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Family reunification between static EU citizens and TCNs: A 'purely internal situation'?

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Abstract

Contrary to family reunification concerning EU citizens who have exercised their right to move within the EU, family reunification of static EU citizens is not regulated by any Directive in the EU framework, but falls in principle within the remit of EU Member States. This thesis argues that placing limitations on family reunification concerning EU citizens who have not exercised their right to free movement and are not able to link their application to any EU Directive cannot be considered as a purely domestic matter. According to the progressive jurisprudence of the CJEU, the TFEU provides safeguards to the citizens of the Union stemming directly from the status of the EU citizenship. This thesis further argues that the substance of the rights attached to this status also entails the possibility for EU citizens to establish and develop their family life in their country of residence. To this end, this paper provides a critical analysis of the case law of the CJEU regarding family reunification of static EU citizens, combined with Member States' human rights obligations with respect to the right to family life, read alone and in conjunction with the principle of equality and non-discrimination. Particular attention is also drawn to the principle of the best interests of the child, which must be the primary consideration of all States in cases which involve children.

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1. Introduction

Europe is currently under strain due to the large migration flows arriving to its territory. According to the European Migration Network, one third of all arrivals of third-country nationals (TCNs) to Europe is due to family reasons, making family reunification one of the main routes to legal migration to the EU[1].

Family reunification in the EU is mainly regulated by Council Directive 2003/86/EC on the right to family reunification[2] and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[3]. The first one applies to TCNs residing lawfully in the territory of a Member State and their family members who are also TCNs, and the second one to Union citizens who have exercised their right to move to or reside in a EU Member State which is different from that of which they are a national, also called mobile or non-static EU citizens, and their family members, regardless of whether the latter are EU citizens or not. By analogy the provisions of the Free Movement Directive also apply to mobile EU citizens who return with their family member to the Member State of origin[4].

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[1] EMN, *EMN Synthesis Report for the EMN Focused Study 2016, Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices* (2017), 4

[2] Council Directive 2003/86/EC on the Right to Family Reunification [2003] OJ L251/12 (EU Family Reunification Directive). The Directive is applicable to all EU Member States, except for the UK, Ireland and Denmark.

[3] Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States [2004] OJ L158/77 (Free Movement Directive)

[4] Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.* [2014] EU:C:2014:135

However, there are also cases, where migrants establish their life in the EU country of arrival, they manage to acquire the citizenship or nationality of that country and then, without exercising their right to move or to reside in another country within the EU, they request to get (re)united with their family members from a third country. In other cases, after their arrival to the EU host country, TCNs have children who obtain the citizenship of that Member State. Subsequently, the parents, who maintain the nationality of the country of origin, apply for permission to abode or for an extension of such permission on the grounds of family reunification with their children. Family reunification in such cases, namely between static or non-mobile EU citizens and TCNs, does not fall under the scope of either the EU Family Reunification Directive or the Free Movement Directive and is not regulated or monitored within the EU legal framework. In principle, such cases fall within the remit of EU Member States, which are allowed a wide margin of appreciation in the development of their migration policies.

Some countries, such as the Netherlands, have voluntarily decided to align their domestic legislation concerning their own citizens who have not exercised their right to move in the EU to the Free Movement Directive[5]. According to the case law of the Court of Justice of the European Union (CJEU), EU legislation must be applied and interpreted uniformly in such situations as well[6]. However, other Member States, in order to reduce their attractiveness as host countries, pass strict laws or handle family reunification requests in a manner, whose compatibility with States' human rights obligations is rather controversial. Most common restrictions in national family reunification policies include narrower definitions of family and the fulfillment of certain conditions, such as income requirements and integration tests.

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[5] EMN, *EMN Synthesis Report for the EMN Focused Study 2016, Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices* (2017), 14

[6] See for instance Case C-313/12 *Giuseppa Romeo v Regione Siciliana* [2013] EU:C:2013:718, paras 21-23 and Case C-28/95 *A. Leur-Bloem and Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] EU:C:1997:369, paras 31-33

While acknowledging States' right to control migration within their territory, this thesis argues that placing limitations on family reunification concerning nationals of a Member State who cannot link their application to any EU Directive cannot be considered as a purely domestic matter. EU law provides safeguards to the citizens of the Union stemming directly from the status of the EU citizenship. The substance of the rights attached to this status also entails the possibility for EU citizens to establish and develop their family life in their country of residence. In this sense, the concept of the EU citizenship status must be interpreted in conjunction with Member States' human rights obligations regarding the right to family life and the principle of non-discrimination. Particular attention should also be drawn to cases which concern children, since, pursuant to the principle of the best interests of the child, what serves children best must be the primary consideration of all States.

To this end, the present thesis will scrutinise Article 20 of the Treaty on the Functioning of the European Union[7], as this has been interpreted by the CJEU in the context of family reunification between static EU citizens and TCNs. Pursuant to Article 51(1) of the EU Charter of Fundamental Rights[8], when Member States or EU institutions, including the CJEU, apply Union law, they should do so in accordance with the Charter. Therefore, the right to family life and the application of the principle of the best interests of the child, as these are enshrined in Articles 7 and 24(2) and (3) of the Charter will be analysed. In this regard, this thesis will also review the shortcomings in the respective case law of the CJEU, where the cases at issue do not fall under the ambit of any EU Directive or Regulation and the Court is ambivalent regarding the applicability of the Charter. Furthermore, Article 7 of the Charter corresponds to Article 8 of the European Convention on Human Rights[9] and, pursuant to Article 52(3) of the Charter, the meaning and scope of the rights enshrined in Article 7 of the Charter are the same as those of the corresponding Article of the ECHR. In

[7] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/01 (TFEU)
[8] Charter of Fundamental Rights of the European Union [2012] OJ C326/02 (the Charter)
[9] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)

any event, all Member States are parties to the ECHR and thus, Article 8 of the ECHR will also form a primary source of this research. Member States' obligations with respect to the protection of family and the right to family life are also entailed in various international human rights instruments, including *inter alia* the International Covenant on Civil and Political Rights[10] and the International Covenant on Economic, Social and Cultural Rights[11] and therefore the respective provisions of these Conventions will be scrutinised as well. The Convention on the Rights of the Child[12], being the most accepted human rights treaty globally, will also constitute a primary source of this thesis, as encompassing provisions concerning the children's right to family life and the principle of the best interests of the child. Likewise, all the aforementioned instruments encompass the principle of equality and non-discrimination and hence they will be additionally employed in order to address Member States' obligations *vis-à-vis* their citizens' right not to be subject to discrimination in the context of family reunification.

The two European judicial bodies, namely the CJEU and the European Court of Human Rights (ECtHR), and the respective human rights treaty bodies have provided authoritative interpretations and useful guidance regarding the application of the treaties, especially in the context of migration and family reunification. Therefore, complementary sources of this thesis will be mainly consisted of case law, general comments, statements and guidance by these Courts and the respective treaty bodies. Similarly, academic books and legal journals will provide some valuable insight into the legal concepts under review and will enhance the credibility of the arguments adduced herein.

The aim of this research is to analyse situations where EU citizens do not fall under the scope of and cannot link their application for family reunification to any EU Regulation or

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[10] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[11] International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)
[12] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3 (CRC)

Directive. Therefore, family reunification concerning asylum seekers, refugees or other beneficiaries of international protection, as well as migrants and EU citizens, which falls under the scope of the EU Family Reunification Directive, the recast Qualification Directive (2011/95)[13], the Dublin III Regulation[14] or the Free Movement Directive, will not be covered by the present thesis. Similarly, situations which are regulated by the Return Directive or cases where the right to family life can become a potential bar to the expulsion of TCNs already residing in the EU fall outside the scope of this thesis[15]. However, relevant references to the aforementioned legal instruments may be made where it is deemed necessary for the support of the arguments articulated herein. Finally, this research will not touch upon national laws in detail, but it will make limited references to national practices in order to indicate States' inconsistency with their human rights obligations. Accordingly, family reunification under bilateral or multilateral agreements between EU Member States and third countries will not be analysed.

[13] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 L337/9

[14] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31-180/59

[15] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98

2. The Fundamental Status of EU Citizenship

2.1. Scope and application in the family reunification context

The EU citizenship status was first introduced in the Maastricht Treaty and constitutes the world's first post-national citizenship. Although the TFEU has been amended after the adoption of the Lisbon Treaty, the citizenship provisions have practically remained the same. Article 20 of the TFEU which establishes EU citizenship provides that:

> '1. 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.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
>
> (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
>
> (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.'

The goals of the common EU market, namely the free movement of people, goods and services, have led to the construction of the concept of the EU citizenship in order to facilitate economic activity among Member States. An independent definition of EU citizenship does not yet exist; however, global migration has gradually strengthened its status and the protection attached to it in several contexts, which are no longer limited to market freedom[16].

Since 2011, the case law of the CJEU regarding Article 20 of the TFEU has developed into a valuable source in the context of family reunification of static EU citizens, whose situation was considered until then to be purely internal and fell outside the EU competence. According to scholars, the rights deriving from the EU citizenship status and the risk of losing such rights in particular were invoked for the first time in the context of family reunification between static EU citizens and TCNs as an attempt by the CJEU to tackle the issue of reverse discrimination[17]. This phenomenon in the EU family reunification framework is identified as the situation where citizens living in their own country, namely static EU citizens, are subject to stricter family reunification rules than EU citizens who have moved to the same country and fall under the scope of the Free Movement Directive. While the latter have the ability to claim a direct right to family reunification under the Union umbrella, static EU citizens must rely on national policies, which often entail stricter provisions than those provided in the EU Directive. This paradox stems logically from the attribution of competences among the EU and Member States, however its drawbacks in terms of equality and States' interference with their citizens rights is regrettable.

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[16] Kristine Kruma, "Family reunification A tool to shape the concept of EU citizenship" in Maribel Gonzalez Pascual and Aida Torres Perez (eds), *The Right to Family Life in the European Union* (Routledge 2017), 133, 134

[17] Peter Van Elsuwege and Dimitry Kochenov, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European Journal of Migration and Law, 443–466

The European Commission had acknowledged this phenomenon and its adverse impacts on static EU citizens in its proposal for the existing EU Family Reunification Directive[18]. An appropriate solution, according to the Commission, was that EU citizens gained access and enjoyed the respective provisions of Community law by including them in the scope of the Directive. However, this provision was later deleted in the amended proposal following the reasoning that the Commission was working on the recasting of the Free Movement Directive and the alignment of the rights of all Union citizens to family reunification would be reviewed later, once that recasting was complete[19]. Since then, the regulation of family reunification concerning static EU citizens and the alignment of their rights to those of the rest Union citizens were postponed indefinitely. Currently, family reunification of static EU citizens remains unregulated at EU level and is not on the EU agenda either.

The CJEU addressed the issue for the first time in the *Zambrano* case, where, due to the specific circumstances of the case at issue, European secondary law could not be applied[20]. Nonetheless, the same conclusion could not be drawn with respect to the applicability of the TFEU. Thus, the Court invoked Article 20 of the TFEU and applied it in a situation which would otherwise be considered as purely domestic. The *Zambrano* concerned a couple of Colombian asylum seekers who had been refused refugee status by the Belgian authorities. Mr Zambrano was also refused a permanent work permit in Belgium. While the couple was however not expelled from the country, Mrs Zambrano gave birth to two children. The two children acquired Belgian nationality and hence the EU citizenship, pursuant to Belgian nationality law, which provided the State's nationality to children who

[18] Proposal of a Council Directive on Family Reunification, COM (1999) 638 final. Article 4 of the proposal reads: 'The family reunification of Union citizens who do not exercise their right to free movement of persons has hitherto been subject solely to national rules. This situation generates an unwarranted difference in treatment between the family of Union citizens who have not exercised their right to free movement and have stayed in the country of their nationality and those who have exercised their right to free movement. National law in some circumstances regulates the family reunification of its own nationals more restrictively than Community law. As Union citizenship is indivisible, the gap must be filled. This Article accordingly allows the family members of Union citizens to enjoy the benefit of the relevant provisions of Community law in matters of family reunification.'

[19] Amended Proposal of a Council Directive on Family Reunification, COM (2002) 225 final, 3

[20] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] EU:C:2011:124

would otherwise become stateless. Mr Zambrano argued that the State's refusal to grant him a work permit would force him to emigrate. Consequently, his children would be deprived of the effective use of their EU citizenship and their fundamental rights would be violated. In its decision, after observing that the Free Movement Directive was not applicable in the case, the CJEU accepted the applicant's argument and stressed the significance of the fundamental status of the citizenship of the Union, which States must not deprive their citizens of[21]. The CJEU concluded 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.'[22]

Accordingly, in the recent case of *Rendón Marín* ruling, the CJEU held that the existence of a criminal record alone is not enough to refuse a residence permit to a TCN who is the sole carer of a minor EU citizen[23]. In the respective case, Mr Marin was a Columbian national with sole custody of two minor children born in Malaga. His son was a Spanish national and his daughter was a Polish national, while both children had always lived in Spain. According to the Court, the mere fact that Mr Marin possessed a criminal record was not enough in order to be automatically refused the right to abode in Spain, as this could compel his children to leave the country and endanger their right as EU citizens to reside in the EU territory[24].

[21] Ibid para 41
[22] Ibid para 45
[23] Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] EU:C:2016:675
[24] Ibid paras 88, 89

In contrast, just after the Court's ruling in the *Zambrano*, no element of the case of *McCarthy* was considered by the CJEU to have the effect of depriving her of the genuine enjoyment of the rights attached to her status or of hindering the exercise of her right to move and reside freely within the territory of the EU[25]. Mrs McCarthy, having both Irish and UK nationality, was born and had always lived in the UK. She got married to a Jamaican national and after the latter being refused to stay in the country due to the State's immigration policy, they both applied for a residence permit under EU law, as a Union citizen and the spouse of a Union citizen accordingly[26]. Their application was rejected and the referring court asked whether EU law would apply to the situation of a Union citizen who has never exercised her right of free movement and who has always resided in a Member State of which she is a national, but who is also a national of another Member State. The CJEU ruled that the situation of Mrs McCarthy was limited in all relevant respects within a single Member State and hence it was not governed by EU law[27]. In any case, according to the Court, Mrs McCarthy could still enjoy her right to reside and move freely in the EU and that right was not restricted by the pertinent national authorities[28].

Following the confusion caused by the ruling on the *McCarthy* case, the CJEU attempted to shed some light and clarify this differentiation regarding the application of Article 20 of the TFEU in the *Dereci and Others*[29]. In that case, five TCNs had their applications for residence permit on the grounds of family reunification with their Austrian family members rejected by the Austrian authorities, whereas four of them were subject to expulsion orders. The Austrian authorities refused to apply the provisions of the Free Movement Directive because the EU citizens, who the TCNs wanted to live with, had not exercised their right of free movement. The CJEU ruled that the fact that the respective EU citizens had not used

[25] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] EU:C:2011:277
[26] Ibid paras 14-17
[27] Ibid para 45
[28] Ibid paras 49-50
[29] Case C-256/11 *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v Bundesministerium für Inneres* [2011] EU:C:2011:734

their right of free movement could not 'for that reason alone, be assimilated to a purely internal situation'. According to the Court, the citizenship of the Union is intended to be the fundamental status of nationals of the Member States, which the States must not interfere with[30]. Nevertheless, taking into account the familial relationship, the current place of residence and the regularity of the initial entry into the Austrian territory, which differed for each applicant, but also from the *Zambrano*, the Court went on to argue that national policies are restricted to the extent that the Union citizen has in fact no other choice but to leave not only the territory of the Member State of which he or she is a national, but also the territory of the Union as a whole[31]. Moreover, the Court held that, although an EU citizen may wish or find it more adequate for financial or family reasons to reside with his or her family members, who are TCNs, in the territory of the country of which he or she is a national, this does not automatically mean that the EU citizen would be obliged to leave the Union territory if such permit was not granted[32]. In any case, according to the CJEU, this assessment was to be made by the referring court[33].

2.1.1. The notion of dependency

Following the *Dereci and Others* and, in order to assess whether a denial of granting or extending a residence permit has the effect of depriving an EU citizen of the genuine enjoyment of the rights conferred by virtue of the EU citizenship status, the CJEU later introduced the notion of dependency in the relationship between the TCN and the EU citizen in question. If the EU citizen is considered to be in such relationship with the TCN that the former would be forced in practice to leave the EU, if his or her family member were to be expelled from the EU territory or not granted a residence permit, then the

[30] Ibid paras 61-64
[31] Ibid para 66
[32] Ibid para 68
[33] Ibid para 74

citizenship rights of the EU citizen, as stated in Article 20 of the TFEU, are violated. However, the assessment of the level of dependency in this context has proved to be rather ambiguous in the Court's case law.

In the *O, S,* Ms. S, a national of Ghana, was living in Finland with a permanent residence permit and had married and divorced a Finnish national, with whom she had a child of Finnish nationality[34]. Ms. S then married Mr O from Cote d'Ivoire and had another child of Ghanaian nationality. The Finnish authorities rejected Mr O's application for a residence permit because he had no secure means of subsistence[35]. Likewise, Ms. L, a national of Algeria, had a child from a previous marriage of dual Finnish and Algerian nationality. She got married to Mr M, a national of Algeria, and had another child of Algerian nationality. Mr M's application for a residence permit was also rejected because he had no secure means of subsistence[36]. The CJEU noted that it did not appear to be any legal, financial or emotional dependence between the applicants and the children in concern[37]. Moreover and contrary to the *Zambrano*, since these children's mothers had already acquired a permanent residence permit, it would be unlikely that the children would be obliged to leave the EU territory, if a residence permit was not granted to the applicants. Nevertheless, the Court held that it was for the referring court to make that assessment of dependency and establish whether the rejection of such applications would lead to the deprivation of the genuine enjoyment of the substance of the rights conferred by the EU citizenship status[38]. In any case, since the applicants' spouses were also TCNs, the Court concluded that the respective cases fell under the scope of the EU Family Reunification Directive and thus, the claimants could have their applications examined on the grounds of family reunification with them.

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[34] Cases C-356/11, C-357/11 *O, S v Maahanmuuttovirasto, Maahanmuuttovirasto v L* [2012] EU:C:2012:776, para 18
[35] Ibid paras 20-22
[36] Ibid paras 25-30
[37] Ibid paras 56,57
[38] Ibid para 59

In the case of *Chavez-Vilchez and Others*, the CJEU held that it should be determined 'which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent'[39]. In this case, Ms Chavez-Vilchez, a TCN, established a relationship with a Netherlands national and gave birth to a child who had also Netherlands nationality. The family lived in Germany until Ms Chavez-Vilchez and her child left the family home. Since then Ms Chavez-Vilchez was staying in Netherlands being the sole carer of the child. However, in the absence of a residence permit, her applications for social assistance and child benefit were rejected by the Netherlands authorities. In the same case before the CJEU, seven other individuals, all TCNs, were in similar situations as they were all mothers of one or more children who had Netherlands nationality, with fathers also being of Netherlands nationality. In these cases, all mothers were separated from the fathers, while the latter had acknowledged the children as theirs. However, the relationship between the fathers and the children concerning custody rights, as well as the mothers' status regarding their right to stay in the EU, differed. Moreover, unlike the child of Ms Chavez-Vilchez, none of the rest children had ever left the Netherlands. The Court held that the fact that the EU parent could undertake full responsibility for the day-to-day care of the child was not itself a sufficient reason to assume that this child would be prevented from leaving the EU territory, if his or her other parent was refused a residence permit. The relationship of dependency between the TCN and the child should be assessed and, in order to make that assessment, regard should be given to the right to family life, as stated in Article 7 of the Charter, read in conjunction with the obligation to protect the best interests of the child, in compliance with Article 24(2) of the Charter[40]. According to the Court, it was for the TCN to provide sufficient evidence in order to prove that such degree of dependency practically existed. However, it was for the competent national authorities to make such inquiries in order to determine the relationship of dependency and ascertain whether a decision to refuse a right of residence to

[39] Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and others* [2017] EU: C:2017:354, para 70
[40] Ibid paras 70 - 72

the parent would oblige the child to leave the territory of the EU and hence deprive the latter of the genuine enjoyment of the substance of the rights attached to his or her citizenship status[41].

The CJEU did not provide a comprehensive description of the concept of dependency in the above mentioned cases, whereas the task of assessing whether any legal, financial or emotional dependence between the family members in fact existed was eventually left to the referring courts. It is nevertheless worth noting that the CJEU has developed case law on the concept of dependency stemming from the application of the Free Movement Directive, which regulates family reunification of mobile EU citizens and their family members. According to the European Commission, the Court's findings in this case law should not be limited to the Free Movement Directive, but should also be employed *mutatis mutandis* as a guide in order to appreciate the nature of dependency under the EU Family Reunification Directive, which regulates family reunification of legally residing TCNs and their family members who are also TCNs[42]. In particular, the CJEU has held that the status of dependency is the result of a factual situation where legal, financial, emotional or material support is provided to the dependent family member. To this end, Member States must give due regard to the various factors that may be relevant in the particular case, such as whether the dependent members need material support to meet their essential needs, whilst the reasons for that dependence do not need to be determined[43]. According to the CJEU, in order to ensure that the dependence is genuine and stable, Member States may impose certain requirements regarding the nature and duration of dependence; however the effectiveness of the respective provisions of the EU Directives that refer to this concept of dependence should not be undermined[44].

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[41] Ibid paras 75 – 77

[42] Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, para 2.2

[43] Case C-423/12 *Flora May Reyes v Migrationsverket* [2014] EU:C:2014:16, paras 21-23

[44] Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman* [2012] EU:C:2012:519, paras 36-40

2.1.2. Correlation to human rights

In his Opinion in *Konstantinidis*, AG Jacobs introduced the concept of '*civis europeus sum*' on the basis of a common code of fundamental values and human rights that can be invoked by European citizens in order to oppose to any infringement of their fundamental rights[45]. Undoubtedly, the above mentioned applications where established on the ties of the applicants with their family members, whilst most of them concerned minor children. In this regard, the application of the fundamental human right to respect for one's family life, as well as the protection of the best interests of the child, as these are enshrined in the Charter and in other human rights instruments and will be further analysed in the next Chapters, seem more than apparent in the foregoing cases. Nevertheless, the CJEU has held a difference stance.

In the *Zambrano*, the referring court asked whether human rights, in particular Articles 21, 24 and 34 of the Charter, were to be considered in determining the compliance of the Belgian legislation with the Treaty provisions on EU citizenship. However, the CJEU did not make any reference to the Charter and focused its analysis solely on Article 20 of the TFEU. Similarly, in the *McCarthy*, where the applicants' family life clearly appeared to be hindered, the Court held a notable silence regarding the applicability of the Charter and the right to family life, as if the ability to establish a family is distinct from the enjoyment of the EU citizenship rights.

In the *Dereci and Others*, the Court held that 'the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing

[45] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig – Standesamt and Landratsamt Calw – Ordnungsamt* [1993] ECR I-1191, Opinion of AG Jacobs, para 46

European Union law'[46]. However, it considered that it had no power to provide a judgment on whether the case fell under the scope of EU law and passed on the responsibility to the national courts. Paragraphs 72 and 73 of the ruling of the CJEU read:

> 'Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.'

In the *O, S,* following its dubious argument that it appears to be not a sufficient level of dependency between the children and their non-biological fathers and thus that the EU citizenship rights of the children did not seem to be endangered, the CJEU noted that the issue in question should be addressed by the national courts. This should be conducted without prejudice to any provisions on the protection of fundamental rights which may be applicable in each case, *inter alia* the right to respect one's family life[47]. It was only when the CJEU observed that the EU Family Reunification Directive could be applied, due to the fact that the children's mothers were TCNs like the applicants, that it stressed the imperative of the courts' compliance with Articles 7 and 24(2) and (3) of the Charter. The Court recalled its recent decision on *Chakroun* regarding the application of the EU Family Reunification Directive and held that, in this context, authorisation of family reunification is the general rule. Therefore, the discretion that the Member States enjoy regarding their migration policies must be applied strictly and in a manner that it does not undermine 'the

[46] Case C-256/11 *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v Bundesministerium für Inneres* [2011] EU:C:2011:734, para 71
[47] Cases C-356/11, C-357/11 *O, S v Maahanmuuttovirasto, Maahanmuuttovirasto v L* [2012] EU:C:2012:776, para 59

objective and the effectiveness of that directive'[48]. Accordingly, since the Directive respects the rights and principles enshrined in the Charter, Member States are required to examine applications for family reunification taking particular account of the interests of the children concerned and also in the light of promoting family life. However, according to the Court, it was again for the referring domestic courts to ascertain whether these requirements are fulfilled while reviewing such claims[49].

Similarly, in the case of *Kreshnik Ymeraga and Others*, since the applicants were not considered to be beneficiaries under the scope of any of the EU Directives and since the refusal to grant a residence right on Mr Kreshnik Ymeraga's family was not found to impede the genuine enjoyment of his EU citizenship rights, according to the established principles in the aforementioned case law, the Court held again that it was beyond its jurisdiction to consider an alleged violation of the Charter[50].

This approach was reversed in the most recent case of *Chavez-Vilchez and Others*, where the Court made a step forward from its previous judgments and highlighted the applicability of the Charter in the process of assessing the dependency between the children with the EU citizenship status and their mothers, nationals of a third country. More specifically, the Court held that

> 'in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-

[48] Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] EU:C:2010:117, para 74
[49] Cases C-356/11, C-357/11 *O, S v Maahanmuuttovirasto, Maahanmuuttovirasto v L* [2012] EU:C:2012:776, para 82
[50] Case C-87/12 *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] EU:C:2013:291, paras 42, 43

> country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.'[51]

In this regard, the Court added that such an assessment should further consider the age of the children, their physical and emotional development, the extent of their emotional ties both to the EU citizen parent and to the TCN parent, and the risks deriving from their separation from their parents[52].

2.2. Shortcomings in the CJEU case law

Following the foregoing, the boundaries set by the CJEU concerning its jurisdiction on the applicability of fundamental human rights seem rather obscure. Despite the welcome shift in the *Chavez-Vilchez and Others* regarding the application of the Charter in the determination of the level of dependency between the static EU citizen and the TCN at issue and of whether the former would be compelled to leave the EU territory, the CJEU appears to have established in its case law the principle that human rights may only be invoked by the Court when the challenged national measure falls under the ambit of secondary EU law. EU citizens who are not able to connect their claim to any EU Directive are thus deprived of an effective consideration of their fundamental rights before the CJEU and are left to the discretion of national authorities. However, this practice brings static EU citizens in a clearly disadvantaged position compared to mobile EU citizens and TCNs, whose fundamental rights are primarily considered and protected under the lens of the

[51] Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and others* [2017] EU: C:2017:354, para 70
[52] Ibid para 71

respective EU Directives on family reunification. If Mrs McCarthy had exercised her right to move within the EU, provided that she had the ability to do so[53], she would have fallen under the scope of the Free Movement Directive and the CJEU would have decided upon her application taking into account Article 7 of the Charter, namely her right to establish a proper family life and live with her husband. Accordingly, in the *O, S* the CJEU invoked Articles 7 and 24 of the Charter only when it observed that the applicants' wives were also TCNs and thus the EU Family Reunification Directive was applicable. Conversely, if Mr O's and Mr M's wives were static EU citizens, then most probably the Court would have maintained its problematic argument regarding the lack of dependency between the family members, leaving the task of assessing the interference with the applicants' right to family life, as well as the consideration of the best interests of their children, to the Finnish authorities.

This practice seems more absurd if one considers its consequences on naturalised citizens, namely refugees or migrants who have managed to obtain the nationality of the host country and thus the EU citizenship status. Acquiring the nationality or citizenship of a country is regarded as the ultimate level of integration in this country and is usually accompanied by more opportunities regarding social and working benefits[54]. In contrast, following the foregoing practice of the CJEU, naturalised citizens who have resided solely in one EU country and cannot link their application for family reunification to any EU Directive might find themselves in a more disadvantaged position than that of maintaining the migrant or refugee status. Family reunification of static naturalised citizens is subject to national migration measures and the problematic –in terms of human rights protection- examination before the CJEU, whilst that of migrants and refugees falls under the scope of

[53] It has to be noted that, according to the facts set in the Court's ruling (para 14), Mrs McCarthy was not a self-sufficient person. She was in receipt of State benefits.
[54] See for instance Article 34 of the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, according to which, States are urged to facilitate and expedite naturalisation proceedings for refugees. See also, OECD, *Naturalisation: A Passport for the Better Integration of Immigrants?* (2011)

the EU Family Reunification Directive and is favoured by an effective human rights consideration before the Court.

The reluctance of the CJEU to invoke the Charter is justifiable taking into account the provisions of Article 51 of the Charter, which explicitly prohibit its application when Union law is not implemented[55]. Additionally, this reluctance can also be attributed to the criticism which followed the *Zambrano* case regarding the legitimacy of the exercise of the Court's judicial power[56]. The *Zambrano* ruling was regarded as a threat to national immigration matters and an extension of the scope of EU law in situations that were previously considered as purely internal[57]. In other words, States viewed this approach as an interference with their sovereign rights that resulted in attaching residence rights to the status of EU citizenship. This interference is even more immense when one considers the irregularity of the residence status of the Zambrano family.

On the other hand, as it had been noted by AG Sharpston in the *Zambrano*, the EU has been founded *inter alia* on the principle of respect for human rights and fundamental freedoms, which are common to all Member States. Arguing therefore that the protection of the fundamental rights of EU citizens is conditional upon whether some relevant provisions have direct effect or whether the Council and the European Parliament have exercised their legislative powers makes this protection incomplete and fragmented[58].

Furthermore, the protection of the rights of the child is stated in Article 3 of the Treaty on the European Union as one of the pursued goals in the EU and this clearly demonstrates the

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[55] Article 51(1) of the Charter provides: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

[56] Michaela Hailbronner, Sara Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status' (2011) Vol 5 Issue 4 ICL, 498-537

[57] Kristine Kruma, *Eu Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (BRILL 2013) 238

[58] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] EU:C:2011:124, Opinion of AG Sharpston, paras 165, 170

significance attached to these rights by its legislature[59]. Likewise, Article 24(2) of the Charter, which entails the principle of the best interests of the child, is based on the corresponding principle of the CRC[60], which is ratified by all Member States and constitutes the most accepted human rights treaty globally. Article 3(1) of the CRC requires that, in all actions undertaken by –among others– courts of law concerning children, their best interests should be the primary consideration. Without doubt, a court decision on migration that has a direct or indirect impact on children, either by assessing the residence status of the children themselves or that of their family members, constitutes an action concerning children. The CJEU is not directly bound by the CRC and, as already mentioned, it may not apply the Charter when an element of Union law has not a direct link to the case. Nevertheless, for the principle of the best interests of the child to be effective, it has to be applied at all instances, including those where the decision of the domestic court is being contested and where the general conditions affecting the child might have changed. Otherwise, the provisions of Article 3(1) of the CRC and Article 24(2) of the Charter become a dead letter. The right of the child to family life and the principle of the best interests of the child will be further analysed in the next Chapters.

Finally, arguing that the Charter is not applicable in the determination of whether an EU citizen is compelled to leave the EU territory and whether he or she would be deprived of the rights attached to the EU citizenship is a rather contested interpretation of Article 51 of the Charter. It is in fact Article 20 of the TFEU itself that triggers the application of the Charter. Once the Court has decided to invoke Article 20 of the TFEU, it has already applied EU law. Considering therefore that the Charter is applicable in making the assessment of whether an EU citizen is under risk of being deprived of his or her citizenship rights does not necessarily mean that the CJEU is extending the scope of the

[59] Consolidated Version of the Treaty on European Union [2008] OJ C115/13
[60] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17

Charter[61]. Besides, at the time of the examination of the case under Article 20 of the TFEU, it is not certain that the challenged national measure will be definitely regarded as depriving the EU citizen of his or her rights attached to the EU citizenship status, nor that a residence permit will be definitely granted to the TCN. On the contrary, the application of the Charter safeguards a human rights-based application of the TFEU and, in this sense, the scope of the Charter is not being expanded[62].

For these reasons, the assessment of whether an EU citizen has a relationship of dependency with a TCN and whether he or she is in fact under risk of being deprived of his or her citizenship rights, as these are enshrined in Article 20 of the TFEU, has to be made in the light of the right to family life and the best interests of the child, according to Articles 7 and 24(2) and (3) of the Charter, following the novelty of the ruling in *Chavez-Vilchez and Others*, and in line with the corresponding provisions of the ECHR and the respective case law of the ECtHR.

[61] Mark Klaassen, Peter Rodrigues, 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter' (2017) 19 European Journal of Migration and Law, 191-218

[62] Aida Torres Perez "The right to family life as a bar to the expulsion of third country nationals in the European Union" in Maribel Gonzalez Pascual and Aida Torres Perez (eds), *The Right to Family Life in the European Union* (Routledge 2017), 161, 162

3. The Right to Family Life

3.1. The family as the fundamental unit of society and family life

Member States' obligations regarding the protection of the family and family life are stated in various human rights treaties. Article 23(1) of the International Covenant on Civil and Political Rights, reiterating Article 16(3) of the Universal Declaration of Human Rights[63], recognizes family as 'the natural and fundamental group unit of society' which is 'entitled to protection and assistance by society and the State', whereas, under Article 17 of the same treaty, individuals are protected 'against any arbitrary or unlawful interference with their privacy, family, home or correspondence'[64]. Furthermore, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights requires States Parties to accord 'the widest possible protection and assistance […] to the family […] particularly for its establishment and while it is responsible for the care and education of dependent children'[65]. The preamble of the CRC recognises family as 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'. Under the European Social Charter, 'the family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development'[66]. Recognition of the family as the fundamental unit of society can also be found in Article 44(1) of the International Convention on the Protection of the Rights of All

[63] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR). The UDHR entails international custom and thus is binding upon the Member States.
[64] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[65] International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)
[66] European Social Charter (Revised) [1996] (ESC)

Migrant Workers and Members of their Families[67] and in the preamble of the Convention on the Rights of Persons with Disabilities[68].

In addition, Article 8 of the ECHR, to which all Member States are parties, provides that '[e]veryone has the right to respect for his or her private and family life, home and communications.' The conditions upon which a Contracting State may interfere with one's right to family life are stated in the second paragraph of Article 8 and concern 'the interests of national security', 'public safety or the economic well-being of the country', 'the prevention of disorder or crime', 'the protection of health or morals' and 'the protection of the rights and freedoms of others'. Such interference for the protection of the above mentioned objectives is allowed only if it is 'in accordance with the law' and 'necessary in a democratic society'. In this regard, the Court also examines the proportionality of the national measure with the goal to be attained.

As already mentioned in the previous Chapter, when Member States or EU institutions, including the CJEU, apply Union law, they should do so in accordance with the Charter. The right to family life is guaranteed in Article 7 of the Charter, whose provisions correspond to those articulated in Article 8 of the ECHR. Therefore, according to Article 52(3) of the Charter, the meaning and scope of the right enshrined in Article 7 are the same as those of the corresponding article of the ECHR. Consequently, any restrictions which may legitimately be imposed on the right to family life under Article 7 of the Charter are the same as those permitted by Article 8 of the ECHR. The CJEU has further ruled that Article 7 must be read in conjunction with Article 24(2) (the best interests of the child) and Article 24(3) of the Charter, acknowledging the need for a child to maintain a personal relationship with both his and her parents on a regular basis[69].

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[67] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3

[68] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3

[69] Case C-540/03 *European Parliament v Council of the European Union* [2006] EU:C:2006:429, para 58

3.2. The right to family reunification

As already stated in the introduction of this paper, in the EU context, family reunification is mainly regulated by the EU Family Reunification Directive and the Free Movement Directive. There are also various EU instruments, such as the Blue Card Directive (2009/50/EC)[70] and the Intra-Corporate Transfer Directive (2014/66/EU)[71], which also encompass similar provisions on family reunification. These Directives generally rely on the EU Family Reunification Directive, but entail more favourable provisions for specific categories of migrants, such as workers with higher professional qualifications.

Unlike the above mentioned EU secondary law, which imposes a positive obligation on Member States to authorise family reunification and grants a direct right to family reunification to those eligible under its scope, human rights law does not grant such a right *per se*. However, the wide recognition of family as the fundamental unit of the society, as mentioned above, and of its nurturing function upon its members affirms that States' obligations regarding the family cannot be limited to a formal acknowledgement[72]. In this regard, human rights treaty bodies and legal scholars have repeatedly stated that States' obligation to protect the family under international human rights law should be interpreted as entailing the duty to facilitate family reunification and ensure that the family unity is maintained.

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[70] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17

[71] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1

[72] UNGA 'Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development. Report of the United Nations High Commissioner for Human Rights' (2016) A/HRC/31/37, para 49

In particular, in its General Comment 19 regarding Article 23 of the ICCPR, the Human Rights Committee has clarified that:

> 'The right to found a family implies, in principle, the possibility to procreate and live together [...] Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families [...].'[73]

Similarly, the Expert Roundtable on Family Unity organized by the UNHCR in 2001 concluded that:

> 'A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. […] Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity…'[74]

This approach was reaffirmed in the discussion paper, dated 4 December 2017 and prepared for the Expert Roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification, organized by the UNHCR in December 2017[75].

Furthermore, according to Article 9(1) of the CRC, States must ensure that a child is not separated from his or her parents, whereas, according to Article 10 of the same Convention, applications for family reunification must be dealt with 'in a positive, humane and expeditious manner'. Although the CRC does not provide a right to family reunification *per*

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[73] UN Human Rights Committee 'General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)' (1990), para 5

[74] Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations On International Protection* (Cambridge University Press 2003) 604, 605

[75] UN High Commissioner for Refugees (UNHCR), Discussion paper prepared for the Expert Roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification (2017), 3 <http://www.refworld.org/docid/5a902b084.html> Accessed 4 April 2018

se either; nevertheless it requires that States act positively and preventively with regards to any adverse impacts on the family members. In the same vein and as mentioned above, the Charter, under Article 24(3), grants every child the right to maintain a personal relationship and direct contact with his or her parents, affirming Member States' obligation to safeguard this relationship[76].

In the context of the ECHR, the Strasburg Court has considered that Article 8 entails the right of the family members to live together. Therefore, State measures that result in separation of families constitute direct interference on the right to family life and need to be measured against the terms of Article 8(2) of the Convention, as seen above. Although, the wording of Article 8 implies that the primary aim of its provisions is to protect individuals against States' arbitrary action and entails a negative obligation to abstain from any undue interference on the right, the ECtHR has established that, under Article 8 of the Convention, States may also have positive obligations to take active measures in order to preserve the family unity and ensure the effective respect for the right to family life. According to the Strasbourg Court, the boundaries between the States' positive and negative obligations are neither explicit nor absolute[77]. This ambiguity in the Court's case law has been criticized by some academics and has been characterised as an attempt of the Court to avoid articulating clear principles and thus to minimise the precedential value of its judgments[78]. In any case, the applicable principles in the Court's case law regarding family reunification are, however, similar in both contexts and have been set as follows:

Firstly, none of the provisions of the ECHR encompasses a general obligation for States to respect migrants' decision regarding the country of their settlement and to authorise family reunification in their territory. Hence, the right of a migrant to enter or to reside in a

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[76] It is noteworthy that, pursuant to Article 1 of the CRC, a child is every person below the age of 18, 'unless under the law applicable to the child, majority is attained earlier'.
[77] *Gül v Switzerland* App no 23218/94 (ECtHR, 19 February 1996), para 38; *Ahmut v the Netherlands* App no 21702/93 (ECtHR, 28 November 1996), para 63
[78] See for instance Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (1st edn, Oxford University Press 2016) 113

particular country is not guaranteed either by Article 8 alone or by the Convention in general[79]. Secondly, a State has the right to control the entry of non-nationals into its territory. According to the ECtHR, States enjoy a wide margin of appreciation in developing their immigration policies. States have better and direct knowledge of their society and thus they are in the best position to estimate their people's needs and interests in the establishment of their economic or social strategy[80]. Thirdly, in the context of both positive and negative obligations, States must strike a fair balance between the competing interests of the individuals involved on one hand and of the community as a whole on the other[81]. In order to make that assessment, several factors are taken into account by the Court. For instance, it examines *inter alia* the extent to which family life would effectively be ruptured, the existence of ties of the family members both with the host country and with the country of origin[82], whether there are 'insurmountable obstacles' preventing the family from living in the country of origin[83] and also, whether the migrant in question has breached the law causing serious considerations of public order weighing in favour of his or her exclusion[84]. Another factor that is taken into consideration by the ECtHR is whether family life was established at a time when the individuals who seek for protection under Article 8 acknowledged that the immigration status of one of them would most probably endanger the establishment and maintenance of their family life within the territory of the host country[85]. Finally, the best interests of the child, as these will be further analysed in the next Chapter, have become another relevant factor to be given due regard in the Court's balancing test[86].

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[79] *Novruk and Others v Russia* App nos 31039/11, 48511/11, 76810/12, 14618/13, 13817/14 (ECtHR 15 March 2016) para 83
[80] *Hode and Abdi v the United Kingdom* App no 22341/09 (ECtHR, 6 November 2012), para 52
[81] *Benmar and Others v the Netherlands* App no 43786/04 (ECtHR, 5 April 2005)
[82] *Chandra and Others v the Netherlands* App no 53102/99 (ECtHR, 13 May 2003)
[83] *I.A.A. and Others v the United Kingdom* App no 25960/13 (ECtHR, 8 March 2016), para 44
[84] *Butt v Norway* App no 47017/09 (ECtHR, 4 December 2012)
[85] *Jeunesse v the Netherlands* App no 12738/10 (ECtHR, 3 October 2014), para 108
[86] *El Ghatet v Switzerland* App no 56971/10 (ECtHR, 8 November 2016), para 46

However, since each application regarding family reunification is subject to the Court's individual balancing test, applicants in similar situations do not always get the same outcome before the ECtHR. This has given rise to some critique concerning the inconsistency and lack of foreseeability in the case law of the Court. As put by T. Spijkerboer, 'identical or comparable factors may turn up on each side of the scale, facts are reframed so as to fits the Court's arguments'[87]. Furthermore, other scholars have argued that the EU citizenship concept under the CJEU case law offers more extensive protection compared to Article 8 of the ECHR under the ECtHR case law[88]. In the latter case, applicants are subject to the balancing test of the Strasburg Court and need to show that their interests outweigh those of the State. In other words, if it is possible for the family to live together outside the host country, then most probably no violation of Article 8 will occur, unless the circumstances of the applicants' case are regarded as exceptional[89]. On the other hand, under the EU citizenship concept, a balancing exercise against the State's interests is not necessary, the applicants do not have to prove that their interests prevail and the family member of the EU citizen, who is a TCN, does not have to prove –for instance– the existence of strong cultural and linguistic ties with the EU country or the legality of his or her residence status. The only prerequisite in this context is to establish that a strong relationship of dependency based on any legal, financial or emotional ties between the family members in fact exists, without leaving much appraisal for the Member States.

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[87] Thomas Spijkerboer 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law, 280

[88] Chiara Berneri 'Protection of Families Composed by EU Citizens and Third-country Nationals: Some Suggestions to Tackle Reverse Discrimination' (2014) 16 European Journal of Migration and Law, 249-275; Peter Van Elsuwege and Dimitry Kochenov, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European Journal of Migration and Law, 443–466

[89] See among others *Ahmut v the Netherlands* App no 21702/93 (ECtHR, 28 November 1996), para 71; *Darren Omoregie and Others v Norway* App no 265/07 (ECtHR, 31 July 2008), paras 66, 68. But see also *Jeunesse v the Netherlands* App no 12738/10 (ECtHR, 3 October 2014), paras 117-122, where the Court held that even though there were no insurmountable obstacles for the family to settle outside the host country, they would nevertheless experience a degree of hardship if they were forced to do so. In this regard, due consideration was given to the situation of all members of the family that made the circumstances of the case at issue exceptional.

In any event, Member States are however bound both by Article 20 of the TFEU and Article 8 of the ECHR. Therefore, both contexts must be taken into account when States legislate or apply their migration policies and family members must be accorded the maximum possible protection. Moreover, as already mentioned in the previous Chapter, when assessing whether an EU citizen maintains a relationship of dependency with a TCN and whether he or she is in fact under risk of being deprived of his or her citizenship rights, as these are enshrined in Article 20 of the TFEU, States need to take into consideration the established principles of the ECtHR, such as the level of disruption of the family ties and the child's best interests.

Furthermore, the Strasburg Court has repeatedly stated that the length and formalities of the proceedings before the migration Services may have an impact on the enjoyment of the right to family life. Therefore, States should handle family reunification applications in a flexible, prompt and efficient way, taking into account the specific circumstances of each case and especially the vulnerability of the persons concerned[90]. In *Saleck Bardi v Spain*, even though the case did not concern family reunification, the Court held that the competent authorities' inactivity and their lack of coordination for a long period resulted in the weakening of the relationship between the child and her mother and thus violated the applicant's right to family life[91]. Moreover, States must not treat individuals with excessive formality as this may have an indirect adverse impact on the enjoyment of their right to family life. In *G.R. v the Netherlands* the applicant complained that the financial threshold for obtaining a residence permit prevented him from residing with his wife and children and therefore he suffered a violation of his right under Article 8 of the Convention[92]. The Court held that it would be more appropriate to examine the complaint under Article 13 (right to an effective remedy) and held that the extremely formalistic attitude of the State authorities and their refusal to exempt the applicant from the required administrative fee deprived him

[90] *Tanda-Muzinga v France* App no 2260/10 (ECtHR, 10 July 2014); *Mugenzi v France* App no 52701/09 (ECtHR, 10 July 2014); *Senigo Longue and Others v France* App no 19113/09 (ECtHR, 10 July 2014)
[91] *Saleck Bardi v Spain* App no 66167/09 (ECtHR, 24 May 2011)
[92] *G.R. v the Netherlands* App no 22251/07 (ECtHR, 10 January 2012), para 27

from an effective access to the administrative procedure by which he could obtain a residence permit and reside lawfully with his family[93].

3.3. The existence of family ties

Regarding the determination of dependency based on the existence of family ties and who is in practice entitled to family reunification, it is noted that, contrary to the EU Directives which regulate family reunification and encompass specific provisions that define the eligible family members, no explicit reference is made in international human rights law. Apart from the CRC, which specifically states that the family scope should also include 'the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child'[94], no definition of the scope of family exists in any of the human rights treaties. According to the Human Rights Committee, the concept of family differs from State to State and even from region to region within the same State and thus it is not feasible to give a standard definition to its concept[95]. Likewise, the Committee on Economic, Social and Cultural Rights has stated that, due to societal developments since the adoption of the ICESR, 'the concept of "family" must be understood in a wide sense'[96]. In any case and despite this wide perception of family,

[93] Ibid paras 35, 43-55
[94] Article 5 of the CRC
[95] UN Human Rights Committee 'General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)' (1990), para 2
[96] UN Committee on Economic, Social and Cultural Rights 'General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (1991), para 6

polygamy and child marriage cannot be considered as compatible with international human rights standards[97].

Similarly, under the ECtHR case law, the concept of family life has evolved during the years, so as to align with social and legal developments concerning the heterogeneity of modern family structures. According to the Strasburg Court, family life depends on the existence of close personal ties between family members irrespective of the legal recognition of such relationship[98]. When a relationship between a couple is concerned, the existence of close personal ties can be proved *inter alia* by their common accommodation, the length of their relationship or the demonstration of their commitment to each other by having children together or by any other means[99]. The relationship between a mother and her child always falls under the scope of Article 8[100]. In addition, a child born out of a marital relationship is *ipso jure* part of that family unit from the moment of birth, even if the parents do not live together any more[101]. Where a marital relationship does not exist, the family ties between the father and the child depend on the evident interest and commitment of the father to the child[102].

Moreover, the Court has held that the absence of a biological link does not make the existence of family life impossible[103]; however a mere genetic link is not sufficient for the establishment of family life[104]. In any case, the Strasburg Court maintains an elastic approach on the concept of family life and decides upon the existence of family ties taking

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[97] Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child 'Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices' (2014), paras 20-28; UN Human Rights Council 'Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children' (2007) A/HRC/4/23, para 21
[98] *Johnston v Ireland* App no 9697/82 (ECtHR, 18 December 1986), para 56
[99] *X, Y and Z v the United Kingdom* App no 21830/93 (ECtHR, 22 April 1997), para 36
[100] *Marckx v Belgium*, App no 6833/74 (ECtHR,13 June 1979), para 31
[101] *Berrehab v the Netherlands* App no 10730/84 (ECtHR, 21 June 1988), para 21
[102] *L. v the Netherlands* App no 45582/99 (ECtHR, 1 June 2004), para 36
[103] *X, Y and Z v the United Kingdom* App no 21830/93 (ECtHR, 22 April 1997), para 37
[104] *J. R. M. v the Netherlands* App no 16944/90 (Commission Decision, 8 February 1993)

into account the specific circumstances of each case[105]. In general, it has ruled that personal ties that constitute family life and are thus entitled to protection under Article 8 of the Convention may exist *inter alia* between children and their foster parents[106], children and their grandparents[107], between siblings[108], uncles or aunts and their nephew or niece[109], and adults and their parents[110]. On the other hand, when examining cases that concern immigration, the ECtHR has found that no family life exists between parents and their adult children, unless they can demonstrate additional elements of dependence that exceed normal emotional ties[111]. Nevertheless, depending on the specific circumstances of the case, such ties may be protected under the notion of 'private life' of Article 8[112].

Finally, following the latest developments in the Court's jurisprudence, a same-sex couple also falls within the notion of family life in the same way as a heterosexual one[113]. This was also affirmed by the CJEU in its recent and much-awaited judgment in *Coman*[114]. In this case, the CJEU, implementing the Free Movement Directive in accordance with Article 7 of the Charter, specifically referred to the case law of the ECtHR and concluded that, even if Member States have not legalised homosexual marriage, they must still offer same sex spouses the same residency rights as heterosexual ones in their family reunification policies[115].

In contrast, national immigration laws often entail a limited scope with regards to the definition of family, excluding for example family members who are not spouses/partners

[105] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Bloomsbury Publishing 2017), 26-30
[106] *X v Switzerland* App no 8257/78 (Commission Decision, 10 July 1978)
[107] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979), para 45
[108] *Boughanemi v France* App no 22070/93 (ECtHR, 24 April 1996), para 35
[109] *Butt v Norway* App no 47017/09 (ECtHR, 4 December 2012), para 70
[110] *Moustaquim v Belgium* App no 12313/86 (ECtHR, 18 February 1991)
[111] *Senchishak v Finland* App no 5049/12 (ECtHR, 18 November 2014), para 55
[112] *Slivenko v Latvia* App no 48321/99 (ECtHR, 9 October 2003), paras 93-97
[113] *Pajić v Croatia* App no 68453/13 (ECtHR, 23 February 2016), paras 64, 65; *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013), para 73
[114] Case C-673/16 *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* [2018] EU:C:2018:385
[115] Ibid paras 48-51

or minor children[116]. Furthermore, some countries require couples to be formally married or to be in a religious marriage, whilst others do not recognise same-sex unions or marriages[117]. These practices, which exclude members of the extended family or other forms of family from family reunification, clearly contradict the interpretation of the ECtHR regarding the scope of family under Article 8 of the Convention. Likewise, as already mentioned, when endeavoring to assess the relationship of dependency between a TCN and an EU citizen and hence whether the latter would be forced to leave the EU territory if his or her family member was denied a residence right, in addition to the existence of any financial or legal ties according to the case law of the CJEU, Member States must not overlook the existence of family ties as these are described in the aforementioned case law of the ECtHR.

3.4. The Principle of Equality and Non-discrimination

3.4.1. An international law imperative

States are under the obligation to exercise their immigration policies in a manner which is compatible with their citizens' right not to be subject to discrimination. The principle of equality and non-discrimination is entailed in all human rights instruments and safeguards the equal enjoyment of the rights guaranteed therein for all individuals without distinction

[116] For instance, Section 37 of the Finnish Aliens Act, which applies to the issuance of a residence permit to a TCN on the basis of his or her family ties with a Finnish citizen, provides that:'(1) When applying this Act, the spouse of a person residing in Finland, and unmarried children under 18 years of age over whom the person residing in Finland or his or her spouse had guardianship are considered family members. If the person residing in Finland is a minor, his or her guardian is considered a family member. A person of the same sex in a nationally registered partnership is also considered a family member. (380/2006) (2) Persons living continuously in a marriage-like relationship within the same household regardless of their sex are comparable to a married couple […]' Finland: Act No. 301/2004 of 2004, Aliens Act

[117] See for instance the Polish legal System in Helsinki Foundation for Human Rights, *Family Reunification of Foreigners in Poland. Law and Practice* (2016), 9

on the grounds of *inter alia* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[118].

In addition, Article 26 of the ICCPR and Protocol No 12 of the ECHR establish a free-standing right to equality, whose application is not limited to the human rights encompassed in the respective treaties. According to the Human Rights Committee,

> '[…] article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right […] Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.'[119]

Accordingly, Article 1 of Protocol No 12 of the ECHR expands the application of the principle of non-discrimination to '[t]he enjoyment of any right set forth by law'.

In general, the principle of equality and non-discrimination guarantees that people under similar circumstances are treated equally both in law and practice. However, not every distinction or difference in treatment amounts to prohibited discrimination. In order for a violation to occur, such differentiation must not be reasonable or objective and the aim to be pursued by the States' measures or decisions must not be legitimate. The respective monitoring treaty bodies and courts have developed rich jurisprudence dealing with issues of equal treatment and the right not to be subject to discrimination either as a free-standing right or in conjunction with the human rights enshrined in the treaties.

The ECtHR, in particular, has developed rich case law in the context of migration and family reunification applying Article 8 in conjunction with Article 14 of the Convention. Article 14 of the ECHR prohibits differences based on an identifiable, objective or personal

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[118] See for instance Articles 2 and 26 of the ICCPR, Article 2(2) of the ICESCR, Article 2 of the CRC, Article 14 of the ECHR and Articles 20 and 21 of the Charter.
[119] UN Human Rights Committee 'CCPR General Comment No. 18: Non-discrimination' (1989), para 12

characteristic or status, including *inter alia* 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Having regard to the wording of Article 14 and the inclusion of the phrases 'any ground such as' and 'any other status', the list set out therein is illustrative and not exhaustive. For instance, the ECtHR has held that health status and sexual orientation fall within the scope of Article 14[120].

According to the Strasburg Court, in order for a violation to arise under Article 14, the facts under review must fall within the ambit of one or more of the substantive rights protected under the Convention, since, as already mentioned, Article 14 is not a self-standing right. However, it is not necessary that the respective substantive right, which Article 14 is combined with, is violated. In the context at issue, it suffices that the facts of the case fall under the scope of Article 8 of the Convention. Furthermore, there must be a difference in the treatment of persons or categories of persons in analogous or similar situations without an objective and reasonable justification. This condition is met when States' measures do not pursue a legitimate aim or when there is not a reasonable relationship of proportionality between the measures in question and the aim sought to be realised[121]. A breach of Article 14 may also arise when a person or group of persons is treated less favourably than another, even though the more favourable treatment is not required by the Convention, or even when the different treatment is not aimed at a specific group and there is no intention of discrimination. In other words, the prohibition of discrimination also extends to those rights which the State has voluntarily decided to provide[122]. Therefore, when a State grants a right to family reunification to certain people or groups of people, any exclusion of other people or groups of people who are in an analogous or similar situation should be based on an objective and reasonable justification. Regarding the burden of proof, the Court has held

[120] *Novruk and Others v Russia* App nos 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14 (ECtHR, 15 March 2016); *Pajić v Croatia* App no 68453/13 (ECtHR, 23 February 2016)
[121] *Pajić v Croatia* App no 68453/13 (ECtHR, 23 February 2016), paras 53, 55
[122] Ibid paras 55,56

that once the applicant has shown that he or she is subject to different treatment, it is for the State to prove that this differentiation is justified[123].

In addition, unequal treatment based on 'suspect' grounds, such as nationality or sex, triggers particularly serious scrutiny and is considered very hard to justify. In this regard, the Strasburg Court often takes into account States' practices and developments at international and EU level, which further narrow States' margin of appreciation[124]. For instance, in *Biao v Denmark*, the Grand Chamber of the ECtHR overruled the Chamber's judgement and held that a difference in treatment based exclusively or to a large extent on the grounds of one's nationality or ethnic origin can hardly be justified in a contemporary democratic society and is therefore incompatible with the Convention[125]. In this case, it was ruled that the Danish Aliens Act, which provided for different treatment between Danish citizens by birth and Danish citizens by naturalisation, was not compatible with the Convention. Likewise, in *Novruk and Others v Russia*, the ECtHR held that the applicants belonged to a particularly vulnerable group that was historically subject to prejudice and social exclusion and that '[t]he existence of a European consensus is an additional consideration relevant in determining whether the respondent State should be afforded a narrow or a wide margin of appreciation'[126]. The applicants in this case were HIV-positive and the different treatment they were subject to on the basis of their health status was not supported by any other State. Therefore, the Russian State should establish very weighty reasons for imposing the restrictions at issue[127]. Similarly, taking into account the global developments regarding recognition of same-sex relationships, the Court ruled in *Pajić v Croatia* that a blanket exclusion of same-sex couples from the possibility of being granted a residence permit on the grounds of family reunification was not acceptable under the

[123] Ibid para 60
[124] *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016), paras 56-61
[125] Ibid paras 93, 94
[126] *Novruk and Others v Russia* App nos 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14 (ECtHR, 15 March 2016), para 99
[127] Ibid para 100

ECHR[128]. In the same vein, in *Taddeucci and Mccall v Italy*, the ECtHR reiterated that 'like differences based on sex, differences based on sexual orientation require […] "particularly convincing and weighty reasons"'[129]. Therefore, it concluded that treating the application to family reunification of unmarried homosexual couples as that of unmarried heterosexual couples constitutes prohibited discrimination, when the former do not have the opportunity to regularize their partnership in the host country[130].

3.4.2. Tackling reverse discrimination

In practice, regarding family reunification of their own nationals who have not exercised their right to move within the EU, most EU Member States apply the same rules as those provided by the EU Family Reunification Directive, whilst few others apply similar rules as those provided by the Free Movement Directive[131]. As already noted in the Introduction of this paper, the EU Family Reunification Directive applies to TCNs residing lawfully in the territory of a Member State and their family members who are also TCNs, and the Free Movement Directive applies to Union citizens who have exercised their right to move to or reside in a Member State which is different from that of which they are a national and their family members, regardless of whether the latter are EU citizens or not. By analogy the provisions of the Free Movement Directive also apply to mobile EU citizens who return with their family member to the Member State of origin[132].

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[128] *Pajić v Croatia* App no 68453/13 (ECtHR, 23 February 2016), para 84
[129] *Taddeucci and Mccall v Italy* App no 51362/09 (ECtHR, 30 June 2016), para 89
[130] Ibid paras 96-99
[131] EMN, *EMN Synthesis Report for the EMN Focused Study 2016, Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices* (2017), 30; EMN, *Ad-Hoc Query on Reunification of third country nationals by an own national sponsor* (2015); EMN, *Ad-Hoc Query on Family Reunification with third-country national family members-applicable rules to "non-mobile" EU nationals* (2009)
[132] Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.* [2014] EU:C:2014:135

It is however noteworthy that the EU Family Reunification Directive provides less favourable rules than those provided by the Free Movement Directive. For instance, the EU Family Reunification Directive distinguishes between those who can definitely acquire a residence permit on the grounds of family reunification with their sponsor (spouse and their minor children, including adopted children) and those who are subject to the States' discretion (dependent first degree relatives in the direct ascending line, dependent adult unmarried children, unmarried or registered partners and their minor children)[133]. Moreover, under the EU Family Reunification Directive, family members are subject to integration measures which depend on national legislation[134]. In addition, once the family members get accepted in the host country, they are granted a renewable residence permit of at least one year's duration and may later, but maximum after five years of residence, be entitled to an autonomous residence permit[135]. In contrast, the Free Movement Directive provides for a wider scope regarding the eligibility of family members, including direct descendants who are under the age of 21 or dependants and those of the spouse or partner; and dependent relatives in the ascending line and those of the spouse or partner[136]. The Free Movement Directive does not entail any provision for potential integration measures and grants a right of permanent residence to the sponsor's family members who have resided legally for a continuous period of five years in the host Member State[137].

That being said, Member States which apply the EU Family Reunification Directive or stricter rules than those provided in the Free Movement Directive to their own nationals who have not exercised their right to free movement, treat these citizens less favourably compared to their compatriots who have exercised their right to move within EU or nationals of other EU countries who reside in the same territory. This differentiation in

[133] Council Directive 2003/86/EC on the Right to Family Reunification [2003] OJ L251/12, Article 4
[134] Ibid Article 7(2)
[135] Ibid Articles 13 and 15(1)
[136] Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States [2004] OJ L158/77, Article 2(2)
[137] Ibid Article 16

treatment needs to be objectively and reasonably justified, otherwise, pursuant to the foregoing, it may constitute prohibited discrimination.

The Strasburg Court does not distinguish between static and mobile EU citizens, nor is it competent to apply EU law. However, as noted above, it takes legal developments and States' practice at EU and international level into account. In this regard, it is worth noting that the non-exercise of one's right to free movement within the EU does not constitute a 'suspect' ground of discrimination under the Court's case law and thus, States enjoy a wide margin of appreciation in this context. However, as also noted above, discrimination on the grounds of nationality requires strict scrutiny and is harder to justify. Therefore, if Member States grant certain groups of foreigners a right to family reunification, in order to exclude their nationals, who have not exercised their right to move within the EU and who are nonetheless in an analogous situation, very weighty reasons must be put forward to justify this differentiation.

Furthermore, Article 18 of the TFEU also prohibits any discrimination on the grounds of nationality. The aim of this provision is to ensure that EU citizens are treated equally within the EU territory and that their free movement is facilitated. The CJEU, when implementing Article 18 of the TFEU, usually follows three procedural steps. First, it examines whether the contested measure falls under the scope of EU law. Then, it considers whether there has been a discriminatory effect against nationals of another Member State and finally, it assesses whether the differentiation in treatment is justified[138]. In her Opinion in the *Zambrano* case, AG Sharpston made an attempt to address the issue of reverse discrimination against static EU citizens and suggested that Article 18 of the TFEU could be invoked to this end. According to AG Sharpston, in order for the CJEU to apply Article 18 of the CJEU in this context, a static EU citizen would have to lodge a complaint alleging that he or she has been discriminated against other citizens in the same country who have

[138] See for instance Case C-628/11 *Criminal proceedings against International Jet Management GmbH* [2014] EU:C:2014:171; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] EU:C:2010:181

exercised their free movement right. This complaint should entail a violation of a fundamental right which is protected under EU law. Article 18 should then be used as a subsidiary remedy in such cases where national law was unable to efficiently protect EU citizens' fundamental rights[139]. However, at the time of the proceedings, the concept of the fundamentality of the EU citizenship status and the rights attached to it had not yet progressed. As already mentioned, before the Court's innovative decision in the *Zambrano*, cases which did not entail the element of movement within the EU and could not be linked to any EU Regulation or Directive were considered as purely internal and hence, fell outside the EU competence. AG Sharpston herself acknowledged that

> 'At the material time in the main proceedings, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law [...]'[140]

AG Sharpston's proposal in the *Zambrano* was not adopted in the Court's decision. Instead, the CJEU decided to invoke the provisions of Article 20 of the TFEU and the concept of the EU citizenship status without any reference to the human rights of the affected. As already observed in the previous Chapter, this approach entails several drawbacks in terms of equality, human rights protection and foreseeability in the Court's case law. In contrast, as Kruma argues, AG Sharpston's approach is well-balanced and adequate to remedy the issue of reverse discrimination in this context. Article 18 of the TFEU may be applied as a subsidiary means of protection in order to safeguard the fundamental rights to family life and to equal treatment of static EU citizens, when Member States fail to do so[141].

Likewise, Articles 21(1) and 21(2) of the Charter correspond to Article 14 of the ECHR and Article 18 of the TFEU accordingly. As already mentioned in the previous Chapter, the

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[139] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] EU:C:2011:124, Opinion of AG Sharpston, paras 144-148
[140] Ibid paras 175, 176, 178
[141] Kristine Kruma, "Family reunification A tool to shape the concept of EU citizenship" in Maribel Gonzalez Pascual and Aida Torres Perez (eds), *The Right to Family Life in the European Union* (Routledge 2017), 146

CJEU is reluctant to invoke the Charter when the factual specificities pertaining to the case do not have a sufficient connection with any EU Directive or Regulation. However, as also argued in the previous Chapter, when the CJEU or States invoke Article 20 of the TFEU and seek to assess whether an EU citizen would be deprived of his or her rights deriving from the EU citizenship status, they are already applying EU law. Therefore, disregarding the provisions of the Charter in this process is not a prudent approach.

4. The Best Interests of the Child

4.1. A general principle of international law

As noted in the second Chapter, the protection of the rights of the child is stated in Article 3 of the TEU as one of the pursued goals in the EU, clearly demonstrating the significance attached by Member States to the well-being of the child.

The concept of the best interests of the child, which requires that the best interests of the child are the primary consideration in all State actions concerning children, was initially included in the second principle of the Declaration of the Rights of the Child[142]. It was then embodied in Article 3(1) of the CRC, which currently constitutes the most accepted human rights treaty globally, and became legally binding upon States[143]. Accordingly, the principle of the best interests of the child was then codified in Article 24(2) of the Charter, which is based on the corresponding principle of the CRC[144].

The significance attributed by the international community to the best interests of the child is also evident by the references made to it in various other international instruments, such as in Articles 5(b) and 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women[145], the preamble of the Hague Convention on the Civil

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[142] Declaration of the Rights of the Child (adopted 20 November 1959) UNGA A/RES/1386(XIV). Principle 2 reads: 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.'

[143] The CRC has been ratified by 196 countries globally. More information regarding ratifications and succession to the CRC can be sought at the UN Treaty Collection website at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&Chapter=4&lang=en (last accessed on 20 May 2018).

[144] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17

[145] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Aspects of International Child Abduction[146] and Articles 14(3), 30(1) and 31(1)(g) of the Convention on the Protection of children against sexual exploitation and sexual abuse[147]. Similarly, respective references are being made in various EU instruments, such as the European Convention on the Adoption of Children (revised) in Articles 4(1), 6, 9, 14 and 19[148]. The EU has also included this principle in both the Free Movement Directive[149] and the EU Family Reunification Directive, whereas, under Article 5(5) of the latter, Member States are required to have due regard to the best interests of the child, when they examine an application for entry and residence on the grounds of family reunification.

Given its inclusion in the various treaties and Directives mentioned above and its broad acceptance globally, the principle of the best interests of the child has come to be perceived by part of the academia as a general principle of international law[150]. This perception is also affirmed by the ECtHR, which has repeatedly stated that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children their best interests must be paramount'[151].

4.2. A threefold concept

Neither the drafters of the CRC nor the Committee on the Rights of the Child have provided a concrete definition of the concept of the best interests of the child. The

[146] Hague Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) Hague XXVIII
[147] Convention on the Protection of children against sexual exploitation and sexual abuse (adopted 12 July 2007, entered into force 1 July 2010) CETS 201
[148] European Convention on the Adoption of Children (Revised) (adopted 27 November 2008, entered into force 1 September 2011) CETS 202
[149] See Article 28(3)(b) of the Free Movement Directive.
[150] Jane McAdam *Complementary protection in international refugee law* (Oxford University Press 2011), 173; *Antwi and Others v Norway* App no 26940/10 (ECtHR, 14 February 2012), Dissenting Opinion of Judge Sicilianos, joined by Judge Lazarova Trajkovska, para 4
[151] *El Ghatet v Switzerland* App no 56971/10 (ECtHR, 8 November 2016), para 46; *Jeunesse v the Netherlands* App no 12738/10 (ECtHR, 3 October 2014), para 109

Committee on the Rights of the Child has stated that the notion of the best interests of the child generally describes the well-being of persons under the age of 18 years[152]. The primary aim of this concept is to ensure the effective enjoyment by the child of all the rights enshrined in the CRC and protect the physical, mental, moral, psychological and social development of the child[153]. It is a broad 'flexible and adaptable' concept that should be determined on a case-by-case basis, taking into consideration the specific circumstances of the child concerned[154]. Moreover, it is a threefold concept that entails a 'substantive right', an 'interpretative legal principle' and a 'rule of procedure'. In other words, the best interests of the child should be the primary consideration in every decision concerning children when different interests are at stake; they should be utilised in favour of the child, when a legal provision is open to more than one interpretation; and they should be incorporated in every step of the policy-making and its implementation[155].

Regarding the duty-bearers of the obligation to have regard to the best interests of the child, Article 3(1) refers to all 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The Committee on the Rights of the Child has clarified that the best interests of the child should be integrated and consistently applied:

> '[…] in all legislative, administrative and judicial proceedings as well as in all policies, programmes and projects relevant to and with an impact on children. The legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle.'[156]

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[152] Committee on the Rights of the Children 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14, para 21. According to the Committee, '[t]he term "children" refers to all persons under the age of 18 within the jurisdiction of a State party'.
[153] Ibid paras 4, 5
[154] Ibid para 32
[155] Ibid para 6
[156] Committee on the Rights of the Child 'Consideration of reports submitted by States parties under article 44 of the Convention. Concluding Observations: Finland' (2011) CRC/C/FIN/CO/4, para 28

Therefore, in all migration issues affecting children, either directly or indirectly, the principle of the best interests of the child has to be applied. It is noted that the Committee on the Rights of the Child advises States to give the term 'concerning children' a broad sense, so that it includes actions which are not only directly aimed at the child, but affect him or her indirectly, for instance through his or her parents or legal guardians[157]. Furthermore, the application of the principle has to be made at all stages and instances, starting from the policy-making instruments and the administrative authorities to the judicial proceedings.

Likewise, as noted in the second Chapter, in order for the principle of the best interests of the child to be effective, the term 'court decisions' under the CRC should also encompass the rulings of the CJEU, where such measures or decisions are being contested. Otherwise, the protection deriving from the principle of the best interests of the child becomes problematic. However, as also noted, the CJEU is not very consistent in referring to the principle of the best interests of the child, all the more so when the facts of the case do not fall under any EU Direction or Regulation and the Court considers that the Charter is not applicable. Nevertheless, it has been equally argued that the Court takes into account what serves the interests of the child implicitly, even though it does not refer to them directly[158]. For instance, in the *Zambrano* the CJEU held that denying the father a right of residence would compel his children to leave the country and this would jeopardise their citizenship rights[159]. That being said, the Court already recognised that it was for the children's interest not to be separated from their parents. Otherwise, the children could be left in the care of the State or that of a foster family.

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[157] Committee on the Rights of the Children 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14, paras 19, 20
[158] Klaassen M., Rodrigues P., 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter' (2017) 19 European Journal of Migration and Law, 191-218
[159] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] EU:C:2011:124

According to the Committee on the Rights of the Children, potential conflicts between the best interests of a child and other interests, e.g. the States' interest to control migration and the entry or residence of foreigners at their territory, should be examined individually by balancing the interests of all parties. Nonetheless, if harmonisation is not possible, then the authorities or decision-makers should bear in mind that the children's interests enjoy high priority and thus larger weight must be attached to what serves the children best[160]. In this regard, the Strasburg Court includes the best interests of the child in its aforementioned balancing test and has repeatedly affirmed that all decisions concerning children should 'place the best interests of the child at the heart of their considerations and attach crucial weight to it'[161]. This due consideration should also be reflected in the reasoning of each decision, whereas the lack of a sufficient reasoning contradicts the requirements of Article 8 of the Convention[162]. Therefore, in *El Ghatet v Switzerland* the Court held that, although it could not clearly conclude whether the applicants' interest outweighed this of the respondent State, nevertheless the domestic authorities violated Article 8 of the Convention, because they did not engage in a thorough balancing of the competing interests, by taking into account the best interests of the child and including this assessment to the reasoning of their decision[163]. However, it is also noteworthy that, under the case law of the ECtHR, the best interests of the child cannot be a 'trump card' for the acquisition of a right of residence. In other words, the concept of the best interests of the child does not automatically pose a general obligation on States to accept in their territory all children that would most probably have a better life there[164].

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[160] Committee on the Rights of the Children 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14, para 39
[161] *El Ghatet v Switzerland* App no 56971/10 (ECtHR, 8 November 2016), para 46
[162] Ibid para 47
[163] Ibid paras 52-54
[164] *I.A.A. and Others v the United Kingdom* App no 25960/13 (ECtHR, 8 March 2016), para 46

4.3. The best interests assessment

In order to determine what serves the best interests of the child, the pertinent authorities or decision-makers need to make an individual assessment according to the specific circumstances relating to each case and the characteristics of the child concerned. According to the Committee on the Rights of the Child, the characteristics of the child that must be taken into consideration include *inter alia*:

> 'age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc'.[165]

The Committee on the Rights of the Child has further advised that, when the family ties between a child and his or her parents are interrupted by migration, the decisions on family reunification must have due regard to the preservation of the family when assessing the best interests of the child[166]. In its General Comment No. 7 (2005) the Committee stated that:

> 'Young children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation. Situations which are most likely to impact

[165] Committee on the Rights of the Children 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14, para 48
[166] Ibid para 66

> negatively on young children include [...] situations where children experience disrupted relationships (including enforced separations)[167],

Likewise, the UNHCR, in its Guidelines on Determining the Best Interests of the Child, has stressed that family reunification should generally be regarded as being in the best interests of the child[168].

According to the case law of the ECtHR regarding immigration, in order to decide upon the best interests of the child and the most adequate means for them to develop their family life, States should take into account the children's age, their situation in their country of origin and the extent to which they are dependent on their parents[169]. In the *Nunez v Norway*, having regard to the children's bonds to their mother and the stress they had to suffer from the long lasting procedure before the migration authorities, the ECtHR held that not sufficient weight was attached to the children's best interests. Therefore, the respondent State failed to strike a fair balance between its own interest in conducting effective immigration control and the applicant's need to remain in Norway and keep contact with her children in their best interests[170]. Accordingly, in the *Rodrigues da Silva and Hoogkamer v the Netherlands*, the Court held that, despite the applicants' delinquent attitude towards the Dutch immigration rules, it was in her daughter's best interests for the applicant to remain in the country and that by attaching great importance to the illegality of the applicant's residence, the Dutch authorities had 'indulged in excessive formalism'[171].

In the EU context, as already noted, the CJEU does not consistently refer to the principle of the best interests of the child and thus the respective concept has not been an object of wide

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[167] Committee on the Rights of the Child 'General Comment No. 7 (2005) Implementing child rights in early childhood' (2005) CRC/C/GC/7, para 18
[168] UNHCR Guidelines on Determining the Best Interests of the Child (2008), 31
[169] *El Ghatet v Switzerland* App no. 56971/10 (ECtHR, 8 November 2016), paras 45, 46
[170] *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011), para 84
[171] *Rodrigues da Silva and Hoogkamer v the Netherlands* App no. 50435/99 (ECtHR, 31 January 2006), para 44

jurisprudential development under the Court's case law[172]. However, in *Chavez-Vilchez and Others*, the CJEU held that, when Member States apply Article 20 TFEU, in order to determine whether a child, who is a Union citizen, will be obliged to leave the EU and hence be deprived of the rights attached to the EU citizenship status, if his or her parents were to be refused a residence right, it is important to assess the level of dependency between the child and the TCN parent. As part of that assessment, the right to family life and the best interests of the child must be given due regard by the competent authorities[173]. In this assessment, the fact that one of the parents is a Union citizen or possesses a valid residence permit and is able to undertake sole responsibility for the child is a relevant factor, but not the only one[174]. Member States still need to take into account

> 'all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium'[175].

Likewise, in *Rendón Marín*, the CJEU held that 'the age of the children at issue and their state of health, as well as their economic and family situation' must be part of this assessment by the referring court[176].

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[172] See Klaassen M., Rodrigues P., 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter' (2017) 19 European Journal of Migration and Law, 191-218; Sara Iglesias Sanchez and Keiva Carr "The right to family life in the EU Charter of Fundamental Rights" in Maribel Gonzalez Pascual and Aida Torres Perez (eds), *The Right to Family Life in the European Union* (Routledge 2017), 46, 47

[173] Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and others* [2017] EU: C:2017:354, para 70

[174] Ibid para 71

[175] Ibid para 72

[176] Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] EU:C:2016:675, para 86

5. Conclusions

Article 20 of the TFEU, as interpreted by the CJEU, has become a valuable means for enhancing family reunification of static EU citizens who do not fall under the scope of any EU Directive or Regulation. As noted in Chapter 2 (The Fundamental Status of EU Citizenship), the CJEU has established in its case law that the fact that static EU citizens have not exercised their right to move within the EU does not alone assimilate their situation to a purely internal one. Following the Court's innovative ruling in the *Zambrano*, Article 20 TFEU was accorded the meaning that Member States are precluded from refusing a right of residence to TCNs, so far as such decision would compel an EU citizen who is their family member to leave the country of residence and thus deprive him or her of the enjoyment of the rights attached to the EU citizenship. In *Dereci and Others*, the Court clarified that national policies should be restricted to the extent that the Union citizen has in fact no other choice but to leave not only the territory of the State of which he or she is a national, but also the territory of the Union as a whole. Therefore, although an EU citizen may wish or find it more adequate to reside with his or her family members in the territory of the country of which he or she is a national, this does not automatically mean that the EU citizen would be in practice compelled to leave the EU, if a residence permit was not granted to his or her family[177].

To this end, in order to assess whether the EU citizen would be practically obliged to leave the EU territory, the CJEU introduced the concept of dependency regarding the relationship between the EU citizen and his or her family member who is a TCN[178]. As noted in the *O, S,* States must determine the level of dependency between the family members and this assessment needs to take into account any legal, financial or emotional ties. According to

[177] See Chapter 2.1. Scope and application in the family reunification context
[178] See Chapter 2.1.1. The notion of dependency

the Court, it is for the applicants to claim that such ties practically exist; however, it is the Member States' responsibility to make such inquiries in order to make a proper assessment.

Despite this jurisprudential evolution, the CJEU has been very hesitant in referring to the human rights of the affected. In the *Zambrano* and *McCarthy* the Court held a remarkable silence with regards to the right to family life and the principle of the best interests of the child, despite the fact that in both cases the impact on the applicants' family life was more than apparent and especially the *Zambrano* case concerned the family life of two minors. In the subsequent cases of *Dereci and Others* and *O, S*, the CJEU started making references to human rights in its reasoning; nevertheless it considered itself incompetent to apply the Charter in situations which were not linked to any EU Directive or Regulation. Therefore, the responsibility of addressing any potential human rights violations was eventually passed on to the Member States[179].

As noted in Chapter 2.2. (Shortcomings in the CJEU case law), although the restrictions regarding the scope of application of the Charter provided in Article 51 of the Charter and the concerns for being accused of expanding its jurisdiction may have justifiably provoked the Court's reluctance to invoke human rights in the above mentioned cases, this approach has several shortcomings in terms of equality, legal certainty and human rights protection. Unlike mobile EU citizens and TCNs, whose human rights are primarily considered and protected under the lens of the respective EU Directives on family reunification, EU citizens who are not able to connect their claim to secondary EU law are deprived of an effective consideration of their fundamental rights before the CJEU. Furthermore, it has been argued that this approach disregards the fact that the principle of respect for human rights and fundamental freedoms is the cornerstone of the EU foundation and that the international principle of the best interests of the child may only be effective if it is applied at all instances, including those where the decision of the domestic courts is being challenged. Besides, arguing that the Charter is not applicable in assessing whether an EU

[179] See Chapter 2.1.2. Correlation to human rights

citizen would be compelled to leave the EU territory and hence, whether he or she would be deprived of the rights attached to the EU citizenship, is a contested interpretation of Article 51 of the Charter. As argued in the same Chapter, it is Article 20 of the TFEU itself that triggers the application of the Charter, which in turn ensures a human rights-based application of the TFEU. Therefore, in such cases, it cannot be considered that the CJEU would be extending the scope of the Charter. Consequently, any assessment of whether an EU citizen has a relationship of dependency with a TCN and whether the former is in fact under risk of being deprived of his or her EU citizenship rights has to be made in accordance with Articles 7 and 24(2) and (3) of the Charter, following the novelty of the ruling in *Chavez-Vilchez and Others*, and in line with the corresponding provisions of the ECHR[180].

In any event, as mentioned in Chapter 3 (The Right to Family Life), most human rights treaties, to which Member States are parties, perceive family as the 'fundamental group unit of the society' and require States to accord its members the widest possible protection[181]. This obligation is not limited to a formal acknowledgement of the family, but should be interpreted as entailing the duty to facilitate family reunification and ensure that the family unity is maintained. The ECtHR in particular has affirmed that Article 8 of the ECHR entails the right of family members to live together and imposes negative, as well as positive, obligations on the States. However, according to the established principles of the Court, States enjoy a large margin of appreciation regarding their migration policies and a right to family reunification is not granted *per se*. When the ECtHR examines an alleged violation of Article 8 of the Convention, it examines whether the State has stroke a fair balance between the interests of the individuals to enjoy their family life on one hand and the national interest to exercise an effective migration control on the other. This balancing test under the Court's case law encompasses a thorough examination of several factors,

[180] See Chapter 2.2. Shortcomings in the CJEU case law
[181] See Chapter 3.1. The family as the fundamental unit of society and family life

which 'may turn up on each side of the scale'[182]. Comparing the protection accorded to the family under Article 8 of the ECHR on one hand and Article 20 of the TFEU on the other, it was argued that the latter offers more extensive protection, leaving less space for maneuver to the Member States. Member States must, however, comply with both contexts and, especially when they assess whether an EU citizen is dependent on a TCN, so that he or she is in fact under risk of being deprived of his or her citizenship rights, if the TCN is not granted a residence permit, the established principles of the ECtHR, including *inter alia* the disruption of family ties and the best interests of the child, must not be disregarded. Moreover, according to the Strasbourg Court, excessive formality or lengthy and ineffective procedures may as well impair the right to family life[183].

Regarding the determination of dependency based on the existence of family ties, it was noted in Chapter 3.3 (The existence of family ties) that none of the international human rights instruments include an explicit definition of the term 'family'. However, human rights treaty bodies and the ECtHR have adopted an elastic approach regarding the concept of family, so as to reflect the heterogeneity of modern family structures. According to the Strasburg Court in particular, family life depends on the existence of close personal ties between the family members, which is assessed in light of the specific circumstances of each case and the concurrent social and legal developments. Therefore, without prejudice to forms of family which are incompatible with international human rights standards, such as polygamy and child marriage, national family reunification policies which exclude members of the extended family or other forms of family like same-sex unions or marriages, contradict international human rights imperatives[184].

In addition, as stated in Chapter 3.4 (The Principle of Equality and Non-discrimination), States must exercise their immigration policies in a manner which is compatible with their

[182] Thomas Spijkerboer 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law, 280
[183] See Chapter 3.2. The right to family reunification
[184] See Chapter 3.3. The existence of family ties

citizens' right not to be subject to discrimination. The principle of equality and non-discrimination is entailed in all human rights instruments, either as a self-standing right or in relation to the rights enshrined in the respective treaties, and ensures that people under similar circumstances are treated equally both in law and practice. The ECtHR, in specific, has developed rich jurisprudence with regards to discriminatory practices in the context of migration, applying Article 8 in conjunction with Article 14 of the Convention[185].

As noted in Chapter 3.4.2 (Tackling reverse discrimination), the Free Movement Directive provides more favourable provisions compared to the EU Family Reunification Directive. Therefore, Member States which apply the EU Family Reunification Directive or stricter rules than those provided in the Free Movement Directive to their own nationals who have not exercised their right to free movement, treat these citizens less favourably compared to their compatriots who have exercised their right to move within EU or nationals of other EU countries who reside in the same territory. In this regard, it was noted that nationality constitutes a 'suspect' ground of discrimination under the case law of the ECtHR and thus, if Member States grant certain groups of foreigners a right to family reunification, in order to exclude their nationals, who have not exercised their right to move within the EU, but are nonetheless in an analogous situation, particularly convincing and weighty reasons must be established. Otherwise, this differentiation in treatment violates Article 8 read in conjunction with Article 14 of the ECHR. Furthermore, in the same Chapter it was argued that AG Sharpston's human rights-based approach regarding the application of Article 18 of the TFEU is an efficient way to address this issue of reverse discrimination and protect the fundamental rights to family life and not to be subject to discrimination of static EU citizens. Likewise, following the argument that the Charter safeguards a human rights-based application of the TFEU, the respective provisions of Article 21 of the Charter concerning the prohibition of discrimination are also of relevance in this regard[186].

[185] See Chapter 3.4.1. An international law imperative
[186] See Chapter 3.4.2. Tackling reverse discrimination

Besides, as mentioned in Chapter 4 (The Best Interests of the Child), in cases which involve children, Member States are bound to have due regard to what serves the children best, irrespective of whether they do so under the Charter or the CRC. As a three-fold concept, the principle of the best interests of the child ensures that the child's well-being is the primary consideration in every step of the legislative, administrative and judicial proceedings, regardless of whether the impact on the child is direct or indirect, for instance through his or her parents or legal guardians[187]. The ECtHR is more consistent in referring to the best interests of the child under its balancing test, whereas the CJEU seems to take them into account implicitly. In any case, both Courts have gradually developed important case law regarding the assessment of the best interests of the child, which, combined with the guidance provided by the Committee on the Rights of the Child, constitutes an authoritative guide for the national legislators and decision-makers[188].

To summarise, it is worth noting that regulating family reunification of static EU citizens or harmonising EU practices in the context of family reunification is not currently on the EU agenda. Consequently, the CJEU and the ECtHR have been inevitably tasked with the role of facilitating this harmonisation process through their developing jurisprudence. The CJEU has initiated this venture with its ruling in the *Zambrano*; however, as mentioned several times in this paper, a more consistent human rights-based approach is essential. The substance of the rights attached to the EU citizenship status does not only entail the protection of one's physical location within the EU territory, but also the possibility to establish and develop his or her family life in the country of residence. Therefore, the CJEU needs to promote this concept of a rights-based citizenship more and 'give teeth' to the right to family life in its jurisprudence. The ECtHR on the other hand, has developed rich case law in the context of family reunification applying Article 8 of the ECHR, alone and in conjunction with Article 14 of the Convention. This jurisprudence may enhance the protection provided by Article 20 of the TFEU; nevertheless, the ECtHR may not disregard

[187] See Chapter 4.2. A threefold concept
[188] See Chapter 4.3. The best interests assessment

that in the EU legal framework a direct right to family reunification is granted and in this sense family reunification is the general rule which significantly narrows States' margin of appreciation. Therefore, as stated by Judge Pinto de Albuquerque in his concurring opinion in *Biao v Denmark*, the Court must take a coherent stand for the right to family life and assert that the right to family life does in fact warrant family reunification. Family members should live together when practical obstacles do not exist and such obstacles may not be created by States[189].

[189] *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016), Concurring Opinion of Judge Pinto de Albuquerque, paras 29-35

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