of abuse of rights of fraud, such as marriages of convenience*.'[200] These measures require an individual examination.[201]

3.3.2. EU Case Law on Route A

In most cases dealing with EU citizenship rights, children will be the direct descendant of either the EU migrant or his spouse or partner, under the age of 21 or 'dependent', and thus qualify as a 'family member' of the moving EU citizen – one or both of the parents that moves to another Member State to take up employment.[202] In that case, the child enjoys a right of residence under the conditions laid down in Directive 2004/38. This means that the child is dependent on the movement of his parent(s) in order to derive his right. Once entered the host State with his family, the child enjoys the right to equal treatment.[203] This means that the child is entitled to the same rights as the nationals of the host Member State.[204] Rights include for example the right to (higher) education.[205] The child can also take up economic activities himself, irrespective of whether his migrating parent is economically active.[206]

In the *Lebon* case, the ECJ clarified the limitations for children to derive rights from their EU citizen parent(s).[207] The case concerned Mrs Lebon, a French national, who lived in Belgium with her father. He was a French national and in receipt of a retirement pension in Belgium. Mrs Lebon had always lived in Belgium, except for a period of four years during which she worked in France. Upon return, she received social assistance. After a few months the payment was discontinued by decision of the Belgium authorities on the basis of a lack of evidence of her intention to find work.[208] Mrs Lebon challenged the decision on the basis of her entitlement to equal treatment. She claimed she was entitled to the same social assistance as Belgium nationals in her position would have received, because she was the family member of a EU migrant worker. The ECJ however, held that these family members "*only indirectly qualify for equal treatment.*"[209] As soon as the descendant has reached the age of 21, is no longer dependent on the EU citizen and does not have the status of a worker, he loses his entitlement to any right derived from the citizenship status of his parent.[210] Mrs Lebon was thus no longer entitled to social assistance.

---

[199] C-215/03, *Oulane* [2005] ECR I-1215.
[200] 'Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of citizens, COM(2014) 604.
[201] C-434/09, *McCarthy* [2011] ECR I-3375.
[202] Article 2(2)(c) Directive 2004/38.
[203] Article 24(1) Directive 2004/38.
[204] Art 24 Directive 2004/38. Derogations are laid down in Art 24(2) Directive 2004/38.
[205] Art 12 Regulation 1612/68. (Now: Art 7(1)(c) Directive 2004/38) See also C-73/08, *Bressol and Others* [2010] ECR I-2735.
[206] Art 23 Directive 2004/38.
[207] C-316/85, *Lebon* [1987] ECR I-2811.
[208] C-316/85, *Lebon* [1987] ECR I-2811, par. 4.
[209] C-316/85, *Lebon* [1987] ECR I-2811, par. 12.
[210] C-316/85, *Lebon* [1987] ECR I-2811, par. 14.

The case of *Lubor Gaal* however, shows that the derived right to equal treatment can be far-reaching. Mr Gaal was a 22-year-old Belgian national who had been living in Germany ever since he was three. His only income was an orphan's allowance to which he was entitled due to the death of his father, and he was not dependent on his mother. Mr Gaal had applied for an education allowance in order to be able to continue his university degree in the United Kingdom. Like Mrs Lebon, his application was refused because he was over the age of 21, no longer dependent and not working.[211] The ECJ however, clarified how to interpret Article 12 of Regulation No. 1612/68. This provision grants a right to general education to children of EU migrant citizens resident in the host State under the same rights as nationals of that State.[212] The ECJ held that "*the status of a child of a migrant EU worker implies that such children must be eligible for study assistance from the State in order to make it possible for them to achieve integration in the society of the host country.*"[213] This meant that Mr Gaal's allowance should cover the costs of his education and maintenance under the same conditions as apply to the host State's own nationals.[214] The ECJ was of the opinion that to subject Article 12 to an age-limit or to the status of dependence would have been contrary to both the letter and spirit of that provision, as it would make it impossible for Mr Gaal to properly finish his education the way he is entitled to.[215]

The fact that the EU citizen upon whom Mr Gaal was dependent had, as opposed to in the case of Mr Lebon, the status of a worker seemed decisive. In more recent case law, the rights for EU citizen and their family members have been extended to include migrant non-economically active EU citizen and their families. The *Martinez Sala* case concerned the application for a child-raising allowance for workers of Mrs Martinez Sala, a Spanish national living in Germany. She had always been employed and thus lawfully resident in Germany, except for a particular period of time during which she received social assistance and did not have a residence permit. It was this period in which her child was born. The ECJ held that despite Mrs Martinez Sala was not in an employment relationship, she still had the right to be treated equally to German nationals based on her status as a EU citizen.[216] Unlike German nationals however, German law required her to produce proof of her right of residence in order for her to receive the allowance. This was constitutive to the benefit, and according to the ECJ this amounted to unequal treatment.[217] The ECJ connected EU citizenship with the right to equal treatment and non-discrimination as enshrined in Article 18 TFEU for the first time, and has continued to do so in several areas since.[218]

It now follows from *Martinez Sala* that it does not matter whether the EU citizen parent upon whom the child is dependent is economically active for the child to enjoy those rights. In fact, the EU citizen does not even have to be present in the host State in order for his child to derive rights. The early case of *Echternach & Moritz* concerned two

---

[211] C-7/94, *Lubor Gaal* [1995] ECR I-1031, paras. 3-4.
[212] Article 12(1) of Regulation No. 1612/68 states: "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory."
[213] C-7/94, *Lubor Gaal* [1995] ECR I-1031, par. 19.
[214] C-308/89, *Di Leo v Land Berlin* [1990] ECR I-4185, par. 9.
[215] C-308/89, *Di Leo v Land Berlin* [1990] ECR I-4185, paras. 24-26. The ECJ referred also to C-389-390/87, *Echternach & Moritz* [1989] ECR I-723.
[216] C-85/96, *Martinez-Sala* [1998] ECR I-2691, par. 61 & 62.
[217] C-85/96, *Martinez-Sala* [1998] ECR I-2691, par. 63.
[218] C-85/96, *Martinez-Sala* [1998] ECR I-2691.

families with German nationality that had moved to the Netherlands for work of the father. After a few years, they moved back to Germany. The German education system however, did not recognize Dutch diplomas. The ECJ held that the possibility for children of the migrant EU citizen of going to school and pursuing education in the host State in order to complete that education was necessary to allow the best conditions for the integration of the family of the migrant EU citizen.[219] As a result, the children were entitled to continue their studies in the Netherlands, even after their parents had moved back to Germany.[220]

In the case *Baumbast* similar facts arose, but as opposed to in the case of *Echternach and Moritz*, coordination of diplomas existed this time. The ECJ however, clarified that the relevant EU legislation in this case sought to ensure the proper integration of members of the families of migrant workers, and stated that the possibility of completion of education in the home State was irrelevant.[221] Would this be a decisive element, the EU migrant citizen would possibly be deterred to exercise his free movement rights.[222]

Whilst the right to equal treatment seems to entail far-reaching rights in the area of education, it has been subject to limitation in the specific context of accessing social benefits such as student finance[223] and first-time job-seeker's allowance.[224] In striking a balance between facilitating the exercise of free movement rights and protecting the functioning of the social security systems of Member States, the ECJ has recognized that EU law allows for a certain degree of financial solidarity among migrant EU citizens and the nationals of a host Member State insofar as such citizen do not become an unreasonable burden on the public finances of the Member States concerned.[225] They may impose restrictions on access to social benefits, provided however that they are proportionate to the EU citizen's ties with the host Member State on the one hand, and the specific nature and purpose of that benefit on the other.[226] Member States thus cannot revoke a right to social assistance automatically,[227] but have to assess the degree of integration of the migrant EU citizen and his family members,[228] and the existence of a genuine link with the host State.[229]

3.3.3. Assessment

The legislative framework set out by Directive 2004/38 aims to couple EU citizen

[219] C-389-390/87, *Echternach & Moritz* [1989] ECR I-723, par. 21.
[220] C-389-390/87, *Echternach & Moritz* [1989] ECR I-723, par. 23.
[221] C-413/99, *Baumbast* [2002] ECR I-07091, par. 53.
[222] C-413/99, *Baumbast* [2002] ECR I-07091, par. 52.
[223] C-542/09, *Commission v Netherlands* [2012] ECR I-346.
[224] C-224/98, *D'Hoop* [2002] ECR I-6191.
[225] C-184/99, *Grzelczyk* [2001] ECR I-6193.
[226] Guild, Peers and Tomkin (2014), p. 226.
[227] C-456/02, *Trojani* [2004] ECR I-07573.
[228] C-209/03, *Bidar* [2005] ECR I-2119, paras 56-59; C-158/07, *Forster* [2008] ECR I-8507, paras 49-50; and C-103/08, *Gottwald* [2009] ECR I-9117, par. 35.
[229] C-224/98, *D'Hoop* [2002] ECR I-6191, par. 38; C-138/02, *Collins* [2004] ECR I-2703, par. 67; and joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-4585, par. 38. Relevant factors to be taken into account are whether the EU citizen has spent time living, being educated, working, or seeking work in the host Member State, or whether he or she is a national of that Member State. The length of time spent in another Member State may also be indicative of the degree to which a EU citizen has developed ties with that State.

children's rights with their moving EU citizen parents as long as they are their direct descendants, not over 21 and dependent on them. The parents on the other hand, have to be either worker/self-employed, or satisfy the sufficient resources requirement. [230] The case law of the ECJ reveals the development of a liberal approach. Originally, access to many social benefits were directly linked to the employment contract of the worker.[231] The cases of *Lebon* and *Lubor Gaal* concerned two children in a factual similar situation, being direct descendants, over the age of 21, no longer dependent and not working. Contrary to its decision in *Lebon*, the ECJ did grant Mr Gaal a right to educational benefits, based on his status as the biological child of a EU migrant worker. It remains guessing whether the ECJ attached more weight to the fact that Mr Gaal was an orphan, wishing to complete his studies after which he could start contributing to the internal market, or to the employment status of the migrating EU citizen father. In the early years of EU citizenship, the latter seems most likely. The ECJ has however, gradually included non-economically active EU citizen too.[232] In doing so, the EU has developed a body of entitlement, which was traditionally confined to domestic social and family policy.[233]

Although this development is to be welcomed as it asserts more rights to children, the rationale behind this approach has been to facilitate the migrant's worker integration into the host State. Case law on the derived right to equal treatment reveals a similar rationale. In both *Echternach & Moritz* and *Baumbast*, the children enjoyed a far-reaching right to the same education as the nationals of the respective host State. Children are allowed to finish their education in that State irrespective of the presence of their parents and of a system that allows for the recognition of foreign diplomas in the home State. A closer look at the reasoning of the ECJ reveals that the primary driver behind these rights is the integration of the family members of the moving EU citizen in the host State. Would this not be provided for, the EU migrant citizen would possibly be deterred to exercise his free movement rights. As such, the (possible) correlation between the exercise of the freedom of movement by a worker and the extension of any related rights to family members has been firmly established.

The rights granted to migrant minor EU citizen children are contingent upon their familial, dependent link. The emphasis on dependency seems to reflect the traditional criteria laid down for national citizenship and, more specifically, its emphasis on economic contribution as a basis for full membership. The implications are that minor EU citizens cannot migrate independently, unless they qualify as a worker or fulfil the sufficient resources test themselves.[234] It has been argued that as such "*the free movement provisions fortify children's dependency on their parents*" and "*reinforce the partial and conditional nature of their citizenship status within the EU.*"[235]

3.4. Static Minor EU Citizens and Their Families – Route B

The creation of the concept of EU citizenship "*was not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with*

[230] Art 7(1)(a) and (b) Directive 2004/38.
[231] C-76/72, *Michel S* [1973] ECR I-437.
[232] See for example C-85/96, *Martínez Sala* [1998] ECR I-02691.
[233] Stalford (2000), p. 108.
[234] Art 8(4) Directive 2004/38.
[235] Stalford (2000), p. 110.

Community law."[236] The ECJ has therefore consistently interpreted the Treaty provisions on free movement, and Directive 2004/38 implementing them, to the effect that EU citizenss must move between Member States to fall within the scope of the provisions of the Directive.[237] After all, where no cross-border link is established, the situation falls in the exclusive competence of the Member States. In recent case law however, the ECJ has ruled that at least some categories of persons can rely on EU citizenship rights, even though they have not exercised their free movement rights.

It has been argued that these cases have "*heightened the currency of children's status as EU citizens in their own right.*"[238] Firstly, the ECJ has awarded minor EU citizens with a dual nationality a number of rights based on their EU citizenship status following Article 20(1) TFEU. Secondly, whilst traditionally children derived their citizenship entitlement from their parents following Route A, it has become increasingly common for third-country parents to derive their entry and residence rights within the EU from the citizen status of their children. Both types of cases have had an impact on the position of 'static' minor EU citizens and will be discussed in the following paragraphs.

3.4.1. Cases on Dual Nationality

Garcia Avello was the first case in which the ECJ granted EU citizens rights based on their status even though they had never left the territory in which they were born.[239] The case concerned a claim of two children of Belgian/Spanish nationality who were registered in Belgium with their father's surname, but wished to add the Spanish surname of their mother. A Belgian rule however, prohibited any change in a registered surname where Belgian law required the father's surname to be registered. The children claimed that they were being discriminated against by comparison to other Belgian nationals, relying on the prohibition of discrimination ex Article 18 TFEU and Article 20 TFEU. The ECJ held that the dual Belgian-Spanish nationality triggered EU law, and found a violation of these principles. According to the ECJ, the discrepancy in surnames could result in serious professional and personal inconvenience hampering the free movement, given the likely divergences in official documentation between Member States.[240] Consequently, EU law is activated, irrespective of the fact that granting surnames is usually a national competence. In this situation, both Article 18 and 20 TFEU preclude measures which refuse to change surnames "*on behalf of minor children resident in the [host] State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State*."[241]

Chen is another example of a case in which the dual nationality of a minor EU citizen has triggered EU law.[242] In this case Mrs Chen, a Chinese national, lived in the UK and moved temporarily to Northern Ireland to give birth to her child, Catherine, with the objective of obtaining Irish birthright citizenship. Catherine and her mother both had

[236] Joined Cases C-64/96 and C-65/96, *Uecker and Jacquet* [1997] ECR I-3171.
[237] Guild, Peers and Tomkin (2014), p.47.
[238] Stalford (2012), p. 48.
[239] C-148/02, *Garcia Avello* [2003] ECR I-11613.
[240] C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 36.
[241] C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 45.
[242] C-200/02, *Chen* [2004] ECR I-09925.

sickness insurance and sufficient resources.[243] The UK Home Secretary rejected their applications for long-term residence permits on the basis that Catherine was not exercising any EU law rights and EU law did not cover her mother.[244] After all, Catherine had been born in Ireland and had not moved. The ECJ however, held that despite the fact that Catherine had never exercised her free movement rights, the matter fell within the scope of EU law due to the dual nationality of Catherine. A refusal to grant a right of residence to the parent, whether a EU national or not, who is the carer of a minor EU citizen "*would deprive the child's right of residence of any useful effect*."[245]

In *W (China) and X (China) v Secretary of State for the Home Department* the facts were similar to *Chen*.[246] The parents in this case (W and X) however, had entered the UK illegally. They had travelled to the Republic of Ireland where the mother gave birth to a baby (Q), who had (like Catherine) acquired Irish nationality automatically as a result of the same Irish birthright. The parents returned to the UK and applied for asylum, but their claims were rejected. On appeal, W and X claimed that since Q could not exercise her rights of free movement within the EU without their assistance, they were entitled to bring her to the United Kingdom for that purpose, and to stay there, even though, had those considerations been absent, their presence in this country would be illegal under English domestic law.[247] The ECJ distinguished the case based on the illegal entry of the family in the first place, and secondly, on the fact that they did not have either health insurance or sufficient resources.

In *Chen* the ECJ had not specifically dealt with the issue whether the accompanying carer or carers needed to have health insurance, or sufficient resources so that they themselves, as opposed to the child, did not become a burden on the host state.[248] In *W & X* it was held to flow from the wordings of Article 1 of Directive 90/364 that the right of movement and residence of EU citizen is subject to two preconditions: cover by sickness insurance and possession of sufficient resources.[249] Because it was established in *Chen* that the residence of accompanying parents in the host State was a mere consequence of the citizenship status of the children, the ECJ considered it evident that their accompanying family members had to be subject to the same conditions. If not, the exercise of the right of residence would impose a financial burden on the host State.[250]

Garcia Avello and *Chen* suggest that dual citizens can rely on their citizenship status in order to invoke their accompanying rights. The ECJ has however restricted its approach in *McCarthy*, albeit in a very uncomforting manner. This case concerned Mrs McCarthy, a UK/Irish national who had always lived in the UK and received State benefits. She had married a Jamaican national, but UK immigration rules prohibited them from living together in the UK. Consequently, Mrs McCarthy applied for a residence permit in Ireland, so her husband would be able to move with her to Ireland

---

[243] C-200/02, *Chen* [2004] ECR I-09925, par. 28.
[244] Craig and De Burca (2015), p. 863.
[245] C-200/02, *Chen* [2004] ECR I-09925, par. 45.
[246] W (China) and X (China) v Secretary of State for the Home Department [2007] 1 WLR 1514.
[247] W (China) and X (China) v Secretary of State for the Home Department [2007] 1 WLR 1514, par. 2.
[248] W (China) and X (China) v Secretary of State for the Home Department [2007] 1 WLR 1514, par. 7.
[249] Now Article 7(1) of Directive 2004/38.
[250] W (China) and X (China) v Secretary of State for the Home Department [2007] 1 WLR 1514, par. 8-9.

as the family member of a moving EU citizen.[251] The ECJ was asked to clarify whether Article 3(1) of Directive 2004/38 and Article 21 TFEU are applicable to situations in which a EU citizen has never exercised his right to move and always resided in the Member State of which he is a national. The ECJ stated both provisions were not applicable. A literal, teleological and contextual interpretation of the Directive firstly, prohibited such application.[252] Mrs McCarthy had not 'moved' to another State. The Directive does not govern situations in which EU citizen live in the State of their nationality, as this is in principle left to the Member States. Because Mrs McCarthy cannot be considered a 'beneficiary' in terms of the Directive, her spouse cannot either, since his rights would not be autonomous, but derived from the rights of Mrs McCarthy.[253] Article 21 TFEU secondly, prohibits national rules, which would oblige Mrs McCarthy to leave the territory of the EU. The ECJ held that the failure of the UK authorities to take into account her Irish nationality did not force her to leave the EU,[254] nor did that cause serious inconvenience for her to exercise her rights to free movements, like in *Garcia Avello*.[255]

Subsequent case law has dealt with other manifestations of dualistic nationality, such as the language used on a marriage certificate.[256] The ECJ assessed in several cases whether the inconveniences resulting from national measures precluding the amendment of joint surnames constituted restrictions ex Article 21 TFEU. The ECJ left it up to the national court to decide whether the refusal would be liable to cause 'serious inconvenience' to those concerned at administrative, professional and private levels.[257] If such restriction is found to exist, it is for the national court to determine whether this restriction could be justified. That national court should weigh the national interests of *inter alia* preserving its national language and traditions on the one hand,[258] and the right to private and family life on the other hand.[259] Based on this balancing exercise, the national court should conclude whether the refusal to allow for example, a change of the language on the marriage certificate, is a disproportionate restriction on the rights laid down in Article 21 TFEU.[260]

3.4.1.1. Assessment

The case law on dual nationality has provided minor EU citizens with a route by means of which they can derive rights based on their status as a EU citizen, without having exercised their rights of movement. Although the link with free movement has been eroded to some extent, it continues to be relevant as follows from for example *Garcia Avello*.[261] The possibility of hampering the exercise of free movement rights in the future seems decisive in balancing whether national rules precluding official

[251] C-434/09, *McCarthy* [2011] ECR I-3375.
[252] C-434/09, *McCarthy* [2011] ECR I-3375, par. 31.
[253] C-434/09, *McCarthy* [2011] ECR I-3375. par. 42.
[254] For example C-34/09, *Ruiz Zambrano* [2011] ECR I-1177.
[255] C-434/09, *McCarthy* [2011] ECR I-337, paras. 50-53.
[256] C-391/09, *Runevic-Vardyn* [2011] ECR I-3787.
[257] See for example C-391/09, *Runevic-Vardyn* [2011] ECR I-3787, par. 76. The ECJ referred to C-148/02, *Garcia Avello* [2003] ECR I-11613, paragraph 36; C-353/06, *Grunkin and Paul* [2008] ECR I-7639, paragraphs 23 to 28; and C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, par. 67, 69 and 70).
[258] C-391/09 *Runevic-Vardyn* [2011] ECR I-3787, par. 84. ECJ referred to Article 4(2) Charter.
[259] Art 7 Charter and Art 8 ECHR.
[260] Craig and De Burca (2015), p. 867.
[261] C-148/02, *Garcia Avello* [2003] ECR I-11613.

documentation constitute a proportionate obstacle to the exercise the right to free movement. Another factor to which much weight is attached, in cases that concern the right of residence possibly granted to the primary carer(s) of the minor EU citizen, is whether they do not become a financial burden on the State. This follows from the contrast between *Chen* and *W & X*. Contrary to *W & X*, the *Chen* family was financially independent and had to a large extent contributed to the economy of the UK.

A comparison between *McCarthy* and these earlier rulings of the ECJ however, raises questions. Firstly, in the reasoning in *McCarthy*, the ECJ reframes the *Garcia Avello* judgment to a case that concerned citizenship in terms of possibly "*impeding the exercise of her right to move and reside freely within the territory of the Member States*.[262] A look at the outcomes however, leaves an unsatisfying conclusion. Firstly, it is difficult to imagine how a citizen's right to move and reside could be impeded unless that citizen is either exercising or has the right to exercise these rights, such as in *McCarthy*. Second and more importantly, it seems unrealistic that the requirement to hold documents with different names is more of an impediment to the exercise of free movement than the inability to live together with a spouse.

Both *Chen* and *McCarthy* secondly, concerned an Irish national resident in the UK, which had left that State. It could be questioned why free movement law would apply to an Irish/Chinese national without a UK citizen status, but would not apply to an Irish national who does – such as Mrs McCarty. The *McCarthy* case does not exclude all dual citizens from the scope of the Directive, but it does invite EU citizens to be creative in bringing themselves within the scope of the Directive. They could move to a *third* EU country and return to one of the Member States to which they are nationals, or they could denounce the nationality of the Member State in which they are currently resident. It seems that if Mrs McCarthy had done the latter, she would have been in the same position as baby Catherine.

3.4.2. Cases on Primary Carer(s)

Another category of cases exists, which would traditionally have been considered 'purely internal situations' and left to the national courts, but have been brought within the scope of EU law by the ECJ. It has been argued that the 'founding stone' for this type of reasoning was laid down in the *Rottmann* case, in which the EU stated that although the Mr Rottmann had never exercised his right to move, *"the decision on withdrawing his naturalisation .. placing him in a position capable of causing him to lose the 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."*[263] After the *Rottmann* case, several cases have been brought before the ECJ which concerned minor EU citizens with a third country national parent who no longer qualified for ongoing residence under national immigration law. The ECJ has been willing to extent the right of residence in some of these cases, even though the minor EU citizen had never exercised his free movement rights. The link with EU law was found to be sufficiently substantial due to the impact on the exercise of rights of the minor EU citizen would the residency if his parent not be extended.

The most important case in this respect is the *Zambrano* case. *Ruiz Zambrano*

[262] C-434/09, *McCarthy* [2011] ECR I-3375, par. 49
[263] C-135/08, *Rottmann* [2010] ECR I-1449, par. 42.

concerned the question whether the third country national parents of two children that were born and resident in Belgium, but had never left that Member State, could obtain a right of residence in Belgium derived from that of their children.[264] Many Member States intervened, because they considered the matter to be 'wholly internal', and thus outside the scope of EU law. Both the AG and the ECJ however, disagreed. In only four paragraphs, the ECJ considered 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 of their status as citizens of the Union*."[265] According to the ECJ, a refusal to grant a right of residence and a work permit to a third country national with dependent minor children in the Member State where those children are nationals and reside, would have such an effect. The ECJ reasoned that "*it must be assumed that such 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*."[266]

This case detached the rights of the children concerned from the prerequisites of self-sufficiency and the exercise of the free movements. Instead, the ECJ based its reasoning solely on EU citizenship ex Article 20 TFEU. As a result of the dependent relationship between the minor EU citizen and their primary carers, the latter were awarded a right of residence.[267] The short ruling of the ECJ could potentially have had wide implications, but not long after, the ECJ drew back on its decision in subsequent case law. In *McCarthy,* of which the facts have been dealt with in the previous paragraph,[268] the ECJ held that the rejection of the claim did not give rise to serious professional inconvenience (like in *Garcia Avello*), nor did it deprive McCarthy of the genuine enjoyment of the substance of the right, because she was not obliged to leave the territory of the EU (like in *Zambrano*).[269]

The judgment in *Dereci* limited the scope even more. The case concerned the claim to a right of residence of a third country national, who had entered a Member State illegally and met a EU citizen partner. The latter had never exercised her right to move and was not dependent upon the third country national, but she did give birth to their child.[270] The child obtained nationality from the home Member State, and thus EU citizenship. The ECJ ruled that EU law did not preclude Member States to deny the third country national parents a right of residence. The Court stated that "*the denial of the substance of the rights of EU citizen*" as considered in *Zambrano* would only occur where the EU citizen had to leave not just the territory of the Member State of his or her nationality, but also the territory of the EU as a whole.[271] The impact that the deportation of family members of an EU citizen who does not have the nationality of a Member State may have on the family life or the well-being of that minor EU citizen did not mean that the EU citizen was being 'forced' to leave EU territory if that right was not granted.[272] The factual determinations of the case were left for the national court to make. The ECJ ruled that should the national court decide that the case falls

[264] C-34/09, *Zambrano* [2011] ECR I-1177.
[265] C-34/09, *Zambrano* [2011] ECR I-1177, para. 42.
[266] C-34/09, *Zambrano* [2011] ECR I-1177, para. 44.
[267] Chapter 4, p. 46.
[268] See for the facts of *McCarthy* p.37-38.
[269] Craig and De Burca (2015), p. 869.
[270] C-256/11, *Dereci* [2011] ECR I-11315.
[271] C-256/11, *Dereci* [2011] ECR I-11315, para. 66.
[272] C-256/11, *Dereci* [2011] ECR I-11315, para. 68

within the scope of EU law, a right of residence based on the right to family life in Article 7 of the Charter should be granted. If not, then the national court should decide the case on the basis of the right to family life under Article 8 ECHR.[273]

The cases of *Zambrano, McCarthy a*nd *Dereci* have been referred to as a trilogy, as they have clarified an outer boundary of EU law in a relatively short timeframe.[274] Since, the *Zambrano* test has been exercised in a number of cases. A few of them have been of particular relevance in the context of minor EU citizens, which will briefly be discussed.

The *Iida* case for example, dealt with the application for a residence card for permanent residence of a family member of a EU citizen by Mr Iida.[275] He was a Japanese national that had married a German national in the United States and had a daughter with German, American and Japanese nationality. The family moved from the US to Germany, where Mr Iida obtained a full-time job and a residence permit for family reunion. Two years later Mr Iida's spouse started full-time work in Vienna, moved there with her daughter and separated – though not divorced – from Mr Iida. Both spouses jointly held parental responsibility for their daughter, and according to the information available to the ECJ, father and daughter maintained regular contact and an excellent relationship. In its assessment, the ECJ first assessed whether Mr Iida could fall within the scope of Directive 2004/38. The ECJ held that Mr Iida could neither be considered to be 'dependent' on his daughter ex Article 2(2)(d) Directive 2004/38,[276] nor could he be considered a 'beneficiary' of the directive as the family member of his spouse, since Article 3(1) of the Directive requires that the family member of the EU citizen has moved so to accompany or join the EU citizen, which he had not done so.[277] Secondly, the ECJ assessed the application of Article 20 & 21 TFEU. It recalled that the citizenship provisions do not confer any autonomous rights on third-country national parents, unless they are the primary carer of a minor EU citizen, who's enjoyment of his right of residence would be deprived of any useful effect if the third-country national would be withheld a right of residence.[278] The ECJ held that the refusal of the German authorities to grant Mr Iida a residence card was not liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of their EU citizenship rights. Firstly, Mr Iida did not seek a right of residence in the host Member State in which his spouse and his daughter resided, but in Germany. The absence of a EU law right of residence had furthermore up until then never discouraged the daughter and spouse to exercise their freedom of movement. Thirdly, Mr Iida already enjoyed a right of residence under national law.[279]

The case *O, S & L* concerned *inter alia* Mr O, a national of Cote d'Ivoire, who had

[273] C-256/11, *Dereci* [2011] ECR I-11315, para. 72-73. See also: C-87/12, *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] 3 C.M.L.R. 33.
[274] Tryfonidou (2012), p. 502.
[275] Article 10(1) Directive 2004/38
[276] With regard to the relationship with his daughter, a direct relative in the ascending line of a EU citizen can only qualify for a residence when 'dependent' on that citizen. To be considered a 'dependent' family member of a EU citizen would mean a factual situation in which the daughter would be materially supported by her father. As follows from the case law of the ECJ (Chen par. 43-44), in the converse situation it cannot be held that Mr Iida is dependent on his daughter. Par. 56.
[277] C-40/11, *Iida* [2012] OJ C145/4, paras. 61-62.
[278] C-40/11, *Iida* [2012] OJ C145/4, par. 66-69.
[279] C-40/11, *Iida* [2012] OJ C145/4, paras. 73-76.

married Mrs S, a national of Ghana who lived in Finland, with whom he had a child of Ghanaian nationality. He lived in Finland too, and Mr O and Ms S shared his custody.[280] From an earlier marriage, Ms S had a child with Finnish nationality living in Finland of whom she had sole custody. The Finnish authorities had rejected his claim for a right of residence on the ground that he did not have secure means of subsistence.[281] The ECJ was asked by the Finnish Supreme Administrative Court whether EU law precludes Member States from refusing to grant a third country national (like O) a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage (like S) who is a minor EU citizen, and with the child of their own marriage (between O & S), who is also a third country national.[282] In particular, the ECJ was asked how the interpretation of the EU citizenship provisions is affected by the fact that the applicant for the residence permit is not the biological father and does not have custody of the minor EU citizen.[283]

According to the ECJ, EU law generally did not preclude the refusal of the right of residence. It left it for the Finnish court to apply the exceptional criterion of whether the EU child citizen is deprived of the genuine enjoyment of her rights to the facts of the case. The ECJ did however provide the Finnish court with guidance as to which factors it should attach weight to. When assessing whether the genuine enjoyment of the rights would be deprived, the court had to take into account that the children had been part of reconstituted families. The refusal of a residence permit to Mr O, and possibly the decision of Ms S to leave the territory as a consequence of that refusal, would harm the relationship with the biological father of either the third country national or the minor EU citizen.[284] Whether the applicant lives together with his family members at the time of application and whether a blood relationship between the third country national and the EU citizen exists are however, not decisive.[285]

However, the ECJ also stressed the exceptional nature of the criterion and restated its wordings in *Dereci*: the mere desirability to preserve the family unit in the territory of the EU is not sufficient for the third country national to be granted a residence permit.[286] It held that it should take into account that Mrs S had a permanent right of residence and that her EU citizen child had not been legally, financially or emotionally dependent on Mr O. It is that dependency however, which would oblige the minor EU citizen to leave the Member State, or the EU territory as a whole. The ECJ took a bold step by concluding "*Subject to the verification which it is for the referring court to carry out, the information available to the Court appears to suggest that there might be no such*

[280] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776.
[281] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 24.
[282] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 35.
[283] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 36.
[284] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, paras. 51-52.
[285] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 54.
[286] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 52 – See C-256/11 *Dereci*, par. 68. This was confirmed in C-87/12 *Ymeraga* [2013] 3 C.M.L.R. 33, par. 39. In this case it was decided that when the only factor which could justify a right of residence being conferred on the family members of the citizen concerned is the intention to bring about, in the Member State in which he resides and of which he holds the nationality, reunification with those family members, that is not sufficient to support the view that a refusal to grant such a right of residence may have the effect of denying the EU citizen the genuine enjoyment of the substance of the rights conferred by virtue of his status as citizen of the EU.

dependency in the cases in the main proceedings."[287] In doing so, the ECJ in fact directs the national court to a certain outcome. The national judges would have to have a good explanation would they want to decide otherwise.

The case of *Alokpa* concerned Mrs Alokpa, a citizen of Togo, who had been granted discretionary leave to remain in Luxembourg. In Luxembourg, she gave premature birth to a set of twins, who were recognized by Mr Moudoulou, a French national. Consequently, the children had French nationality. Mrs Alokpa applied for a residence permit based on EU law in Luxembourg, because she was unable to settle with her children in France. She had no relationship with their father and the children required follow-up medical treatment in Luxembourg. Her application was rejected, because Mrs Alokpa's children had never enjoyed family life with their father and the children had never actually exercised their free movement rights. The Luxembourg authorities then asked the ECJ whether Articles 20 TFEU and 21 TFEU had to be interpreted as precluding a Member State to allow a third country national to reside in its territory, where that third country national has sole responsibility for her minor children who are EU citizens, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and having made use of their right to freedom of movement.[288] The ECJ restated its case law in which it had ruled that while "*Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host State."*[289] If Mrs Alokpa could satisfy the sufficient resources test, then she could be granted a right to residence in Luxembourg based on Direct 2004/38 and Article 21 TFEU.

More interestingly, with regard to Article 20 TFEU it had to be assessed whether the effectiveness of the EU citizenship status of the children would be undermined if a right to residence would be refused. The AG stated that Mrs Alokpa, as the mother of two children and as the sole carer of those children since their birth, could obtain a derived right to reside in France on the basis of the French nationality of their children.[290] It followed that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence could have never resulted in her children being obliged to leave the territory of the European Union altogether. The ECJ left it however to the referring court to determine whether, in the light of all of the facts of the main proceedings, that was in fact the case.[291]

The cases of *S & G* lastly, concerned two third country nationals that had moved to reside with their EU citizen family member in the State of which the latter was a national. Both of them had the responsibility of nurturing the child of their EU citizen family member and both of them appealed against the rejection of their application to obtain a right of residence derived from their family members. The national court asked the ECJ for clarification in a preliminary ruling procedure. It asked whether Directive 2004/38, Article 20, 21(1) and 45 TFEU precluded a refusal by a Member State to grant a right of residence to a third country national who is a family member of a Union

[287] Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 57.
[288] C-86/12, *Alokpa* [2013] OJ C 344/21, par. 21.
[289] See C-200/02, *Chen* [2004] ECR I-09925 paras. 46-47 and C-40/11, *Iida* [2012] OJ C145/4, par. 69.
[290] Opinion AG Mengozzi in C-86/12 *Alokpa,* paras. 55-56.
[291] C-86/12, *Alokpa* [2013] OJ C 344/21, paras. 33-35.

citizen within the meaning of Article 2(2) of Directive 2004/38 where that citizen is a national of and resides in that Member State but regularly travels to another Member State in the course of his professional activities.[292] The ECJ held that Directive 2004/38 does not, referring to the text of Article 2(2) of the Directive and previous case law.[293]

Article 45 TFEU however, does confer a right of residence on a third country national in situations as in this case, if the refusal to grant such a right of residence would have discouraged the worker from effectively exercising his rights under Article 45 TFEU, which the ECJ left for the referring court to determine. It stated that in that regard, "*the fact noted by the referring court that the third country national in question takes care of the Union citizens' child may .. be a relevant factor to be taken into account by the referring court when examining whether the refusal to grant a right of residence to that third country national may discourage the Union citizen from effectively exercising his rights under Article 45 TFEU.*" It added however, that "*the mere fact that it might appear desirable that the child be cared for by the third country national who is the direct relative in the ascending line of the Union citizen's spouse is not .. sufficient in itself to constitute such a dissuasive effect.*"[294]

3.4.2.1. Assessment

In *Zambrano*, the ECJ engaged citizenship rights in a situation purely internal to one State. Although the ECJ in subsequent case law stated that *Zambrano* rights only apply in 'exceptional circumstances,'[295] the ruling has opened a new route for minor EU citizens to receive rights based on their status as a EU citizen. The general rule was established that primary carers of minor EU citizens would only be granted a derived right of residence when refusal of such right would lead to a situation where these children would have to leave the territory of the EU in order to accompany their parents. The rule recognizes that child autonomy and self-sufficiency are two different things: children have an autonomous right to reside in a Member State founded on their status as a EU citizen, but are not expected to exercise that right without appropriate parental support.[296]

In the context of children, aforementioned case law reveals that the ECJ applies a rather stringent test. As it was held in *Dereci*, the mere fact that *"the EU citizen [the primary carer] considered it desirable for economic or family reasons that his or her non-EU national family members should reside with them within the EU did not mean that the EU citizen was being 'forced' to leave EU territory if that right was not granted."* Instead, the allotment of the right of residence has to be absolutely crucial, for the EU citizen child to be able to reside, or to be taken care of, in the EU. In *Iida*, Mr Iida and his spouse had joint responsibility for their daughter. The ECJ however, relied on the evidence that father and daughter had a good relationship with a lot of contact, irrespective of the fact both lived in a different country. The right of residence was therefore not held to be sufficiently crucial. In *O & S*, the ECJ went even further. Despite its observation that refusal of a residence permit to Mr O, and possibly the decision of Mrs S to leave the territory as a consequence of that refusal, would harm

[292] Joined Cases C-457/12 and C-456/12, *O & S* [2014] OJ C 135/6, par. 33.
[293] Joined Cases C-457/12 and C-456/12, *O & S* [2014] OJ C 135/6, par. 37-43.
[294] Joined Cases C-457/12 and C-456/12, *O & S* [2014] OJ C 135/6, par. 43-44.
[295] F.e. C-434/09, *McCarthy* [2011] ECR I-3375.
[296] Neale (2004) and Lister (2008).

the relationship with the biological father of either the third country national or the minor EU citizen, it suggested in its judgment that there was no evidence of a sufficiently dependent relationship for the minor EU citizen to be denied the enjoyment of the substance of the rights.

In *Alokpa*, the ECJ was a little more reserved in 'suggesting' a solution to the national court. The case was significant however, because the ECJ went as far as to hint that a refusal to a right of residence in Luxembourg would probably not deprive the EU citizenship status of Mrs Alokpa's children of its effectiveness. On the basis of their French nationality, they would have a legitimate right of residence in France. The ECJ in this regard, did not attach any weight to the circumstances that Mrs Alokpa and her children had never been in France, and had no strings with the country in terms of relatives or acquaintances. In fact, their French nationality was nothing more than sole coincidence: it could have been any country. Although the ECJ did not touch upon the matter in its reasoning, it is not unimaginable however, that the ECJ attached weight to the fact that because French is the official language in Togo, the family would have relatively little difficulty integrating in French society.

S & G confirms how family life may be secured through the effectuation of EU citizenship rights, but only as a side effect of the realization of optimal circumstances for the exercise of free movement rights. This means, that when considering whether a third country national family member in the ascending line who takes care of EU citizen's child with the status of a worker is eligible for a right of residence such as in the *S & G* case, the fact that it could possibly deter the EU citizen from exercising his free movement rights is decisive. The mere desirability that the child is cared for by a family member in this respect was held not to be decisive.

4. DEPENDENCY

4.1. Introduction

As has stated in the previous chapter, ‘dependency’ has evolved in the case law of the ECJ as a principal qualifying criteria when deciding on whether a right of residence should be granted. This works in two ways. Originally, the ‘dependent’ relationship between an EU citizen and his descendants has been a way through which the latter have been able to derive rights from the citizenship status of the latter.[297] In these cases, minor EU citizen can derive a right of residence in the host State because they qualify as a family member of their migrating EU citizen parent. This route will be referred to as ‘Route A’.

In the past decade however, the criterion has also proved to be a source of rights for third country national parents with a child with a EU citizen status of whom they are the primary carers. In these cases, children are dependent to the extent that refusal to grant these parents a right of residence in the Member State in which the minor EU citizen resides would ‘*deprive his EU citizenship status of its effectiveness*’ and undermine the ‘*enjoyment of the substance his rights*’.[298] See to that extent paragraph 3.4.2 on primary carers.[299] In doing so, the dependent relationship has become another route for securing the existence of the family unit of EU citizens. This route will be referred to as ‘Route B’.

But although the criterion takes a central position in EU citizenship legislation and case law, clear guidelines as to what exactly constitutes ‘dependency’ do not exist. These guidelines would be welcome however, since the existence of such relationship determines whether a child is able to reside with his family. In this chapter, the current meaning under EU law will be discussed using Directive 2004/38, the Communication from the Commission on guidance for better transposition and application of Directive 2004/38, the Communication on guidance for application of Directive 2003/86 (on family reunification) and the most important case law of the ECJ.[300]

4.2. ‘Dependency’ in Route A

Article 2(2)(c) of Directive 2004/38 provides that young family members who are *“the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)”* are eligible for a number of (derived) rights, such as the right of residence in the host State. ‘Dependency’ in this respect has served as a basis on which to claim ‘child’ status.[301] In its case law, the ECJ does not refer to the age of children, which suggests that this is irrelevant in considering whether a relationship of dependency exists. The age of 21 thus merely serves as an upper limit of the age-based assessment.

---

[297] Article 2(2)(c) Directive 2004/38.
[298] C-34/09, *Zambrano* [2011] ECR I-1177.
[299] Paragraph 3.4.2. p. 39.
[300] ‘Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’, COM(2009) 313. And Communication from the Commission to the European Parlement and the Council on guidance for application of Directive 2003/86 on the right to family reunification’. COM(2014) 210 final.
[301] Stalford (2012), p. 24.

In 2009, the Commission published a communication, which aimed to provide guidance on how the different provisions of Directive 2004/38 should be interpreted. The Commission issued a similar communication in 2014, but this time on the interpretation of the Family Reunification Directive. Article 4(2)(a) of this Directive grants minor children a right to family reunification on the condition that the 'sponsor'[302] or the spouse has custody and the children are ***dependent*** on him/her. While it needs to be kept in mind that the context and the purpose of the Free Movement Directive and the Family Reunification Directive are different, the criteria used by the ECJ to assess the level of dependency may, according to the Commission, *mutatis mutandis*, serve as guidance to Member States when interpreting 'dependency' under Directive 2004/38.[303] Both communications consolidate all previously existing case law on the interpretation of the criterion of dependency and serve therefore as a good starting point for this analysis.

The ECJ stated in 2009 that "*the status of a 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the EU citizen or by his spouse/partner."*[304] ECJ case law reveals that 'material support' in this respect refers to financial support, indicating how the dependent relationship in the early years had to be of financial nature in order to be entitled to a right of residence or social benefits. No further conditions were imposed (such as living together), because the EU legislator had never intended "*to impose specific conditions .. concerning the way in which they [EU citizens] must conduct their married life in order to qualify, as a family, for the right to free movement*."[305]

It seems far-reaching that family members could be living in the host Member State separate from the worker and still have a claim, provided they could show some form of ongoing financial dependency. By acknowledging the existence of a relationship of financial dependency in situations where the family is separated, the ECJ had accepted a broad scope. It has however, explicitly ruled out application of the free movement provisions in cases where the EU citizen had not moved, as in the *Morson* case for example.[306] These rights were therefore only of limited meaning to children, because children generally cannot migrate independently of their parents. The only children able to benefit these rights were those of migrating EU citizen.[307]

Currently, eyes are on the interpretation of 'financial dependency' in the context of a potential Brexit. In case of a Brexit, as the result of a positive outcome of the referendum held on June 23rd 2016, the UK plans to adapt its child allowances for EU citizens from another Member State residing in the UK. They would be reconsidered, and adapted to the 'circumstances' of the home State.[308] As a result, the child allowances would be reduced.

---

[302] Art 2(a)-(d) Directive 2003/86: The Directive applies to third country sponsors. That means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU, who is residing lawfully in a MS, and who applies or whose family members apply for family reunification, and to their third country national family members who join the sponsor to preserve the family unit, whether the family relationship arose before or after the resident's entry.

[303] COM(2014) 210 final, p. 7.

[304] COM(2009) 313 final, p. 5.

[305] C-267/83, *Aissatou Diatta* [1985] ECR I-574, par. 18a.

[306] Joined Cases C-35/82 and C-36/82, *Morson* [1983] ECR I-3723, par. 16.

[307] Stalford (2000), p. 109.

[308] See NRC Handelsblad (in Dutch): http://www.nrc.nl/nieuws/2016/02/19/brexit-afgewend-eu-bereikt-deal-over-brits-eu-lidmaatschap (Last accessed June 23rd 2016).

In later case law, the ECJ has developed the criterion of 'dependency' by stating that the status of a 'dependent' family member is the result of a factual situation characterized by the fact that legal, financial, emotional or material support for that family member is provided by the sponsor or by his/her spouse/partner.[309] When examining an applicant's personal circumstances, the competent authority must take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the sponsor and the family member.[310] As a result, the practical interpretation of the notion of 'dependency' may differ according to the situation and the particular family member concerned.

According to the Commission, in order for family members to be dependent, it must be assessed in the individual case whether, having regard to the financial and social conditions, they need material support to meet their essential needs in their country of origin or the country from which they came at the time when they applied to join the EU citizen (i.e. *not in the host State where the EU citizen resides*).[311] This does not require an examination whether the families concerned would in theory be able to support themselves, for example by taking up paid employment.[312] What matters is that the dependency is genuine and structural in character. Member States may impose particular requirements as to the nature or duration of the relationship of dependency to satisfy themselves that the dependence is genuine and stable, and has not been brought about with the sole objective of obtaining entry into and residence in its territory. [313]

In order for such relationship to be acknowledged, dependent family members are *"required to present documentary evidence that they are dependent."*[314] This evidence may be adduced by any appropriate means, as confirmed by the ECJ in *Jia*.[315] Where the family members concerned are able to provide evidence of their dependency by means other than a certifying document issued by the relevant authority of the country of origin or the country from which the family members are arriving, the host State may not refuse to recognize their rights. The mere undertaking from the EU citizen to support the family member concerned however, is not sufficient in itself to establish the existence of a relationship of dependency.[316] Whether family members could support themselves has furthermore been held to be irrelevant. [317] That would make it excessively difficult for the descendent to obtain the right of residence.[318]

What has not been clarified however, is how to apply the concept in a context in which *others* than the person on whom they are dependent could support the family members. Following the aforementioned reasoning of the ECJ, it would not be unnatural to conclude that that possibility of family members receiving support from others than the EU citizen is irrelevant either. If indeed others than the EU citizen support a family

---

[309] By analogy with C-316/85, *Lebon*, paras. 21-22; Case C-200/02, *Chen*, para 43.
[310] By analogy with C-83/11, *Rahman* [2012] 3 CMLR 55, par. 23.
[311] By analogy with C-1/05, *Jia* [2007] ECR I-1, para 37.
[312] COM(2009) 313 final, p. 5. See also C-423/12, *Flora May Reyes* ECLI:EU:C:2014:16, par. 28.
[313] COM(2014) 210 final, p. 7.
[314] COM(2009) 313 final, p. 6.
[315] C-1/05, *Jia* [2007] ECR I-1, par. 41.
[316] C-1/05, *Jia* [2007] ECR I-1, paras. 42-43.
[317] C-423/12, *Flora May Reyes* ECLI:EU:C:2014:16.
[318] See EU Law Blog: http://eulawanalysis.blogspot.nl/2014/01/when-is-family-member-of-eu-citizen.html (Last accessed March 4th 2016).

member, then secondly, it remains unclear how to apply these notions aside from each other.[319] The EU citizen could be responsible for the whole, a substantial part or significant support. But when is the family member considered sufficiently dependent? It has been argued that it would be best to require a significant contribution from the EU citizen, as this would reflect "*the obligation to interpret the free movement rules broadly, and is consistent with the case law to the effect that the exercise of an economic activity need not be full time or supply all the income of a worker, but need only be 'genuine and effective'.*"[320] The ECJ will possibly provide clarification on these matters in the currently pending *Chavez* case, which will be discussed in Chapter 5.[321]

What remains unclear lastly, is what to do when the dependency relationship ceases, or is likely to cease to exist. The EU legislator has dealt with the loss of the family link in Article 12 and 13 of Directive 2004/38, but it has not with respect to the loss of the dependency relationship. If the dependent family member is not a EU citizen, a tension exists between admitting that person on the basis of their dependence on the one hand, and their right to take up employment pursuant to Article 23 on the other hand.[322] The ECJ has dealt with this matter to some extent in the case of *Flora May Reyes*.[323] This case concerned Ms Reyes, a Philippines citizen, who was left in the care of her grandmother when she was three years old. Her mother moved to Germany to work to be able to support her family resident in the Philippines. She obtained German citizenship and remained in close contact with the family by sending money each month, paying for studies and visiting them each year. By the time Mrs Reyes had finished her degree, she wanted to join her mother in the EU. She was refused a right of residence because although she was economically dependent, it was possible to provide in her own basic needs by taking up paid work. The ECJ ruled that the fact that the family member – due to personal circumstances such as age, education and health – is deemed well placed to obtain employment and in addition intends to start work in the host State does not affect the interpretation of the 'dependent' relationship as provided for in Directive 2004/38, even though that relationship would cease to exist once the relative would actually start to work.[324] The ECJ held that the situation of dependence must exist at the time when he applies to join the EU citizen on whom he is dependent.[325] Another reading would be contrary to Article 23 Directive 2004/38, as it would prohibit the descendant to take up employment in the host State.[326]

4.3. 'Dependency' in Route B

Although the focus originally seemed to be on dependency in terms of financial dependency, in more recent case law in the context of 'Route B', the criterion was further developed. The ECJ has established that besides the financial relationship, the legal and emotional nature of the dependent relationship is relevant too.[327] These

---

[319] Guild, Peers and Tomkin (2014), p. 44.
[320] Guild, Peers and Tomkin (2014), p. 46.
[321] Chapter 5, p. 53.
[322] Guild, Peers and Tomkin (2014), p. 46.
[323] C-423/12, *Flora May Reyes* ECLI:EU:C:2014:16.
[324] C-423/12, *Flora May Reyes* ECLI:EU:C:2014:16, par. 33.
[325] C-1/05, *Jia* [2007] ECR I-1, par. 37 and C-83/11, *Rahman* [2012] 3 CMLR. 55, par. 33.
[326] Article 23 Directive 2004/38: Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.
[327] Joint Cases C-457/12 and C-456/12, *O & S* [2014] OJ C 135/6, par. 56.

specific elements will be discussed in turn.

Legal

Legal dependency in the context of minor EU citizens refers to parental authority and custody. In *O, S & L* the ECJ stated that "*for the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the custody of the sponsors' children [..] are also relevant.*"[328] To determine on which carer the minor EU citizen is depending legally, it is to be determined which carer(s) holds custody of the child. The holder of custody does not only legally represent the minor EU citizen, but also has other significant powers with regard to the child. Article 2 sub 9 of the Brussels II bis Regulation on *inter alia* matters of parental responsibility for example defines the term 'right to custody' as to include "*the rights and duties relating to the care of the person of a child and in particular the right to determine the child's place of residence.*"[329]

Financial

Originally, the ECJ focussed primarily on relationships of dependency of financial nature.[330] In establishing whether such relationship exists based on the facts of each case however, the Court has left many aspects to the discretional interpretation of the Member States. The ECJ has for example not referred to a minimum duration of the relationship of financial dependency; it has not established the minimum amount of material support provided for by the primary carer; nor the standard of living needed for determining the need for financial support by the primary carer. AG Geelhoed in C-1/05 *Jia* stated that the test should primarily be "*whether, in the light of their personal circumstances, the financial means of the family members permit them to live at the minimum level of subsistence in the country of their normal residence.*"[331]

Emotional dependency

Although the ECJ has stated that in assessing whether the minor EU citizen is *dependent* on his third country national parent emotional dependence plays a role, it has never explained when a child can be considered emotionally dependent.[332] Instead, the Court has elaborated on the importance of the fact that the third country national parent is his primary carer.[333] In *Chen* for example, baby Catherine's mother was granted a right to reside in the UK. According to the ECJ it was clear that "*enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.*"[334] In *Alokpa* too, the ECJ referred to the mother of the two minor EU

[328] Joint Cases C-457/12 and C-456/12, *O & S* [2014] OJ C 135/6, par. 51.
[329] Council Regulation No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000 (PbEU 2003, L338/1).
[330] COM(2009) 313 final, p. 6.
[331] AG Geelhoed in C-1/05, *Jia* [2007] ECR I-1, par. 96.
[332] AG Mengozzi seems to assume that both parents in Zambrano derive a right of residence. See C-256/11, *Dereci* [2011] ECR I-11315, par. 45.
[333] C-40/11, *Iida* [2012] OJ C145/4, par. 69.
[334] C-200/02, *Chen* [2004] ECR I-09925, par. 47.

citizens as the ‘sole carer’ of those children. As a result, she could have the benefit of a derived right to reside in France.[335]

It is interesting how the ECJ deals with the other parent, who is not the primary carer. In fact, it does not elaborate on this category. In *Baumbast* the ECJ found that a third country national mother as the primary carer of her child was entitled to a right of residence in the host State. The fact that the EU citizen parent and she had divorced and he had ceased to be a migrant worker in the host State was irrelevant, because to refuse a parent permission to remain who is the primary carer of the child exercising his right to pursue his studies in the host Member State, would infringe that right.[336] The ECJ attached weight to who *actually* exercised the care. The ECJ did not investigate whether the EU citizen parent from who she had divorced could have been able to provide that same care, even though he was already in the possession of a right of residence.[337]

Up until now, this seems the only clue in establishing dependency of emotional nature.

4.4. Assessment

The analysis in this Chapter reveals the secondary position children are in as a result of the qualifying nature of the ‘dependency’ criterion. Children are dependent on a relationship regardless of whether that dependency operates in the best interests of the child. The *Chen* case is a good example, in which the child lost her Chinese nationality because her parents wanted to live in the UK. But whilst it confirms the inability to enjoy rights independently within the EU citizenship legal structure, it also downgrades children to passive recipients, because they have to be cared for. Although in most cases children are to some extent dependent on adults, the notion prohibits children from ever being considered as active contributors.

The interpretation of the notion of ‘dependency’ by national courts when assessing the facts of a particular case has profound impact on the lives of the children involved in that case. When a relationship is established via Route A, children obtain a right of residence in the State to which the EU citizen on whom they are dependent have moved. They also enjoy a number of rights to properly integrate in that new State, such as the right to pursue and finish their education, irrespective of the continued presence of their EU citizen parent. When a relationship is established via Route B, parents can derive a right of residence from their EU citizen children in the Member State in which they reside. EU law grants them these rights despite the fact that the minor EU citizens have not moved and are economically inactive. If not, the effectiveness of their EU citizenship status would be undermined and they would be deprived of the genuine enjoyment of the substance of those rights.

Despite the crucial relevance of the interpretation of this criterion for children and their ability to enjoy their family life, neither the European legislator, nor the European judiciary has provided the national courts with substantial guidance. Certain questions have yet to be answered. Furthermore, some elements are identified as being fundamental to the establishment of a dependent relationship, but have hardly ever been elaborated on. A good example is the emotional nature of that to be established dependent relationship. Not only is the substance of this element unclear, it is also left

---

[335] C-86/12, *Alokpa* [2013] OJ C 344/21, par. 34.
[336] C-413/99, *Baumbast* [2002] ECR I-07091, par. 73.
[337] This was confirmed in C-480/08, *Texeira* [2010] ECR I-1107.

up to the national courts to decide on the way it relates with the legal and financial nature of the dependent relationship. The result is very ad hoc and fact specific jurisprudence, with detrimental effect for the predictability and thus the legal position of children. Clarification by the ECJ would be welcome, since currently parties to a great extent have to guess their chances of a derived right of residence, and thus – most likely – family life in the host State. Luckily, the ECJ has the opportunity to provide this clarification in the pending *Chavez* case, which will be discussed in Chapter 5.

5. HOW 'FUNDAMENTAL' IS EU CITIZENSHIP FOR MINOR EU CITIZENS?

5.1. Introduction

The ECJ has stated on several occasions that EU citizenship is destined to be the fundamental status of the nationals of the Member states.[338] As first established in *Rottmann*[339] and *Zambrano*,[340] Article 20 TFEU confers rights directly on EU citizens, even without there being a supporting cross-border link. The line of case law in which this 'route' to derive rights was 'discovered' by the ECJ, has been referred to in the previous Chapters as 'Route B'.

But from a children's rights perspective, EU citizenship case law concerning claims via Route B has on numerous occasions resulted in an unsatisfactory situation. In these cases, a right of residence was refused to one of the family members of a minor EU citizen, putting pressure on the child's ability to reside with his family in his home State. This raises questions as to the reach of the intended 'fundamental status' of EU citizenship. Of what meaning is such status, if one cannot be with both his parents?

The potential meaning of EU citizenship for minor EU citizen's fundamental rights will be discussed in this chapter. The right to family life in particular will be paid attention to. The way the ECJ currently deals with (alleged) violations of fundamental rights of EU citizens will be discussed first. To continue, the opinion of certain scholars on how to use the EU citizenship status as a vehicle to improve the current situation for minor EU citizens will shortly be elaborated on. Also, the implications of the existing and proposed approaches for minor EU citizens will be considered. Lastly, the currently pending *Chavez* case will be discussed, and the possible implications for the fundamental protection of minor EU citizens will be drawn.[341]

5.2. Starting Point: *Zambrano*

In the *Rottmann* case, the ECJ stated that *"It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attached thereto falls, by reason of its nature and its consequences, within the ambit of [EU] law."*[342] It was the first time the ECJ held that even in the absence of any physical movement, national measures which deprive an individual of his EU citizenship status falls within the scope of the provisions on EU citizenship.

The judgment paved the way for the 'emancipation of EU citizenship' in the following case of *Zambrano*.[343] Despite the extensive elaboration of AG Sharpston, the ECJ in *Zambrano* was brief and clear: a link with EU law could be established, despite the

[338] C-184/99, *Grzelczyk* [2001] ECR I-06193, par. 31.
[339] C-135/08, *Rottmann* [2010] ECR I-1449.
[340] C-34/09, *Zambrano* [2011] ECR I-1177.
[341] C-133/15, *H.C. Chavez Vilchez et A.* (nyr).
[342] C-135/08, *Rottmann* [2010] ECR I-1449, par. 42.
[343] Lenaerts (2015), p. 2.

absence of a cross-border link, because the minor EU citizens faced the deprivation of the genuine enjoyment of their EU citizenship rights. The ECJ reasoned that because EU citizenship is destined to be the fundamental status, Article 20 TFEU precludes such measures.[344] As a result, Ruiz Zambrano was granted a work permit and a right of residence in Belgium with his children. The statement generated a heated debate among EU law practitioners, as it remained unclear what could be understood as the genuine enjoyment of 'the substance of the rights'.

The EU is based on a complex and delicate balance of powers between Member States, the EU and its institutions. Firstly, the principle of conferral limits the EU's powers to those laid down in the Treaties.[345] This is referred to as the (vertical) division of powers. Secondly, the EU institutions are bound to act within the limits of the powers conferred upon it by the Treaties, in conformity with the procedures, conditions and objectives set out therein.[346] This is referred to as the (horizontal) separation of powers.[347] In general, the EU is not competent to act in 'internal situations.' By acknowledging that a cross-border link is not always necessary to fall within the scope of EU law, the ECJ has however interfered with the delicate make-up of the EU.

Previously, it had stated "*EU citizenship was not intended to enlarge the scope ratione materiae [of EU law].*"[348] With its judgment however, the ECJ extended its jurisdiction and in doing so, the scope of EU law. After all, the ECJ provided itself with the possibility to consider matters in internal situations (in which a static EU citizen had been deprived of the genuine enjoyment of 'the substance of the rights).' Although the notions of 'the scope of EU law' and the 'competence of EU institutions' overlap, the former is broader than the latter.[349] By extending the scope to these aforementioned situations, the ECJ has blurred this distinction. In doing so, it has enabled itself to impose limitations on Member States, even if the matter at issue falls outside the scope of the EU competence to act and the Member States are in principle free to regulate the matter. Due to its profound impact on the balance of powers in the EU, determination of the exact scope of 'the substance of the rights' of EU citizenship is of utmost importance.

Van Eijken & de Vries identified shortly after the *Zambrano* judgment, that besides the impact on the division of competences, the judgment could also have important implications for the scope of application of fundamental rights in the EU. As stated in Chapter 2, the protection of fundamental rights is activated in situations that 'fall within the scope of EU law'.[350] A broad interpretation of Article 20 TFEU would thus trigger the application of fundamental rights more easily. The scholars considered that it seemed as if the ECJ, when looking at the substance of the rights of citizens to determine whether Article 20 TFEU is applicable, the Court referred to a certain "spine" of EU citizenship. They suggested that "*the enjoyment of – at least certain – fundamental rights could be qualified as crucial for the enjoyment of European*

[344] C-34/09, *Zambrano* [2011] ECR I-1177, par. 42. "*Article 20 TFEU precludes national measures which have the effect of depriving EU citizen of the genuine enjoyment of the substance of the rights conferred by virtue of their status of EU citizens*."
[345] See Art 5(1) and 5(2) TEU.
[346] See Art 13(2) TEU.
[347] Prechal, De Vries and Van Eijken (2011), p. 214.
[348] See for example C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 26. The statement returned in C-256/11, *Dereci* [2011] ECR I-11315.
[349] Prechal, De Vries and Van Eijken (2011), p. 215.
[350] Art 51 Charter.

citizenship rights."[351] Van Eijken & De Vries had been well aware of the exceptional circumstances of the case, the several points in need of clarification and other obstacles, but were convinced that the judgment had a huge potential for EU citizens. To them, it were possibly the start of the determination of certain minimum guarantees for static EU citizens. Consequently, they designated 'Route B' as "*a new route into the promised land.*"[352]

As Van Eijken and De Vries predicted in 2011, new cases since *Zambrano* have offered the ECJ the possibility to provide further insights into the complex status of EU citizenship and what is to be considered 'the substance of the rights.' In this subsequent case law however, neither has the scope of EU citizenship been much extended, nor has its nature been strengthened in the way Van Eijken and De Vries in 2011 expected. The most important case law on 'Route B' has been discussed in Chapter 3.[353] In the following paragraph, these cases will not be discussed extensively, but only to the extent the reasoning of the ECJ has contributed to the determination of the content of the 'substance of the rights'.

5.3. The 'Substance of the Rights' of EU Citizenship

The *McCarthy* and *Dereci* cases illustrate that once the enjoyment of the substance of EU citizenship rights is at issue, the matter falls within the scope of EU law – and EU fundamental rights protection is applicable.[354] Strikingly however, the ECJ was not ready to find the separation of the family in *McCarthy* and *Dereci* as part of that 'substance'. On the contrary, the ECJ stated that *"the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."*[355] The question arises what does constitute this 'substance'. According to AG Sharpston, "*the right to have what rights?"* is the crucial question on which the essence of true European citizenship depends.[356]

In its case law, the ECJ has formulated an answer to this question. In *Zambrano*, the ECJ stated that the Zambrano children would be deprived of the genuine enjoyment of the substance of their EU citizenship rights if their father would not be granted a right of residence, because *"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."*[357] In *McCarthy* and *Dereci* the ECJ has clarified that this concerns more than 'serious inconveniences.' It requires a de facto loss of ones rights attached to the status of a citizen of the EU. In fact, it should be understood as meaning that the EU citizen *"has to leave not only the territory of the Member State of which he is a national but*

[351] Van Eijken and De Vries (2011), p. 13.
[352] Van Eijken and De Vries (2011), p. 15.
[353] Chapter 3, p. 28.
[354] Kochenov (2013), p. 510. See for the facts of C-256/11, *Dereci* p. 40, and for C-434/09, *McCarthy* p. 37.
[355] C-256/11, *Dereci* [2011] ECR I-11315, par. 68.
[356] AG Sharpston in C-34/09, *Ruiz Zambrano* [2011] ECR I-1177, par. 3.
[357] C-34/09, *Zambrano* [2011] ECR I-1177, par. 44.

also the territory of the Union as a whole."[358] The strict interpretation does not include violations of fundamental rights, even though the reasoning of the ECJ reveals the judges were well aware of the implications.[359] Only after establishing the existence of the described effect, the measure may be examined in the light of the Charter.

In subsequent case law, this interpretation has been confirmed.[360] In *O, S & L* the ECJ has added that to establish whether a national measure produces such a 'deprivation effect', the case must be examined by reference to both law and the facts of the case.[361] In *Iida* for example, the mothers held permanent residence permits, meaning that in law there would be no obligation for her EU citizen children to leave the territory of the EU. The ECJ considered however, that the factual existence of a dependency relationship between the children and the third country nationals could have meant that if they would be refused a residence permit, the children would have to leave the territory with them after all. In the absence of such dependency relationship, the EU citizenship provisions were held not to be applicable.[362]

The ruling in *Alokpa* lastly, in a joint reading with *Zambrano*, clarified that a third country national who is the primary carer of a minor EU citizen is entitled to a residence and work permit in the Member State *of which such a EU citizen is a national*.[363] If not, the third country national would be forced to leave the territory of the EU. The fact that Luxembourg did not grant a residence permit in the *Alokpa* case did not have a 'deprivation effect', because the French nationality of the children enabled them to legally move and reside in France. Also, the case clarified that whilst a residence permit granted on the basis of Article 21 TFEU is subject to the conditions of Article 7(1)(b) of Directive 2004/38 – requiring sufficient resources – a residence permit granted on the basis of Article 20 TFEU is not.

From this analysis it follows that the ECJ has not included fundamental rights in its interpretation of the 'substance' of EU citizenship rights. Current interpretations of the substance however, have put pressure on the ability of minor EU citizens to enjoy their rights in the company of their families. For them EU citizenship remains an empty shell. It seems legitimate to wonder whether a minor EU citizen would be able to genuinely enjoy the substance of his rights whilst his family is not with him? In the following paragraph it will therefore be assessed whether this 'substance' should not include some level of protection, at least to family life.

5.4. Should 'Substance of the Rights' entail the Right to Family Life?

From the start of the integration process, the concepts of EU citizenship and fundamental rights have been closely connected, not in the least because they share the same objective: to situate the individual at the centre of the constitutional construction of an integrated Europe.[364] The preamble of the Charter even states that the Union 'places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.' But despite this

---

[358] C-256/11, *Dereci* [2011] ECR I-11315.
[359] Chapter 3, p. 40.
[360] C-40/11, *Iida* [2012] OJ C145/4.
[361] Joined cases C-356/11 & C-357/11, *O, S & L* [2012] ECR I-0776.
[362] Joined cases C-356/11 & C-357/11, *O, S & L* [2012] ECR I-0776, par. 80.
[363] C-86/12, *Alokpa* [2013] OJ C 344/2, par. 32.
[364] O'Leary (1995), p. 519.

convergence, the jurisprudential ways of EU citizenship and EU fundamental rights have only rarely crossed paths in an explicit way. The Treaties have maintained two formally and systematically differentiated legal regimes that have been built upon divergent rationales.[365]

Some legal scholars have put forward strong arguments in favour of this division. First and foremost, a connection between the two would put the constitutional structure of the EU and its underlying principles, such as the principle of conferral, under pressure. Although the intention of the drafters with regard to the objective of the EU is still unclear, EU fundamental rights law has been primarily designed to protect workers who have exercised their free movement rights. Although the EU has expanded its social and human rights agenda in the past decade, the application of EU fundamental rights law is still limited. The Charter is only applicable to situations whenever situation falls within the scope of EU law.[366] The ECJ could expand its jurisdiction by interpreting 'the substance of the rights' broadly so to include interferences of the family life of minor EU citizens who have not exercised their right to move. In doing so however, it would expand the scope of EU law to internal situations and circumvent the measures put in place to preserve a balance of powers between the EU, its institutions and the Member States.

It has furthermore been argued that the universality of fundamental rights is at odds with the specific categories of persons that EU citizenship confers rights on. Lastly, it has been noted that a connection would potentially put pressure on naturalization law. Van Eijken has warned that *"Member States may seek to limit their rules on the acquisition of nationality to persons born on their territory, since nationality opens the door to EU citizenship, within the limits of international law."*[367] As a result, the broad interpretation of 'substance' of EU citizenship would lead to a 'levelling down' of fundamental rights protection in the Member States.

Scholars in favour of a connection between the two concepts have rebutted these arguments. With regard to the division of competences, it has been argued that ever since its introduction EU citizenship has filled the gaps in both the personal and material scope of fundamental rights protection, be it with a different motif.[368] The principle of non-discrimination for example, has stretched the boundaries of the division of competences between the EU and its Member States by granting 'equal' protection to EU citizens and Member State nationals. With regard to the argument on the universal nature, applying to everyone and not just EU citizens, the design and content of EU citizenship has precluded much of this exclusionary effect.[369] The ECJ furthermore, has clarified that a strong involvement in the protection of fundamental rights of citizens is likely to spread across the nationality divide. With regard to the naturalization argument, lastly, it has been argued that it is not that likely that Member States will change their laws as the result of a connection between the notions of EU citizenship and fundamental rights protection, because it would be an ineffective remedy. If more third country nationals would enter and remain in the home State because they derive

[365] Sanchez, (2014), p. 465.
[366] Article 51(1) Charter.
[367] Van Eijken and De Vries (2011), p. 13. The nationality laws of Ireland for example, were revised after the ECJ's judgment in Chen in order to limit the possibilities for non-Irish nationals to acquire Irish nationality.
[368] Sanchez (2014), p. 466.
[369] Kostakopoulou (2001), p. 66.

rights of residence from their minor EU citizens, they are likely to remain in that State with them to provide them the care needed, whether they have the prospect of acquiring that nationality too or not.

The two frameworks might have been designed and remained separately, but *"their concurring goals, their common weaknesses, their openness and their far-reaching constitutional meaning tend to blur the contours of both legal doctrines."*[370] The *Zambrano*-test has put the division under pressure, a development that has been welcomed by many. A broad interpretation would provide a more consistent level of fundamental rights protection than under the previously existing framework, which would correspond with the intended fundamental status of EU citizenship.[371] Under the current interpretation of EU citizenship rights the absolute deprivation of the enjoyment of these rights has to be weighed. The test is however limited to such extent, that it does not leave room to scrutinize the different circumstances in which this genuine enjoyment could be negatively affected, but only enables review in those cases where citizenship rights are absolutely stripped out.[372]

Such interpretation would furthermore offer a potential remedy to the problem of 'reversed discrimination.' Because EU law does – generally - not apply in purely internal situations, any difference in treatment between static EU citizens and those who have exercised their free movement rights, does not fall within the scope of EU law.[373] As a result, nationals of Member States that have never moved are structurally treated less favourably than the nationals that have moved, because they do not enjoy the rights granted under EU law. A broad interpretation of the substance of EU citizenship rights however, would provide a minimum level for both moving and static EU citizens.

Lastly, it is worth noting the progressive visibility of fundamental rights protection in the EU, resulting in both national courts increasingly asking questions to the ECJ about the applicability of the Charter and EU citizens turning to the EU institutions to question their protection.[374] It has been argued that these trends indicate a change in the perception among EU citizens of the protective roles of the Member States on the one hand, and the EU on the other. Although these developments would never be sufficient to legitimize a structural change in the fabric of the EU, it seems that it would legitimize some adaption of the rigid legal system to accommodate a higher minimum degree of protection to EU citizens.

5.5. Routes to Enhanced Fundamental Rights Protection of Minor EU Citizens

Although the call for enhanced protection of minor EU citizens is strong, arguments against the connection of EU citizenship and fundamental rights have been taken serious by aforementioned legal scholars too: to 'just' extend the scope of application of fundamental rights protection by a broad interpretation of the substance of EU citizenship rights would be a bold and unrealistic move of the ECJ in a politically sensitive context, contravening the delicate but fundamental system of the balance of powers. Several scholars have proposed ways to connect the two concepts in a way that respects this system. A closer look at some of these proposals will shed light on the

---

370 Sanchez (2014), p. 466.
371 AG Sharpston in C-34/09, *Zambrano* [2011] ECR I-1177, par. 170.
372 Sanchez (2014), p. 478.
373 C-127/08, *Metock* [2008] ECR I-6241, par. 78.
374 Sanchez (2014), p. 468.

means the ECJ has at its disposal to enhance fundamental rights protection of minor EU citizens.

AG Sharpston firstly, proposed in his opinion on the *Zambrano* case to extend the application of fundamental rights to areas in which the EU has competence to act (whether exclusive or shared), even if such competence has not yet been exercised.[375] He argued that the fact that Member States have conferred competences on the EU based on which directly effective measures can be adopted, means that the EU should take its responsibility to guarantee fundamental rights protection in the areas in which it has been granted competences, regardless of whether those powers have been exercised.[376] A competence-based approach would avoid the need to create a 'fictitious or hypothetical' link with EU law, it would encourage Member States to promote fundamental rights protection and it would most certainly be in line with the alleged 'fundamental status' of EU citizenship. Most importantly, it would mean an increase in legal certainty.

The claim for legal certainty can be contested however, especially from the viewpoint of the division of competences. The EU is not based on a clear system of allocation and exercise of competences, like in a federation. Instead, the system comprises both explicit and implicit powers, which are designed to fulfill broad objectives. The flexible and dynamic nature of this system makes it difficult to apply fundamental rights based on competences, particularly where it concerns competences shared by the EU and the Member States.[377]

Bogdandy has proposed an option that provides more clarity.[378] He has claimed that *"systemic violations of the essence of fundamental rights, as enshrined in Article 2 TEU, by any public authority in the European legal space amount to infringements of Article 20 TFEU, which can be considered by national courts in cooperation with the ECJ."*[379] His proposed remedy is based on the presumption that national laws and national courts comply with the obligation laid down in Article 2 TEU. Whenever this presumption could be rebutted, i.e. human rights would be systematically violated,[380] the substance of EU citizenship rights would entail a core content of protection that would work as a last resort.[381]

Bogdandy's proposal would enhance the position of minor EU citizens by providing them with protection against systemic violations of their fundamental rights. The remedy has however, also attracted criticism, for example with regard to its inability to deal with the problems of reverse discrimination and inequality. Also, the emphasis on

---

[375] AG Sharpston in C-34/09, *Zambrano* [2011] ECR I-1177, par. 163.
[376] AG Sharpston in C-34/09, *Zambrano* [2011] ECR I-1177, par. 165.
[377] Jacobs (2001), p. 337.
[378] Von Bogdandy (2012), p. 516.
[379] Von Bogdandy (2012), p. 501.
Bogdandy calls its proposal the 'Reversed Solange doctrine', as the remedy is inspired by the Solange doctrine of the German Federal Constitutional Court. The Court had stated in that case that it does not exercise its competence to control EU secondary law as long as the Union ensures fundamental rights protection which is "essentially similar to the protection of fundamental rights required unconditionally by the Basic Law." This is further defined by the requirement to "generally safeguard the essential content of fundamental rights" and operates as a presumption to be disproved by the claimant. See BVerfGE 73, 339, 376 (1986) (Solange II).
[380] Inspiration should be drawn from art 7(2) TEU.
[381] Von Bogdandy (2012), p. 509.

Article 2 TEU has been criticized, as Article 2 TEU is only one of the numerous other sources guiding the ECJ in discovering and protecting fundamental rights outside the scope of Article 51(1) Charter.[382] Lastly, Kochenov has argued that systemic violations do not reflect the problems EU citizens face in their daily lives.[383] Following Bogdandy's proposal, a violation of Article 2 TEU would be found when fundamental rights in number or seriousness account for systemic failure and would put into question the basics of the European legal space as well as depriving EU citizenship of its practical meaning. It is not likely that the mundane problems EU citizens are currently facing will meet this abstract criterion.

Sanchez believes that the EU should not only be engaged in such exceptional cases.[384] She has rejected the notion of the substance of EU citizenship rights as an instrument to the general incorporation of fundamental rights, because that would constitute a complete circumvention of the Charter and therefore an unrealistic intervention of the ECJ to undertake. Instead, she proposes a 'relaxation' of the current approach upheld by the Court. The scope of EU law should not only include cases where the genuine enjoyment of EU citizenship rights is absolutely deprived, but also where it is seriously impaired.[385] According to Sanchez, such an approach "*would enable proportionality and fundamental rights review in a wider range of situations, and would help to narrow the gap between the protection offered to free-movers and third-country nationals covered on the one side, and static citizen on the other.*"[386]

Although it seems to level down to an arbitrary decision as to how and when one could speak of a serious impairment of the substance of EU citizenship rights, Sanchez argues for application of this approach in the specific field of family reunification.[387] She puts forward a number of arguments to support her claim. An important reason in favour is for example the need for the application of a uniform EU standard in this field, as the impact of EU law on this field is particularly strong. Furthermore, the protection of family life through family reunification – an area that already falls within the competences of the Member States - is one of the most important components of the status of EU citizenship. The denial of residence rights to family members is liable to severely hinder the genuine enjoyment of the rights conferred by EU citizenship once the right to be present in the EU as a whole has become part of the substance of that status, especially in the context of minor EU citizens.[388] Lastly, the proposed approach would, according to Sanchez, allow for an application of the Charter, which respects the limits of Article 51.

The ECJ has been willing to approach fundamental rights claims from a more EU citizen angle too. In the *ZZ* case for example, where it concerned the expulsion of a EU citizen with French/Algerian nationality, who had been legally residing in the UK for 15 years on grounds of public order.[389] He had travelled to Algeria, but upon return was refused admission to the UK by the UK authorities on national security grounds. The

[382] Kochenov (2012), p. 7-8.
[383] Kochenov (2012), p. 5.
[384] Sanchez (2014), p. 477.
[385] Sanchez (2014), p. 478.
[386] Sanchez (2014), p. 478. See also Wiesbrock (2011), p. 861.
[387] Sanchez (2014), p. 478.
[388] Sanchez (2014), p. 479.
[389] C-300/11, *ZZ v Secretary for the Home Department* [2013] EWCA Civ 7.

UK authorities based their decision on secret evidence, that Mr ZZ was not allowed access to. The UK Court of Appeal referred questions to the ECJ. In its answers, it held that at least *"the essence on the grounds on which a decision refusing entry [..] is based"* must be given.[390] Withholding this evidence contravened the principle of effective judicial protection as laid down in Article 47 of the Charter, because Mr ZZ was limited in his abilities to put forward an effective defence.

In this paragraph a number of legal solutions of different EU legal experts have been discussed, which demonstrate that the ECJ has a number of opportunities at its disposal to interpret 'the substance of EU citizenship rights' in way that would enhance the fundamental rights protection of minor EU citizens. It could extend the application of fundamental rights to the areas in which the EU has competence to act (whether exclusive or shared), regardless if such competence has been exercised. It could provide even more certainty by interpreting the notion of the substance as a shield against systemic violations of fundamental rights, using Bogdandy's construction of Article 2 TEU and Article 20 TFEU. If the ECJ lastly, would seek to relate to the more 'everyday life' problems of minor EU citizens, it could broaden the interpretation of 'the substance of the rights' to not just include cases where the genuine enjoyment of EU citizenship rights is absolutely deprived, but also those where it is seriously impaired. The ECJ has approached EU citizenship cases from a more fundamental rights perspective before (as follows from for example the *ZZ* case). The adoption of such an approach would be possible in the context of minor EU citizens too.

5.6. Assessment

Shortly after the *Zambrano*-test was 'invented' by the ECJ, speculations started on the possible implications for fundamental rights protection in the EU. Did 'the substance of the rights' refer to a certain 'spine' of rights, establishing some minimum level of protection for static EU citizens? It did not take long until it was clarified in the subsequent cases of *McCarthy* and *Dereci* that the ECJ would not go that far, respecting the delicate system of the balance of powers between the EU, its institutions and the Member States, on which the EU is founded. Ever since, the ECJ has followed an incremental approach, in which the ECJ has case-by-case answered questions and revealed under which circumstances an EU citizen is 'deprived of the substance of his EU citizenship rights'.

The interpretation of the 'substance' which the ECJ has adopted shows a minimalist understanding, in which the ECJ has limited the scope of the concept to situations of absolute deprivation of the enjoyment of citizenship rights (through expulsion or denaturalisation).[391] But despite this strict scope, the interpretation by the ECJ has been welcomed as it allegedly has "*unveiled that the status of EU citizenship encompasses the ultimate protection of membership and physical presence in the territory of the Union as a whole, confirming its will to assert the most fundamental protection awarded by membership and therefore, consolidating the 'citizenship-capability' of the EU.*"[392] It has offered an answer to what is to be understood 'the fundamental status'

[390] C-300/11, *ZZ v Secretary for the Home Department* [2013] EWCA Civ 7, par. 64.
[391] Landsbergen (2011), p. 287.
[392] Sanchez (2014), p. 476.

awarded to EU citizenship, without interfering with the limitations imposed by the horizontal provisions of the Charter.

Both the way it arrives at this interpretation, and the interpretation itself have been criticised. With regard to the procedure, scholars have been critical towards the lack of explanation given as to how it has come to this interpretation. The choice has been called 'random', lacking both a clear reasoning and a legal foundation. The absence of a legal foundation is especially problematic, because *"such rights could come from virtually every pool of rights"*[393], such as the TFEU, unwritten principles of law, the ECHR or the Charter. Without a reference to a legal foundation, the only source of the substance of rights of EU citizenship is the case law of the ECJ itself where such rights are presumably named.

With regard to the interpretation, it seems as if the ECJ simply used its own first example of what falls within the scope of the substance of rights ("*not being forced to leave the territory*", which was established in *Zambrano* and used since). Instead, the ECJ should have weighted different rights more carefully. In determining what is to be considered the fundamental status, the ECJ could at least have explained why it has chosen to exclude other rights from other sources, such as the right to family life. Instead, the ECJ has dismissed all other potential candidates.

According to Holmes, the cases *Rottmann, Ruiz Zambrano, McCarthy, Dereci, Iida* and *Alokpa* show that *"the life of the law [on EU citizenship] has not been logic, but has experiencing."*[394] Holmes refers to the functioning of a common law system, in which the common law court reasons in a similar case-by-case manner. Although it could be considered as a demonstration of a sense of judicial prudence, the strict interpretation leaves the minor EU citizen in a very vulnerable position in which, whilst not having exercised their right to move, arguably their most important right - the right to family life – is in a precarious position. Research acknowledges the importance of the presence of (when possible) two loving and caring parents for the happiness, mental and physical development of young children.[395] Not recognizing such minimum level of protection disregards the possibility for children to fulfil their full potential.

The ECJ has clearly struggled with its statement regarding the fundamental status of EU citizenship. In fact, ever since its judgement in the *Dano* case, the ECJ has not mentioned it again.[396] The 'fundamental' in 'fundamental status' has thus far been rather disappointing for minor EU citizens. In a EU that has the protection and promotion of the rights of the child as one of its key objectives, the fragmented connection between EU citizenship and fundamental rights protection leads to unsatisfactory situations. Although the ECJ has a number of possibilities at its disposal which have been elaborated on in the previous paragraph, it has been reluctant to interpret 'the substance of the rights' of EU citizenship in a way which would effectively protect minor EU citizens. The ECJ can however, only to a limited extent be held accountable for its prudence. It has only little room to manoeuvre, whilst observing the delicate relationship between the interpretation of Article 20 TFEU and the principles that protect the balance of powers within the EU. Guidance on this

[393] Kochenov (2013), p. 512.
[394] Holmes (2009), p. 132.
[395] The Bernard van Leer Foundation (2015), p. 5.
[396] C-333/13, *Dano*, ECLI:EU:C:2014:2358.

delicate relationship by the EU legislator would be welcomed, who has been rather passive on the matter.

From a children's rights perspective, the hard law approach has up until now failed to deliver satisfactory results. Other possibilities exist however, to enhance the legal position of minor EU citizen. The EU can be qualified as a multi-level constitutional legal order, i.e. a legal space that consists of different levels of law. The fragmented nature of the rights awarded of minor EU citizens must be examined within this context.[397] Minor EU citizens are to some extend protected by European law, but are also subject of the national legal order of the Member State in which they reside. Because all Member States are State Parties to the CRC and the ECHR, minor EU citizens derive multi-layered protection of national and international sources. Whenever a matter falls outside the scope of EU law therefore, minor EU citizens are not left out alone in the cold. The fact that a matter falls outside the scope furthermore does not necessarily mean that the EU can wash its hands off the matter. The ECJ has previously pushed national courts to apply international human rights standards, even though the case fell outside its jurisdiction.[398] The EU legislator can furthermore assist Member States in upholding international standards by different means of soft law, such as codes of conduct, guidelines and communications.

In providing the best protection possible however, a EU law approach is preferable. In the pending *Chavez* case, the ECJ has the opportunity to provide more guidance. The facts, positions of both parties and its possible implications for the protection of minor EU citizen will be discussed.

5.7. H.C. Chavez and Others v. The Netherlands (C-133/15)

In the *Chavez* case, the Dutch judiciary has referred questions to the ECJ in a new case on Route B and the *Zambrano*-test. The case concerns the situation in which a minor EU citizen resides in the State of his nationality with his third country national mother, who is his primary carer, but does not have a residence permit. The minor EU citizen derives his nationality from his EU citizen father, who has acknowledged the child, but since has implicitly or explicitly refused to take care of the child. The ECJ in this case, is asked to clarify which degree of dependency is required for the third country mother to derive a right of residence from Article 20 TFEU.

5.7.1. Preliminary Questions referred by the Dutch National Court

Case C-133/15 *Chavez-Vilchez* comprises eight joint Dutch cases, all of them concerning the application for social benefits granted by the *Wet Werk en Bijstand* (WWB) en de *Algemene Kinderbijslagwet* (AKW) by third country national mothers, without a right of residence and with at least one child holding Dutch nationality – thus being an EU citizen. Dutch law requires the possession of a residence permit on account of the Dutch Immigration Law (*Vreemdelingenwet*), which the third country national mothers do not have. Consequently, the persons do not fall within the scope of application of the Dutch laws. As a result, the responsible Dutch authority, the Immigratie- en Naturalisatiedienst (IND), has rejected their applications for benefits.

[397] Van Eijken (2014), p. 233.

[398] C-256/11, *Dereci* [2011] ECR I-11315, par. 72.

Measures to effectuate the decision by the public authorities refusing a right to residence have however, not been taken.

The responsible Dutch court is the Centrale Raad van Beroep (CRvB), which is the court of last resort on this matter. The CRvB has to assess whether the third-country national mothers have a derived right of residence based on Article 20 TFEU following the EU citizenship status of their child. In its referred court order the CRvB assumes that such derived right of residence – if applicable - would stem directly from the TFEU, meaning the IND would not be required to grant a residence permit or issue any official document stating the legality of residence. If such directly effective right of residence exists, it follows from earlier case law and the Vreemdelingenwet that the third country national mothers have a similar right of residence as the minor EU citizen, qualifying for both a right of residence and social benefits stemming from the WWB and AKW.

The CRvB recalls the *Zambrano*-test, stating that *"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."*[399] It furthermore restated that it *"follows 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 refers 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."*[400]

The CRvB has to ascertain whether the minor EU citizens in these cases are in such position that the refusal of a right of residence to their third country national mothers would mean that the children would have no choice but to leave the territory of the EU. The Dutch court mentions a number of relevant factors for this assessment: The mothers in these cases are entrusted with the (sole) custody rights, as well as the day-to-day care of their children. The children have derived their nationality from their fathers, who have legally acknowledged them after their birth. None of the children live with their father. The frequency of contact between father and child heavily differentiates per case. All fathers however, have implicitly or explicitly clarified that they are unable/unwilling to take care of their child. The fathers are not, or only to a minor extent, entrusted with (shared) custody rights. Lastly, the CRvB notes that, if relevant, it is not at all excluded that a transfer of these custody rights is impossible. Furthermore, the possibility of a situation in which a father takes care of the child independently, in the absence of the third country national mothers, has not been ruled out.

The CRvB considers it unclear how it should assess the position of the father. It is aware of the restrictive and exceptional application of Article 20 TFEU to internal situations. According to Dutch case law, the *Zambrano*-test is satisfied in cases in which the father is not at all able to take care of the child, when he suffers from a severe mental illness for example. The *beleidsregels* of the IND clarify that the third country national mothers should make it convincing that the fathers are not, even with the help of third

[399] C-34/09, *Zambrano* [2011] ECR I-1177, par. 45.
[400] C-256/11, *Dereci* [2011] ECR I-11315, par. 66.

parties, able to take care of the child.[401] The CRvB is however, not at all convinced that the test should be applied that strictly, that Article 20 TFEU grants a right of residence solely in cases in which it has been proven or made convincing that the father is not at all able to take care of the child. After all, as it considers, the ECJ has always attached great weight to the dependency relationship between the child and the third country national mother, taking into account the legal, financial and emotional dependence.

Aforementioned considerations have forced the CRvB to refer questions to the ECJ to receive a preliminary ruling. In doing so, the Dutch court wishes to receive clarification of the case law on Article 20 TFEU, especially with regard to the relevant legal and factual circumstances, determining that a child is deprived of the genuine enjoyment of the substance of his rights as a EU citizen, because it would be obliged to leave the territory of the EU.

It is in the light of this context, that the CRvB has referred the following questions to the ECJ:

1. "Must Article 20 of the TFEU be interpreted as precluding a Member State from depriving a third country national, who is responsible for the day-to-day and primary care of his/her minor child, who is a national of that Member State, of the right of residence in that Member State?"

2. "In answering that question, is it relevant that the legal, financial and/or emotional burden does not rest entirely with that parent and, furthermore, that it cannot be excluded that the other parent, who is a national of the Member State, might in fact be able to take care of the child? In that case, should the parent/third-country national have to make a feasible case that the other parent is not able to assume responsibility for the care of the child, as a result of which the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?"

The Dutch national court thus seeks clarification under which circumstances a third country national parent, who provides the primary, day-to-day care to his minor EU citizen child, and who is separated from the other EU citizen parent, can derive a right of residence in the Member State of which the minor EU citizen is a national.

5.7.2. Position of the Applicants

With support of the lawyers of the applicants, the VU Migration Law Clinic has published an Expert Opinion on their case. Because the rules of the ECJ do not allow the submission of amicus briefs, it has been circulated and made public "*in the hope of raising awareness of the cases and the relevant legal issues."*[402] The Expert Opinion accurately reflects the position of the applicants and has therefore been used as a directory for this paragraph.

The applicants argue firstly, that the refusal of a right of residence to the third country national mothers would, due to the relationship of dependency between mother and child, result in the deprivation of the genuine enjoyment of the rights of the latter. Secondly, the applicants argue that would the ECJ not find a deprivation of the genuine

[401] Beleidsregels: Official statements which provide guidance on the interpretation of certain Dutch laws.
[402] Biersteker, Dziedzic and Rodriguez (2015), p.3.

enjoyment of these rights, the minor EU citizens would be separated from their mothers. This would amount to a violation of the right to family life as laid down in Article 7 of the Charter and Article 8 ECHR. Both arguments will be discussed in turns.

5.7.2.1. Argument 1: Forced to leave the Territory of the EU

With regard to the first argument, the applicants investigate the degree of dependency needed to conclude, that if the third country national mother would be forced to leave the territory of the EU, the child would have no choice but to leave too. As elaborated on in Chapter 4, such relationship comprises legal, financial and emotional dependency. [403] In the pending cases, the minor EU citizen are all legally and emotionally dependent on their third country national mothers. The mothers have (sole) parental authority and custody rights over the minor EU citizens and are the primary, daily and actual carers.

With regard to legal dependency, the Brussels II bis Regulation highlights the far-reaching powers conferred on the parent who holds custody rights, such as the possibility to determine the place of residence of the child.[404] Dutch law permits the transferral of custody rights only in exceptional circumstances, when such transferral is in the best interests of the child.[405] Under Dutch law it is however, impossible to transfer parental authority and custody rights against the parents will. In the pending cases, the primary and actual care of the children does not lie with the father and the father is unwilling and in some cases even unable to take over the full care. It is therefore unlikely that the parental authority and custody rights will be transferred.

With regard to dependency of emotional nature, EU law does not provide guidance on how this element should be assessed. It does provide guidance however, on the role of the primary carer. ECJ case law confirms the importance of the provider of the 'actual' care. No attention is paid to whoever theoretically could provide this care, besides the primary carer. The (potential) role of the father thus seems irrelevant.

Lastly, the applicants argue that the inability of the third country national mothers to support their children financially cannot be regarded as decisive, as these mothers are prevented from working by Dutch law until they have derived a right of residence. Until then, they are dependent on the government. The fact that some of the fathers contribute financially does not affect this conclusion. Would mother and child reside in their third country, they would be legally obliged to contribute too.

Based on the aforementioned assessment the applicants conclude that the minor EU citizens are legally and/or emotionally dependent upon their third country national mothers, who are as the primary carers responsible for their actual care. The fact that some of the minor EU citizens are to a lesser extent legally, financially or emotionally dependent on their father does not affect the nature of the relationship of dependency which exists between the mothers and their children. In some cases the father holds joint custody rights. This is however, not likely to be an obstacle for the mothers to take

---

[403] Chapter 4, p. 46.

[404] Article 2 sub 9 of the Brussels II bis Regulation (No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000 (PbEU 2003, L338/1)) defines the 'right to custody' as to include "*the rights and duties relating to the care of the person of a child and in particular the right to determine the child's place of residence.*"

[405] Article 1:253o BW (Dutch Civil Law).

their child to her third country once she is forced to leave the EU, because she is likely to obtain his rights or his approval.

5.7.2.2. Argument 2: Genuine Enjoyment of EU Citizenship Rights

The second argument of the applicants is grounded in their view that if the ECJ would decide that the minor EU citizens are not forced to leave the territory of the EU if their mothers are refused a right of residence because they would be able to stay with their fathers in the Netherlands, the minor EU citizens would nonetheless be deprived of the genuine enjoyment of the substance of their rights. According to the applicants, the separation of the mothers and their children would amount to a violation of their fundamental rights, i.e. their right to family life.

The ECJ has stated that the mere desirability to keep the family together is insufficient to support the view that the EU citizen would be forced to leave the EU territory if a right of residence is not granted to his third country national family members. [406] The applicants argue however, that in these cases it does not concern the *wish* of the minor EU citizens to reside with their mothers in the Netherlands, but to prevent the violation of their fundamental rights. A forced depart of the mothers would prohibit the minor EU citizens to ever exercise their right to family life. This would amount to a deprivation of the genuine enjoyment of their EU citizenship rights, as it would be impossible to genuinely *enjoy* these rights whilst their fundamental rights are systemically violated.

To support their claim that a separation of mother and child would violate the right to family life as laid down in Article 7 and 24(3) of the Charter, the applicants refer to the case law of the ECtHR. It follows from migration, custody and child protection cases that a forced separation, and expropriation of parental authority and custody rights to enable this, amounts to a violation of the child's right to family life as protected under Article 8 ECHR and Article 7 of the Charter. The ECtHR has held '*Article 8 ECHR does not guarantee a right to choose the most suitable place to develop family life*.'[407] What is important however, is the possibility to remain together as a family. The ECtHR has acknowledged that that is considerably difficult in cases in which the parents are divorced, as it is unlikely that the parent legally residing in a Member State will follow his divorced spouse. In cases in which the parent who is forced to leave has close ties with the child, but little chance of direct contact with the child, the expulsion will amount to a violation of the latter's right to family life.[408]

ECtHR case law on family matters has furthermore clarified that the separation of the child and his parent is only allowed under exceptional circumstances in which such decision is proven to be in the best interests of the child and all other less intrusive measures are exhausted. This means on the one hand, that Member States are in fact under the obligation to create a situation in which the parent would be able to take care of the child,[409] f.e. by providing adequate housing,[410] or child-raising support.[411]

---

[406] C-256/11, *Dereci* [2011] ECR I-11315, par. 68.
[407] ECtHR, *Berisha/Switserland*, 2013, Application number 948/12, par. 61 and ECtHR, *Avelo Aponte/the Netherlands,* 2014, Application number 28770/05, par. 54.
[408] See for example ECtHR, *Muraldi/Russia,* 2015, Application number 72780/12, par. 76.
[409] ECtHR, *Moser/Austria*, 2006, Application number 12643/02, paras. 68-73.
[410] ECtHR, *Wallova and Walla/Czech Republic*, 2006, Application number 23848/04.
[411] ECtHR, *Savigny/Ukraine,* 2008, Application number 39948/06.

Because separation constitutes a clear violation of the child's fundamental rights, it should on the other hand, be based on his best interests and with the purpose of protecting the child against immediate danger.

According to the applicants it must therefore be concluded that forced separation of the minor EU citizen and third country mother with the sole purpose of ensuring that the child remains in the EU and to prevent the third country parent from obtaining a derived right of residence, amounts to a clear violation of the child's right to family life. It therefore cannot be upheld that under these circumstances the minor EU citizen can genuinely enjoy his right to remain in the EU. If the child can only enjoy his right of residence in the EU by sacrificing his right to family life, this does not amount to genuine enjoyment of that residence right. Accordingly, separation of the minor EU citizens from their third country national mothers who are the primary and actual carer shall deprive the minor EU citizens of the genuine enjoyment of the substance of the rights attached to their EU citizenship status.[412]

5.7.2.3. Conclusion

Based on aforementioned arguments, the applicants believe the referred questions should be answered accordingly:

- Article 20 TFEU must be interpreted as precluding a Member State from depriving a third country national, who is responsible for the primary day-to-day of a minor EU citizen, who is legally and emotionally dependent on the third country national and who is a national of that Member State, of a residence permit and sufficient resources in that Member. Such decision would mean that the EU citizen would be forced to leave the territory of the EU as a whole to follow his third country national parent. Whether the legal, financial and/or emotional dependent relationship could, in part or wholly, hypothetically, be transferred to another parent, who is a national of, and residing in that same Member State, is irrelevant.

- Consequently, Article 20 TFEU has to be interpreted as precluding that EU citizens are deprived of the genuine enjoyment of the rights derived from their EU citizenship status, when a minor EU citizen has the possibility to remain on the territory of the EU, but is separated from his third country national parent who is responsible for the primary and day-to-day care of his minor child, and on whom he is legally and emotionally dependent. Such separation would violate the fundamental rights of the minor EU citizen, especially his right to family life as laid down in Article 7 of the Charter, and his right to maintain regular and direct contact with his parents as laid down in Article 24(3) Charter.

5.7.3. Position of the Netherlands

Although the written commentary of the Netherlands has not been published, it is possible to reconstruct to some extent the position of the Dutch government. In advising the ECJ on how to answer the referred preliminary questions, the Netherlands will have two objectives. Firstly, it is in the interests of the Member States to argue that Article 20 TFEU is subject to a restrictive interpretation, in which the ability to derive a right of residence for third country parents is limited to exceptional circumstances. Furthermore, the Member States probably wish to leave the decision as much as

[412] Biersteker, Dziedzic, and Rodriguez (2015), p. 4-5.

possible up to the discretion of the national public authority responsible, which will have to decide based on the specific characteristics of each case. Extensive 'general' guidance on how to interpret the relevant circumstances would thus not necessarily be in their advantage. With these two motifs in mind, the arguments of the Netherlands will be reconstrued.

5.7.3.1. Argument 1: Forced to leave the Territory of the EU

In principle, third country national mothers can derive a right of residence if refusal would have a deprivation effect for their minor EU citizen. To support a claim for a restrictive approach, the Netherlands could refer to EU case law in which the ECJ has emphasized the exceptional nature of the criterion, and the importance of the *factual* circumstances of the case.[413] The statement of the ECJ in *Dereci*, regarding the mere desirability of keeping the family unit together, would contribute to highlight this exceptional character.[414] With regard to the factual circumstances of the case that are relevant for determining whether a minor EU citizen would be forced to leave the EU, the Netherlands could argue that whoever carries out the day-to-day care is just one of many relevant circumstances, emphasizing that it is however, not decisive.

To substantiate this argument, the Netherlands could refer to the case law of the ECJ, from which can be inferred that a palette of different factual circumstances could lead to the decision that a minor EU citizen would be forced to leave the EU territory.[415] Examples that Member States could mention are the residential status of the parents, the division of custody rights, the family composition and of course, the extent to which the minor EU citizen is legally, financially or emotionally dependent on the third country national parent. According to EU law, it would be a matter for the referring court to verify, looking at the specific facts of each case, whether refusal to grant a derived right of residence to the third country national parent would force the minor EU citizen to leave the EU.[416]

In the pending cases, a number of circumstances could be taken into account by the national court to verify whether the minor EU citizen would be forced to leave the EU territory: the recognition of the child, parental authority, willingness to take care of the child, financial contribution, daily care; and the nature of the dependency relationship. The Netherlands will argue that these circumstances should be interpreted in a way that would support their argument. In general, this means a very restrictive approach. With regard to dependency of a legal nature for example, the Netherlands could argue that legal recognition of a child by means of which he obtains the Dutch nationality, is not without consequences. As a result, the EU citizen parent has become both legally and financially responsible, irrespective of his decision to assume this responsibility.

The Netherlands could furthermore argue that the 'exceptional nature' of the criterion implies that the outcome of a particular case should be somewhat exceptional too. The fact that only the third country national mother is entrusted with the care of the child is insufficient to establish a forced departure of the minor EU citizen, meaning the family

[413] C-256/11, *Dereci* [2011] ECR I-11315, par. 67. This has later been confirmed in C-356/11 & C-357/11, *O, S & L* [2012] ECR I-0776, par. 48 & 55 and C-86/12, *Alokpa* [2013] OJ C 344/21, paras. 32-33.
[414] C-256/11, *Dereci* [2011] ECR I-11315, par 86.
[415] C-40/11, *Iida* [2012] OJ C145/4, par. 71.
[416] C-256/11, *Dereci* [2011] ECR I-11315, par. 74.

would be separated. After all, 'broken' families in which children are for whatever reason taken care of by only one parent, are unfortunately daily realities in our current societies.

5.7.3.2. Argument 2: Genuine Enjoyment of EU Citizenship Rights

If the Netherlands would argue that the minor EU citizens in the pending cases are not forced to leave the territory of the EU, they will conclude stating they have not been deprived of the genuine enjoyment of the substance of their rights. As a result, the matter falls outside the scope of EU law, which means that EU fundamental rights are not applicable. The Netherlands would however, probably still have to provide a statement with regard to the question of the CRvB relating to the weight that should be attached to the interests of the child. This could be dealt with rather shortly however, in the same way the ECJ has dealt with the matter in recent cases. Like in *O, S & L*, the Netherlands could suffice by stating that whether Articles 7 and 24 Charter have been violated, has to be dealt with by the national court separately.[417] A similar argument could be raised with regard to Article 8 ECHR.

5.7.3.3. Conclusion

Based on aforementioned arguments, it is expected the Netherlands will stress the ECJ to answer the referred questions accordingly:

- Article 20 TFEU must be interpreted as not precluding a Member State from depriving a third country national, who is responsible for the day-to-day and primary care of his child and on whom he is legally and emotionally dependent, who is a national of that Member State, of the right of residence in that Member State, unless such decision would mean that the minor EU citizen would be denied the genuine enjoyment of the substance of his EU citizenship rights. A minor EU citizen will be forced in exceptional circumstances, in which the complete inability of the EU citizen parent to take on the day-to-day care has been established. It is up to the national court to decide on the matter, based on the specific circumstances of the case.

5.7.4. Implications of the Case

The *Zambrano*-test and the accompanying derived residency rights via Article 20 TFEU have to a certain extent been explained and settled in the case law of the ECJ. In the pending *Chavez* case however, the ECJ has the possibility to develop Route B even further. Firstly, the ECJ is asked to clarify in more detail under which circumstances a third country national parent, who provides the primary, day-to-day care to his minor EU citizen child, and who is separated from the other EU citizen parent, can derive a right of residence in the Member State of which the minor EU citizen is a national. Also, it faces another opportunity to shed light on the possible connection of EU citizenship and fundamental rights. Lastly, the interpretation of the ECJ could have consequences for the relationship between the ECJ and the national courts. The three elements will be discussed in turn.

---

[417] Joint cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776, par. 75.

The role of the father & other relevant circumstances

The referred questions ask to clarify how the CRvB in the pending cases has to appreciate the role of the fathers, especially in the specific context of each case. The applicants believe it follows from previous ECJ case law that the role of the primary carer is decisive. Indeed, the ECJ has up until now emphasized the importance of the primary carer, upon whom the minor EU citizen is dependent for his day-to-day care. It has however, not yet been faced with a situation which demanded for the exploration of the possibilities of a transferral of those tasks. To conclude that the existence of such possibilities would be irrelevant seems therefore a little short-sided.

With regard to the dependency criteria more in general, the ECJ has the opportunity to shed light on ways to interpret a relationship of emotional dependency. An emotional relationship is difficult to weigh: providing the day-to-day care does not necessarily result in a relationship of emotional dependency, nor does an arrangement concerning parental access of a couple of hours necessarily preclude the existence of such relationship. The appreciation of the emotional dependency of a minor EU citizen is therefore not at all that straightforward. Also, some guidance on the relationship between the emotional dependencies on two parents would be helpful to national courts. Is a minor EU citizen less dependent on his mother, if he is also – to some extent – depending on his father? Financially speaking, probably, but emotionally?

In exploring the relevance of the fact that the father is not involved in the caretaking of the minor EU citizen, and the consequences for the application of the *Zambrano*-test, the ECJ has the opportunity to clarify how other (related) circumstances should be appreciated. How should a national court deal with the unwillingness of the father to assume responsibilities for his child for example? On the one hand, Member States will not want to carry the burden of EU citizens, which do recognize their children, but refuse to assume the legal and financial consequences of their actions. To interpret such circumstances strictly however, would ultimately result in situations in which the third country mother is send back to her country of origin, whilst an artificial family is created with a minor EU citizen, an unwilling father and – possibly – a third party providing childcare support. If a plea such as has been put forward by the Netherlands, with regard to the everyday reality of the existence of 'broken families', would be accepted by the ECJ, the situation would have detrimental consequences for the minor EU citizen and his family life.

Connection with fundamental rights

Clearly, the case touches upon the ability of the minor EU citizen to enjoy his rights in the comfort of his family. The applicants argue that the ECJ should differentiate between the *desire* and the *factual possibility* of the minor EU citizen to enjoy his right to family life. But although it does seem awkward to consider it possible to enjoy the EU citizenship status and accompanying rights whilst one's fundamental rights are systemically violated, the ECJ has ignored proposals to link the core of EU citizenship rights with the protection of fundamental rights. The facts of the *Chavez* case do not however, offer any reason to believe the ECJ will circumvent the principle of conferral now. Would the ECJ be in a bold mood however, it could unexpectedly attach much weight to some of the new circumstances presented in these cases, such as the unwillingness of the father. With regard to the political implications however, it is more likely it sticks with its original minimalistic mantra of membership and residency.

Relationship with national courts

It will be difficult for the ECJ to answer the question on the role of the fathers, without giving some normative statement as to what it believes constitutes a family. After all, it will have to assess for example the emotional relationship between father and child and conclude whether this is or is not sufficient to prevent the child from being forced to leave the EU. This is likely to amount to an appreciation of the commitment one should expect from a parent. The ECJ will avoid providing such statement as much as possible, as the appreciation of what constitutes a family is heavily culture-specific. Too much guidance provided by the ECJ would interfere with the discretion of the national courts to evaluate the facts of each case.

6. CONCLUSION

6.1. Introduction

By looking at children's rights at EU level, the current meaning of the EU citizenship status for minor EU citizens and the (possible) meaning for their fundamental rights protection, this research has sought to answer the following research question:

Should EU citizenship accommodate the fundamental rights of minor EU citizens?

In this Chapter first, an overview of the analyses provided for in this thesis will be provided, after which the research question will be answered.

6.2. Recap

As was discussed in Chapter 2, children's rights have gradually earned their position in the EU. The EU used to be primarily occupied with fostering the development of the EU internal market. Citizens were awarded rights to facilitate the exercise of their free movement. As a result, children derived rights from the EU citizenship status of their parents. As the integration progressed however, a necessity was felt to engage in broader issues. Although the market connotation remained relevant, the EU's focus gently shifted to more social and citizenship rights-related issues, including those affecting children. Eventually, a framework aimed at fostering EU children's rights was designed.

At the policy level, it has led to the adoption of the EU Agenda of the Rights of the Child. Most of the policy objectives set out therein have been translated into EU law. The EU legislator has been awarded, however, only limited competences to adopt measures that strengthen the position of the child. The Treaties make little reference to children, and although the legislator has been creative in finding a child-orientated approach in other areas (EU labour law for example), the conditions of subsidiarity and proportionality require a clear cross-border link. The Charter does mention children explicitly. It recognizes the best interests of the children as a fundamental right laid down in Article 24. Although children's rights activists have celebrated its potential, it has not been realised just yet. Several elements of the provision are still unexamined. The scope of application of the Charter is limited too. The ECJ lastly, has made little reference to Article 24 in its judgments.

The EU legal framework has been heavily inspired by several international children's rights sources, of which the CRC and the ECHR have been the most important. The CRC contains the biggest children's rights catalogue and was of great influence on the wording of Article 24 of the Charter. The CRC is legally binding, but the vague wording of its provisions leave a large room for the discretion of the Member States. It furthermore lacks an effective enforcement mechanism. The ECHR, secondly, does not contain specific references to children's rights. The ECtHR however, has accepted claims concerning children's rights violations and consequently has developed a large body of case law. As the example on the right to family life has showed, the ECHR has been determining for *inter alia* the minimum level of protection by the EU, and the limitations that the Member States legitimately may impose.

The extent to which the EU legislator has drawn inspiration from international sources can be contrasted with the approach of the ECJ. The ECJ has shown reluctance to rely heavily on other sources in reaching decisions, despite the expertise on children's rights of for example the ECtHR. Instead, it has preferred to refer to the Charter. The accession of the EU to the ECHR could be of both symbolic and practical value for children's rights protection at the EU level. Considering the protectiveness of the ECJ of its autonomy however, this is unlikely to happen anytime soon.

In Chapter 3 the current meaning of EU citizenship for minor EU citizens was explored. EU citizenship has originally been concerned with a number of pre-established categories of persons, such as workers, students, family members of workers, etc. Children have not been one of these categories. If EU citizenship is however, destined to be the fundamental status of Member State nationals, it could be argued that all Member State nationals, including children, should feel the effect of that status. It did not take long for the ECJ to clarify in its case law that EU citizenship rights are directly effective, meaning not pre-established categories of EU citizens are entitled to these rights too. The extent to which the concept of EU citizenship is of meaningful relevance to children is however, not so evident. These rights are after all, to a large extent synonymous with the free movement of persons.

An analysis of ECJ case law via Route A (via Article 21 TFEU) confirms that children of EU citizens who have exercised their right to move have been awarded far-reaching rights, especially in the area of education. The primary driver behind these rights has always been the integration of the family members of the EU citizens in the host State. Would this not be provided for, the EU migrant citizen would possibly be deterred from exercising his free movement rights. As such, the link between the exercise of the freedom of movement by a worker and the extension of any related rights to family members has been firmly established. Would a minor EU citizen want to exercise his right to move independently, he is subjected to the same conditions as an adult EU citizen: he has to have sufficient resources and a sickness insurance.

Route B (via Article 20 TFEU) refers to cases in which a parent/carer derives rights from his minor EU citizen child directly, who has not exercised his free movement rights. In the cases concerning minor EU citizens with a dual nationality firstly, rights have been granted by linking the situation somewhat artificially with the (future) exercise of free movement rights. In the cases concerning primary carers secondly, the right to move was completely disconnected from the right to reside. The *Zambrano* case laid down a test by means of which static EU citizens can derive rights directly from Article 20 TFEU. Although the test had a potentially broad scope, the subsequent cases soon established a drawback. What is left is a test by means of which third country national family members of EU citizens are entitled to a derived right of residence, when refusal of such right would mean that they would have to leave the territory of the EU.

The criterion of 'dependency' takes a central position in this *Zambrano*-test and was looked at more closely in Chapter 4. It is the relationship of dependency between the third country national family member and the minor EU citizen, would force the minor EU citizen to leave the territory of the EU if his family member would not be granted a right of residence. But although the interpretation is crucial to enable children to enjoy their family life in the EU, clear guidelines as to what exactly constitutes 'dependency' do not exist. The ECJ has clarified that dependency should be established in law and in

fact, and that the relationship of dependency could be of a legal, emotional and/or financial nature. It furthermore has to be genuine and structural in character, in order to rule out the possibility that a situation of dependency was created with the sole objective of obtaining entry into and residence in its territory. The Commission has stated it looks at the specific circumstances of the case, but has given hardly any guidance on which matters are relevant. Age for example would seem of relevance, but in the absence of any reference this is a matter of guessing. From a children's point of view, especially with regard to legal certainty, it is rather worrisome that the interpretation of such crucial criterion is left up to the complete discretion of the national courts.

In Chapter 5, the potential reach of the intended 'fundamental status' of EU citizenship was explored by looking at the connection of EU citizenship and fundamental rights. The two notions have been designed separately, with other objectives in mind. The *Zambrano* ruling however, led to tons of speculations on the implications of the case. Did the ECJ refer to a certain 'spine' of EU citizenship rights when referring to the 'substance' of the rights? And if so, would this spine include – at least some – fundamental rights? Speculators did not have to wait long for their answer: the interpretation of the criterion in subsequent case law shows only a minimalist understanding. According to the ECJ a EU citizen has been deprived of the 'substance' of his EU citizenship rights when it is established – in law or in fact – that he is forced to leave the territory of the EU as a whole or lose its EU citizenship status by becoming stateless. Clearly, the ECJ has chosen not to include fundamental rights violations in its interpretation. In doing so, the notions of EU citizenship and fundamental rights have remained separated. Only after the establishment of the existence of such 'deprivation effect', the measure falls within the scope of EU law and may be examined in the light of the Charter.

The currently pending *Chavez* case lastly, offers new opportunities for the minor EU citizen and their families. In this case, the Dutch court wishes to receive clarification on the case law on Article 20 TFEU, especially with regard to the relevant legal and factual circumstances, determining that a child is deprived of the genuine enjoyment of the substance of his rights as a EU citizen, because it would be obliged to leave the territory of the EU. The ECJ is asked to explain to what extent such decision is influenced by the fact that the parent/primary carer of the minor EU citizen shares the legal, financial and/or emotional burden with another parent/carer.

Although the ECJ will be reluctant to provide extensive general guidance on how to interpret 'dependency' in these cases due to their highly fact specific nature, it will not be able to evade to provide such guidance completely. Especially on dependency of emotional nature guidance would be welcomed, since the ECJ has refrained from providing any so far. A broad interpretation of such criterion could mean that the third country national mother would be granted a right of residence even though it has not been excluded that custody rights and day-to-day care responsibilities could be transferred to the EU citizen father. It would prevent uncomfortable situations in which a minor EU citizen is forced to live with an unwilling (and possibly even incapable) parent, whilst being separated from his loving and caring parent. The ECJ would however, have to deal with the difficulties of proving the existence of dependency of such immaterial nature too.

In their subsidiary line of reasoning, the applicants advocate a broad interpretation of

the ‘substance’ of the rights, so as to include at least some minimum level of fundamental rights protection. Based on the ECJ’s reluctant attitude towards stretching the boundaries of EU law, it seems more likely that the ECJ will cling on the exceptional nature of the criterion, in accordance with the position of the Netherlands. Depending on whether or not the national court is willing to find, based on the facts of the case, that the minor EU citizens are forced to leave the territory of the EU, EU fundamental rights are applicable. If not, the ECJ could advise the national courts to consider international and national fundamental rights separately.

6.3. Conclusion

The research question of this research comprises two elements. First, whether EU citizenship currently accommodates the fundamental rights of minor EU citizens. Secondly, if it does not, whether EU citizenship should accommodate the fundamental rights of minor EU citizens. Both questions will be answered in turn.

Does EU citizenship currently accommodate the fundamental rights of minor EU citizens?

EU citizenship currently, does not accommodate fundamental rights of minor EU citizens. EU citizenship is for most part concerned with all sorts of categories of persons, such as workers, students, family members of workers, except children. It has been designed to encourage EU citizens to exercise their free movement rights to carry out economic activities. As such EU citizenship has taken on a key position in the development of the EU internal market.

An analysis of the most important EU provisions and ECJ case law via Route A (via Article 21 TFEU) endorses this perspective. Minor EU citizens have far-reaching derived rights through EU citizenship, provided that movement has taken place. Considering that minor EU citizens are unlikely to move within the EU independently, they are to a large extent dependent on their familial link. The children of moving EU citizens are one of, if not the most important possession they have. Would these children not be granted *inter alia* a right of residence, the EU citizen would be deterred from exercising his free movement rights. Once moved, the children are granted the basic rights they need to integrate in the host State: a right of residence and the right to be treated equally to nationals of that host State. Instead of being addressed separately, they derive the same rights as all other family members of the EU citizens that fall within the scope of Directive 2004/38.

Ever since the landmark *Zambrano* case, minor EU citizens have been mentioned as a separate category of persons in the context of EU citizenship. In subsequent case law on Route B (via Article 20 TFEU) the *Zambrano*-test was confirmed and further developed. The test recognizes that child autonomy and self-sufficiency are two different things. Children have an autonomous right to reside in a Member State founded on their status as EU citizen, but are not expected to exercise that right without appropriate parental support. As a result, a third country national parent can in exceptional circumstances derive a right of residence in the host State to take care of the minor EU citizen. Unfortunately, the ECJ seems only to a limited extent engaged with the practical consequences of its decisions. Successful application of the test has been limited to exceptional circumstances in which the presence of just one parent

seems sufficient to satisfy the test. It is hard to imagine how this could ever be in 'the best interests of the child' and its ability to enjoy family life.

Both Route A and B show how EU citizenship as a status of minor EU citizen is only of a fragmented and conditional nature. The importance of the 'dependency' criterion in both routes only enforces this nature, as it emphasises how the interests of the minor EU citizen are subordinated to other categories of persons. In *Chen* the EU citizen status of children was even (ab)used by third country national parents wishing to continue their residence in the EU. Catherine's mother deliberately moved her baby around to obtain Irish nationality. Consequently, Catherine lost her Chinese nationality. As a result, she will be able to visit her brother in China only for a limited number of days a year.

In the context of EU citizenship, minor EU citizens are merely treated as 'obstacles', which are granted rights to remedy them. The *Chen* case shows how EU citizenship currently does not accommodate the interests of the child, let alone their fundamental rights.

Should EU citizenship accommodate the fundamental rights of minor EU citizens?

The EU has mostly pursued an internal market approach in which adultist objectives have been of primary concern. As a result, children's rights protection has developed gradually and fragmented. Almost every aspect of EU law however, has (in)direct consequences for children. This enforces the responsibility of the EU to put in place appropriate mechanisms to protect the interests of the children living in the EU. The Member States are furthermore under a legal obligation to act in children's best interest. The EU is also in a unique position to provide protection to children in cross-border situations. Lastly, the EU has a number of different political and economic resources at its disposal to deal with these issues.

To offer effective protection would suit the increased attention within the EU on other objectives than the realization of the internal market. This belief is shared by EU policymakers, as shown by the EU Agenda on the Rights of the Child. The fact that EU citizenship does not grant minor EU citizens protection does not necessarily have to be problematic however, as their interests are protected in other ways. The analysis of the existing framework in place to protect the interests of children at the EU level however, reveals that it lacks teeth to provide them with adequate protection.

This research has looked at whether EU citizenship then, could serve as an (additional) vehicle to protect children's rights. The ECJ has up until now not explicitly clarified what it meant with its famous statement that EU citizenship is destined to be the fundamental status of nationals of Member States. In fact, its reluctance to elaborate on that status since *Dano* could mean that the ECJ is struggling with its own statement.[418] The special nature could refer to certain rights and guarantees that accompany the EU citizenship status. Fundamental rights protection and EU citizenship have from the start been two separate legal regimes, and as discussed earlier, the ECJ has not shown any intention to join the two. Arguments exist, however, as to why EU citizenship would be suited to protect children's rights by offering protection to minor EU citizens who have not exercised their free movement rights. EU citizenship after all, grants rights to citizens which are directly effective and enforceable. Unlike specific children's rights,

[418] C-333/13, *Dano*, ECLI:EU:C:2014:2358.

EU citizenship is furthermore firmly grounded in the Treaties and familiar to the EU institutions. As such it could potentially be a valuable source of protection.

Article 20 TFEU confers rights directly on EU citizens, even without there being a cross-border link. However, application of the article in internal situations is limited by the vertical and horizontal separation of powers. Already, the ECJ has extended the scope of EU law by enabling itself to impose limitations on Member States, even if the matter concerns an internal situation that falls outside the scope of the EU competence to act. Current interpretations of the 'substance of the rights' have however, put pressure on the ability of minor EU citizens to enjoy their rights in the company of their family. Looking at the vulnerable position minor EU citizens are occasionally put in as elaborated on in Chapter 3, it seems legitimate to wonder whether it would be able for minor EU citizens to properly enjoy their rights if there would not be a minimum level of protection offered to, for example, the family life of the EU citizen. For them, EU citizenship remains an empty shell, which leads to the bizarre situation in which minor EU citizens with one or two caregivers from a third country would have to move to another Member State or outside the EU for them to enjoy their family as a whole. The question which arises from the present state is how the ECJ, within the limits provided for by the European legislator, can interpret European citizenship ex Article 20 TFEU in a way which guarantees the protection of children's rights?

In the *Chavez* case the ECJ has the opportunity to offer a higher level of protection to minor EU citizens. In this case, the Dutch national court seeks clarification under which circumstances a third country national parent, who provides the primary, day-to-day care to his minor EU citizen child, and who is separated from the other EU citizen parent, can derive a right of residence in the Member State of which the minor EU citizen is a national. In this case, the ECJ has the opportunity to offer more insights as to how to weigh the dependent relationship between the primary carer and the minor EU citizen. Contrary to the argumentation put forward by the Netherlands, it could attach decisive weight to the carer who provides the *actual* care. Such approach would take the existing emotional dependency serious, instead of guessing whether one could potentially emerge once the third country national parent would be forced to leave the EU, and the EU citizen parent forced to provide care to the child.

The ECJ has furthermore stated that "*the applicability of EU law entails the applicability of fundamental rights guaranteed by the Charter.*"[419] As explained in Chapter 3, Article 20 TFEU provides a connection with the scope of EU law.[420] It might therefore trigger the scope of the Charter, which might extend the scope of the protection of the right to family life (and reunification). A broader interpretation of Article 20 TFEU in the light of the Charter could result in a broader scope of protection. In that case, Article 20 TFEU could even include family members on whom the EU citizen is not dependent, widening the right to family reunification. Although Article 20 TFEU does not demand two caregivers present in the EU territory, this might be evaluated differently in the light of fundamental rights protection. With regard to the specific situation put forward in the *Chavez* case, the mother could be eligible for a derived right of residence. Unfortunately, the ECJ has up until now not shown any willingness to broaden its interpretation of Article 20 TFEU.

[419] C-617/10, *Akerberg Fransson* [2013] ECR I-280.

[420] Chapter 3, p. 28.

The solution that the ECJ has at its disposal of the possibilities discussed in Chapter 5 that would remedy the problems minor EU citizens currently face remedy best, whilst observing the currently existing legal limits is Sanchez's proposal. He introduces a relaxation of the interpretation of 'the substance of the rights' of EU citizens. Instead of looking for absolute deprivation (by expulsion or denaturalisation), the ECJ could interfere in internal situation when the substance of the rights is 'seriously impaired'. Such interpretation would fit the reality of minor EU citizens a lot better than the current approach. It would allow for an interpretation which includes the respect for family life and family reunification. Although Sanchez argues that complete arbitrariness as to what constitutes a 'serious impairment' could be omitted by the provision of some guidance, it would be on the verge of connecting EU citizenship and fundamental rights.

In my opinion, an approach which takes the best interests of the minor EU citizen as a starting point would be more preferable. The ECJ could provide guidance in the *Chavez* case, by elaborating on the interpretation of specific facts, and their relevance for the well-being of the child. It could refrain from taking stance with regard to the connection between EU citizenship and fundamental rights protection. In doing so, it would not be necessary to exceed its powers.

Currently, the ECJ is in an uncomfortable position in which much of the Court is expected. The *Chavez* case offers new possibilities for the ECJ to move around in this uncomfortable position in which it has to protect the position of minor EU citizen in a convincingly manner, whilst observing the delicate relationship between the interpretation of Article 20 TFEU and the principles that protect the balance of powers within the EU. A real amelioration of the minor EU citizens' position requires more dramatic action, especially by the European legislator. It could be argued that whilst Article 21(2) TFEU lays down a legal basis for enacting legislation necessary to realize the free movement of persons, Article 20 TFEU does not provide a legal basis for enacting any of such legislation. Article 352 TFEU could possibly serve as a legal basis as it states:

> *"If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."*

Article 352 TFEU lays down a residual competence to act, whenever this is necessary to achieve the aims of the EU. Article 3(3) TEU states the objective of the EU, one of which being: "*The Union shall promote protection of the rights of the child*." Furthermore, Article 3(5) states: "*In its relations to the wider world, the Union shall .. the protection of human rights, in particular the rights of the child, as well as the strict observance and the development of international law, including the principles of the United Nations Charter*." Although this legal basis is not unlimited, it could be argued that this 'flexibility clause' grants the EU institutions the competence to introduce legislation that explicitly strengthens the rights of minor EU citizens.[421] Another legal basis which

[421] This was confirmed by the ECJ in its Opinion on accession to the ECHR (*Opinion 2/94 [1996] ECR I-01759, par. 35: "Such a modification of the system for the protection of human rights in the community, with equally fundamental institutional implications for the Community and for the Member*

could be explored are the provisions of the AFSJ, as they refer to children specifically too.[422]

Fortunately, other possibilities exist to enhance the legal position of minor EU citizens, as has been explained in paragraph 5.6. In a multi-level constitutional legal order such as the EU, minor EU citizens are subjects of the European and the national legal order of the Member State in which they reside. Minor EU citizens thus derive multi-layered protection of national and international sources. Unfortunately, although they are under the obligation to provide adequate protection on multiple levels, Chapter 2 has revealed that the fundamental rights protection in the Member States sometimes leaves much to desire. The EU could however, assist Member States in upholding international standards, for example by different means of soft law, such as codes of conduct, guidelines and communications.

To conclude, EU citizenship in its present state should accommodate the fundamental rights of minor EU citizens, and more specifically their right to family life. The constitutional make-up of the EU, and the lack of attention paid to the rights of children therein however, allow the ECJ to deliver the fundamentally changing judgments which would be needed to link the notions of EU citizenship and fundamental rights protection for once and for all only to a limited extent. In an emerging community as the EU, the EU citizenship status and its accompanying rights should include all members that ought to feel a sense of belonging to that community. It is extremely important that the meaning of this status is not just felt by the citizens exercising their free movement rights, but that minor EU citizens are included too.

It would be highly improper however, for the ECJ to side step the founding principles of the EU to adjust the EU citizenship to an objective, of which it is in fact, unclear whether it ever intended to serve. The EU legislator is in a position to relieve the ECJ from its uncomfortable position, but the enforcement of the rights of minor EU citizens at the EU level currently lacks a firm ideological framework, which establishes children's rights as an objective per se and is shared by both Member States and EU institutions. Until the EU legislator takes up a more active role in establishing such framework, policy objectives as laid down in the EU Agenda on the Rights of the Child will remain policy objectives. Consequently, the ECJ will continue subordinating the interests of children to the economic objectives of the EU. Rather than a 'fundamental' status, EU citizenship will be an uncomfortable status for minor EU citizens.

States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235" (Article 352 TFEU)).

[422] Articles 79(2)(d) and 83(1) TFEU.

7. BIBLIOGRAPHY

ANDERSON AND HUGHES (2015)
Anderson, B. and Hughes, V. (eds) '*Citizenship and its Others: Migration, Diasporas and Citizenship'* (New York, 2015).

ARESTIS (2013)
Arestis, G. 'Fundamental rights in the EU: three years after Lisbon, the Luxembourg perspective' in *College of Europe Research Papers in Law*, 2/2013 Brugge pp. 1-14.

BERNARD VAN LEER FOUNDATION (2015)
Bernard van Leer Foundation, *'Early Childhood Matters*' (Den Hague, 2015).

BIERSTEKER, DZIEDZIC AND RODRIGUEZ (2015)
Biersteker, A., Dziedzic, L. And Rodriguez, L. N. 'Right of residence under Article 20 TFEU of the primary carer of a minor Union Citizen: Expert Opinion non issues arising from the case of *Chavez-Vilchez and Others* (C-133/15)' (2015) VU Migration Law Clinic, pp. 1-21.

BRUBAKER (1992)
Brubaker, R. '*Citizenship and Nationhood in France and Germany'* (Cambridge, 1992).

VON BOGDANDY (2012)
Von Bogdandy, A. Et al. 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' (2012) 49 *Common Market Law Review* 2, pp. 489-519.

CHOUDHRY AND HERRING (2010)
Choudhry, S. and Herring, J. '*European Human Rights and Family Law'* (Oxford, 2010).

CHOUDHRY (2014)
Choudhry, S. 'Art 7 (Family Life Aspects)' in Peers, S. Hervey, T. & Kenner, J. (eds) in '*The EU Charter of Fundamental Rights: A commentary*' (Oxford, 2014).

CRAIG AND DE BURCA (2015)
Craig, P. and De Burca G. '*EU Law: Text, Cases and Materials* - 6th Edition' (Oxford, 2015).

CURRIE (2009)
Currie, S. 'The Transformation of Union Citizenship' in Dougan, M. And Currie, S. *'50 Years of the European Treaties: looking back and thinking forward'* (Oxford, 2009), pp. 365-392.

VAN EIJKEN AND DE VRIES (2011)
Van Eijken, H. And De Vries, S. "A new route into the promised land? Being a European citizen after Ruiz Zambrano" (2011) 36 *European Law Review* 5, pp. 704-721.

VAN EIJKEN (2014)
Van Eijken, H. '*European Citizenship and the Constitutionalisation of the European Union*' (Utrecht, 2014).

ELEFTHERIADIS (2014)
Eleftheriadis, P. 'The content of EU citizenship' (2014) 15 *German Law Journal* 1, pp. 777-796.

FABBRINI (2014)
Fabbrini, F. '*Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective'* (Oxford, 2014).

FERRARO AND CARMONA (2015)
Ferraro, F. and Carmona, J. '*Fundamental rights in the European Union: The Role of the Charter after the Lisbon Treaty*' (2015) European Parliamentary Research Service PE 554.168, pp. 1-26.

FORTIN (2009)
Fortin, J. '*Children's Rights and the Developing Law*' (Cambridge, 2009).

FUNDAMENTAL RIGHTS AGENCY (2015)
Fundamental Rights Agency and the Council of Europe, *Handbook on European Law relating to the Rights of the Child* (Brussels, 2015).

GRUGEL AND IUSMEN (2012)
Grugel, J. and Iusmen, I. 'The European Commission as Guardian Angel: Agenda-Setting for Children's rights' (2012) 20 *Journal of European public policy* 1, pp. 77-94.

GUILD, PEERS AND TOMKIN (2014)
Guild, E. Peers, S. And Tomkin, J. '*The EU Citizenship Directive: A commentary*' (New York, 2014).

HICKMAN (2011)
Hickman, T. 'Beano no more: The EU Charter of Rights after Lisbon' (2011) 16 *Judicial review* 2, pp. 113-141.

HOLMES (2009)
Holmes, O. W. '*The Common Law'*, (Massachusetts, 2009).

IUSMEN AND STALFORD (2016)
I. Iusmen and H. Stalford (eds), '*The EU as a Children's Rights Actor'* (Berlin, 2016).

JACOBS (2001)
Jacobs, F.G. 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 *European Law Review* 4, pp. 331-341.

KILKELLY (1999)
Kilkelly, U. '*The Child and the European Convention on Human Rights*' (Dartmouth, 1991).

KILKELLY (2000)
Kilkelly, U. 'The impact of the Children's Convention on the case law of the European Court of Human Rights' in Forttrell, D. (ed) *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (Dordrecht, 2000).

KILKELLY (2001)
Kilkelly, U. 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child.' (2001) 23 *Human Rights Quarterly* 2, pp. 308-326.

KILKELLY (2015)
U. Kilkelly, 'The CRC and the ECHR: The Contribution of the European Court of Human Rights to the Implementation of Article 12 of the CRC' in T. Liefaard and J.E. Doek (eds), *Litigating the Rights of the Child* (Dordrecht, 2015).

KOCHENOV 2012
Kochenov, D. 'Von Bogdandy's 'Reverse Solange': Some Criticism of an Important Proposal.' *Forthcoming in Maximilian Steinbeis, Alexandra Kemmerer and Christoph Möllers (eds.), Gebändigte Macht: Verfassung im europäischen Nationalstaat. (2012 Verfassungsblog II. Recht im Kontext, Bd* 4, pp. 1-8.

KOCHENOV (2013)
Kochenov, D. 'The Right to Have What Rights? EU Citizenship in Need of Clarification' (2013) 19 *European Law Review* 4, pp. 502-516.

KOSTAKOPOULOU (2001)
Kostakopoulou, D. '*Citizenship, Identity and Immigration in the European Union: Between Past and Future*' (Manchester, 2001).

LAMONT (2014)
Lamont, R. 'Art 24 – The Rights of the Child' in Peers, S. Hervey, T. & Kenner, J. (eds) in *The EU Charter of Fundamental Rights: A commentary* (Oxford, 2014).

LANDSBERGEN (2011)
Lansbergen, A. and Miller, N. 'Court of Justice of the European Union European Citizenship Rights in Internal Situation: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)' (2011) 7 *European Constitutional Law Review* 2, pp. 287-307.

LAVENDER (1997)
Lavender, N. 'The Problem of the Margin of Appreciation' (1997) 4 *European Human Rights Law Review*, pp. 361-385.

LENAERTS (2015)
Lenaerts, K. 'EU citizenship and the European Court of Justice's 'stone-by-stone' approach' (2015) *International Comparative Jurisprudence* 1, p. 1-10.

LETSAS (2013)
Letsas, G. 'The ECHR as a living instrument: its meaning and legitimacy' in Follesdal, A., Peters, B. and Ulfstein, G. (eds) '*Constituting Europe: The European*

Court of Human Rights in a National, European and Global Context' (Cambridge, 2013).

LISTER (2008)
Lister, R. 'Unpacking Children's Citizenship' in Invernizzi, A. and Williams, J. (eds), '*Children and Citizenship'* (London, 2008).

MAGNETTE (2005)
Magnette, P. '*Citizenship: The History of an Idea'* (Colchester, 2005).

MARIN (2015)
Marin, L. 'The Fate of the Data Retention Directive: About Mass Surveillance and Fundamental Rights in the EU Legal Order' in *Research Handbook on EU Criminal Law* (Utrecht: 2015) pp. 1-21.

MCGLYNN (2002)
McGlynn, C. 'Rights for Children: The Potential Impact of the European Union Charter of Fundamental Rights' (2002) 8 *European public law* 3, pp. 387-400.

NEALE (2004)
Neale, B. *'Young Children's Citizenship: Ideas into Practice'* (York, 2004).

ODERMATT (2015)
Odermatt, J. '*A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights*', KU Leuven, Leuven Centre for Global Governance Studies, 2015.

O'LEARY (1995)
O'Leary, S. 'The relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *Common Market Law Review* 2, pp. 519-554.

PRECHAL, DE VRIES AND VAN EIJKEN (2011)
Prechal, S. de Vries, S. and Van Eijken, H. 'The Principle of Attributed Powers and the 'Scope of EU law'', in Besselink, L., Pennings, F. and Prechal, S. '*The Eclipse of the Legality Principle in the European Union*' (Alphen aan den Rijn, 2011), pp. 213-247.

SANCHEZ (2014)
Sanchez, S.I. "Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liasion?" (2014) 20 *European Law Journal* 4, pp. 464-481.

STALFORD (2000)
Stalford, H. 'The citizenship status of children in the European Union' (2000) 8 *The International Journal of Children's Rights* 2, pp. 101-131.

STALFORD (2002)
H. Stalford, '*Families Valued?: Comparing the EU and the European Convention on Human Rights*', Centre for Research on Family, Kinship and Childhood, Working Paper, pp. 1-19.

STALFORD AND ACKERS (2004)
H. Stalford and L. Ackers, *A Community for Children? Children, Citizenship and Internal Migration in the EU* (Hampshire, 2004).

STALFORD (2005)
Stalford, H. 'Constitutionalising Equality in the EU: A children's Rights Perspective' (2005) 8 *International Journal of Discrimination and the Law* 1-2, pp. 53-73.

STALFORD AND DRYWOOD (2009)
H Stalford and E Drywood, 'Coming of age? Children's Rights in the European Union' (2009) 46 *Common Market Law Review* I, pp. 143-172.

STALFORD AND DRYWOOD (2011)
Stalford, H. and Drywood, E. 'The Use of the UNCRC in EU law and policy making' in Invernizzi, A. and Williams, J. (eds), *The Human Rights of Children: From Visions to Implementations* (New York, 2011).

STALFORD (2012)
Stalford, H. '*Children and the European Union: Rights, Welfare and Accountability'* (Oxford, 2012).

TRYFONIDOU (2012)
Tryfonidou, A. 'Redefining the Outer Boundaries of EU law: The Zambrano, McCarthy and Dereci Trilogy' (2012) 18 *European Public Law* 3, pp. 493-526.

DE VRIES (2015)
De Vries, S.A. 'The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection.' in De Vries, S.A., Bernitz, U. and Weatherill, S. (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument - Five Years Old and Growing* (Oxford, 2015), pp. 235-261.

WELGE (2013)
Welge, R. '*Democratic citizenship in multilevel systems: normative standards and the outcome of political membership and rights in the European Union'*, Ph.D. dissertation, Department of Humanities, Social and Political Sciences (Zurich, 2013).

WELGE (2015)
Welge, R. 'Union citizenship as *demoi*-cratic institution: increasing the EU's subjective legitimacy through supranational citizenship?' (2015) 22 *Journal of European Public Policy* 1, pp. 56-74.

WIESBROCK (2011)
Wiesbrock, A. 'Disentangeling the "Union citizenship puzzle"? The McCarthy Case' (2011) 36 *European Law Review* 6, pp. 861-874.

8. TABLE OF CASES

ECJ

C-76/72, *Michel S* [1973] ECR I-437
C-7/73, *Nold v Commission* [1974] ECR I-491
C-48/75, *Royer* [1976] ECR I-497
Joined Cases C-35/82 and C-36/82, *Morson* [1983] ECR I-3723
C-267/83, *Aissatou Diatta* [1985] ECR I-574
C-316/85, *Lebon* [1987] ECR I-2811
C-389-390/87, *Echternach & Moritz* [1989] ECR I-723
C-308/89, *Di Leo v Land Berlin* [1990] ECR I-4185
C-7/94, *Lubor Gaal* [1995] ECR I-1031
C-13/94, *P v S and Cornwall Country Council* [1996] ECR I-2143
Joined Cases C-64/96 and C-65/96, *Uecker and Jacquet* [1997] ECR I-3171
C-85/96, *Martínez Sala* [1998] ECR I-02691
C-184/99, *Grzelczyk* [2001] ECR I- 6193
C-413/99, *Baumbast* [2002] ECR I-07091
C-60/00, *Carpenter* [2002] ECR I-6279
C-459/99, *MRAX v Belgium* [2002] ECR I-6591
C-224/98, *D'Hoop* [2002] ECR I-6191
C-109/01, *Alkrich* [2003] ECR I-9607
C-148/02, *Garcia Avello* [2003] ECR I-11613
Joined cases C-482/01 and 493/01, *Orfanopoulos and Oliveri* [2004] ECR I-5257
C-200/02, *Chen* [2004] ECR I-09925
C-456/02, *Trojani* [2004] ECR I-07573
C-138/02, *Collins* [2004] ECR I-2703
C-215/03, *Oulane* [2005] ECR I-1215
C-209/03, *Bidar* [2005] ECR I-2119
C-380/03, *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573 (Tobacco Advertising II)
C-408/03, *Commission v Belgium* [2006] ECR I-2647
C-540/03, *Parliament v Council* [2006] ECR I-5769
W (China) and X (China) v Secretary of State for the Home Department [2006] EWCA Civ 1494, [2007] 1 WLR 1514
C-1/05, *Jia* [2007] ECR I-1
Joined Cases C-402/05 P and C-415/05, P. *Kadi* [2008] ECR I-6351
C-244/06, *Dynamic Medien* [2008] ECR I-505
C-127/08, *Metock* [2008] ECR I-6241
C-158/07, *Forster* [2008] ECR I-8507
C-353/06, Grunkin and Paul [2008] ECR I-07639
C-301/06, *Ireland v. European Parliament and European Council*, [2009] ECR I-593
C-103/08, *Gottwald* [2009] ECR I-9117
Joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-4585
C-400/10, J *McB v LE* [2010] ECR I-8965
C-480/08, *Texeira* [2010] ECR I-1107
C-135/08, *Rottmann* [2010] ECR I-1449
C-491/10, PPU *Joseba Andoni Aguirre Zarraga v. Simone Pelz* [2010] ECR I-14247
C-92/09 and C-93/09, *Schecke* [2010] ECR I-11063
C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693
C-73/08, *Bressol and Others* [2010] ECR I-2735

C-256/11, *Dereci* [2011] ECR I-11315
C-34/09, *Zambrano* [2011] ECR I-1177
C-434/09, *McCarthy* [2011] ECR I-3375
C-391/09, *Runevic-Vardyn* [2011] ECR I-3787
Joined cases C-356/11 and C-357/11, *O, S & L* [2012] ECR I-0776.
C-83/11, *Rahman* [2012] 3 CMLR 55; 2013, QB 249
C-40/11, *Iida* [2012] OJ C145/4
C-542/09, *Commission v Netherlands* [2012] ECR I-346
C-617/10, *Akerberg Fransson* [2013] ECR I-280.
C-399/11, *Melloni v Ministerio Fiscal* [2013] ECR I-107
C-86/12, *Alokpa* [2013] OJ C 344/21
C-300/11, *ZZ v Secretary for the Home Department* [2013] EWCA Civ 7
C-87/12, *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] 3 C.M.L.R. 33
Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] OJ C175/6
C-131/12, *Google Spain* [2014] ECR I-317
Joined Cases C-457/12 and C-456/12, *O & S* [2014] OJ C 135/6
C-423/12, *Flora May Reyes* ECLI:EU:C:2014:16
C-333/13, *Dano*, ECLI:EU:C:2014:2358.
C-133/15, *H.C. Chavez Vilchez et A.* (nyr)

ECtHR
ECtHR, *Marckx v. Belgium*, 1979, Application number 6833/74
ECtHR, *Goodwin v UK*, 1996, Application number 28957/95
ECtHR, *Sen v the Netherlands,* 2001, Application number 31465/96
ECtHR, *Sahin v Germany*, 2003, Application number 30943/96
ECtHR, *Sommerfield v Germany*, 2003, Application number 31871/96
ECtHR, *Bosphorous v Ireland*, 2005, Application umber 45036/98
ECtHR, *Moser/Austria*, 2006, Application number 12643/02
ECtHR, *Wallova and Walla/Czech Republic*, 2006, Application number 23848/04
ECtHR, *Bosphorus Airways v. Ireland*, 2006, Application number 45036/98
ECtHR, *Savigny/Ukraine,* 2008, Application number 39948/06
ECtHR, *Neulinger and Shuruk/Switzerland*, 2010, Application number 4161/07
ECtHR, *Osman v Denmark,* 2011, Application number 38058/09
ECtHR, *MSS v Belgium and Greece*, 2011, Application number 30696/09
ECtHR, *Berisha/Switserland*, 2013, Application number 948/12
ECtHR, *Avelo Aponte/the Netherlands,* 2014, Application number 28770/05
ECtHR, *Muraldi/Russia,* 2015, Application number 72780/12