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ECJ's New Role – Guardian of Open but not Socially Inclusive Europe?³

Abstract. The aim of the following article is to find whether the European Court of Justice has reacted in its recent rulings to the growing reluctance of many Europeans and their political representations towards quasi-automatic rights of migrating of European Union citizens to move to another Member State and enjoy there the benefits of social policy on equal footing with this country's nationals. The result of the referendum held in the United Kingdom on 23 June 2016 regarding the UK's membership in the EU demonstrates the importance of the issue in question. The authors analyse recent case law of the European Court of Justice in comparison with its earlier case law regarding the access of Union citizens to social assistance and the status of third country nationals as family members of European Union citizens. The authors have come to the conclusion that so far, the European Court of Justice tightened the interpretation of the European Union law in force in the area of welfare tourists' rights unlike in the case of economically active migrants. First, *Martinez-Sala*, *Grzelczyk*, *Bidar*, *Trojani* and other judgments are mentioned to remind the previous approach of the European Court of Justice, based on the principle of broad solidarity between Member States. Second, this approach is confronted with more recent case law, i. e. *Dano*, *Alimanovic*,

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Garcia-Nieto, Commission against the United Kingdom. In those cases, the court did not require the host Member States to recognize the value of EU citizenship as an individual's "fundamental status" nor to show a degree of solidarity. The court stood for the uncomplicated and rigorous application of Directive 2004/38. When it comes to third country nationals as family members of Union citizens, their status it is not only confirmed but even extended. The authors analyse briefly earlier case law of the European Court of Justice, namely the *Singh, O. and B., Metock, Zambrano and Dereci* cases. These judgments are characteristic of broad interpretation of Directive 2004/38 and provisions of the Treaty on EU citizenship in favour of the family members. Protection of fundamental rights also plays an important part. Other than in the case of social tourism, there has been no change in the approach of the European Court of Justice. On the contrary, in *Marín, Chavez-Vilchez, Lounes or Coman* judgments, the European Court of Justice confirms its previous line of reasoning and further develops it. Nevertheless, the authors hold the view that the European Court of Justice should more carefully balance and try to reconcile free movement rights, fundamental rights, as well as the sovereign rights of Member States in order to contribute to the prevention of European disintegration.

Keywords: Court of Justice of the European Union, welfare tourism, access to social assistance, third country nationals, family members, right of residence, Directive 2004/38, Brexit.

Introduction

Free movement of persons and their right to equal treatment by authorities of any Member State is among the achievements of European integration. This internal market freedom has been closely connected with Union citizenship since 1993. Each EU citizen has the right to move and reside freely within the territory of the Member States, to work or pursue economic activity and to get social assistance. Although the beneficiaries of these rights are in particular citizens of the Union, i.e. Member State nationals, EU law also involves third country nationals having the status of a family member of an EU citizen.

All relevant provisions of EU law on free movement of persons are interpreted by the European Court of Justice (hereinafter: ECJ). One may conclude that such interpretation has traditionally been mostly in favour of free movement and of the related rights of Union citizens and their family members in line with the liberalizing policy of the ECJ in the area of the internal market. This paper focuses on the question of whether the approach of the ECJ has changed in recent case law. Brexit in particular could have been the impetus to change direction. Free movement of persons (and so-called "welfare tourism" as one of its collateral features) had become one of the key issues of the Leave campaign before the referendum regarding the UK's membership in the EU took place (23 June 2016) (see for details Craig, 2016, pp. 1-42). Furthermore, other Member States have also expressed certain

objections towards the free movement of persons and their entitlement to social benefits, as will be mentioned below.

The aim of the following analysis is therefore to find whether the ECJ has reacted in its recent rulings to the growing reluctance of many Europeans and their political representations towards quasi-automatic rights of migrating of EU citizens to move to another Member State and enjoy there the benefits of social policy on equal footing with this country's nationals. Any change in the case law of the highest judicial institution on European integration will inevitably have an impact on the social policies of Member States. The European Union, as "the community of law", rests on the primacy of its legal principles and provisions over national laws and policies, thus quite understandably, the stance of the ECJ as the supreme interpreter of obligations arising from EU law is of paramount importance. In the first part of the text, the ECJ case law relevant for an (un)restricted access of migrating EU citizens to social assistance in the host Member State is scrutinized, while in the second, the focus of the authors is broadened to cover the area of free movement and residence rights as such. The comparative analysis of the gist of relevant "old" and "new" ECJ's judgments and the subsequent assessment of its result considering the EU broader political context are the main methods used to fulfil the research aim of the present text.

Earlier case law of the ECJ on the access to social assistance

The European Court of Justice acquired after the year 2000 the reputation of being a staunch supporter of EU citizens' right to move freely between Member States and to be entitled everywhere to equal treatment – including access to social assistance – based more on their EU citizenship than on their worker or self-employed status. Legally, such approach was built on an "expansive view of citizenship" (Davies, 2016, p. 4), derived directly from the Treaty provisions, and on a restrictive view of limitations on free movement specified by EU secondary legislation. Politically, this pro-EU and pro-liberal optimism of the ECJ has never been fully shared by EU Member States who have seen it as a further limitation of their sovereign rights and as a burden on their national systems of social security⁴. With the recent financial and economic crisis and in the unfortunate perspective of Brexit, the issues of intra-EU migration, especially from East to West, became much more politicized and some governments even mentioned the possibility of

4 A recent study showed how the traditional welfare states such as Denmark and the Netherlands reacted to the increased mobility of EU citizens and the social burden (and also public fears) that it caused. They limited the eligibility for certain types of social assistance, adopted caps on total annual amount of grants, tightened controls of beneficiaries etc. See for details in Kramer, Sampson Thierry & van Hooren, 2018, pp. 1501-1521.

non-compliance with the EU law extending further the social rights of migrating EU citizens (Blauberger, Heindlmaier & Kramer et al., 2018, pp. 9-10). The ECJ has seemed to “get the message” and its case law has begun to change. As the change is still under way, only some answers have been given so far and numerous questions still wait unresolved, nevertheless the boundaries of the EU approach towards this part of its social policy are emerging step-by-step and, once noticed, they can be described and analyzed.

The ECJ’s “traditional approach”, which raised both hopes (for “social citizenship”) and fears (of “social tourism”) (Heindlmaier & Blauberger, 2017, p. 1199), embodied one of the possible interpretations of the existing EU compromise between the “logics of opening” appropriate to EU citizenship and free movement provisions of EU law and the “logics of closure” that always characterized national welfare states based on internal solidarity of their societies (Heindlmaier & Blauberger, 2017, p. 1199). The freedom to move and stay in another Member State, accompanied with equal access to all tax and social benefits, has *stricto sensu* always been reserved to economically active persons, who have been supposed to contribute to the welfare of the host society and not to become a social burden for it. In practice, however, thousands of exceptions to the rule of a full-time employed hard-working EU migrant, capable to sustain himself and his family, occurred. The ECJ was seized with cases of EU citizens, legal residents of another Member State, becoming unemployed, unable to work or to gain enough for a decent living there, who applied for not just an insurance-based but for a needs-based social assistance financed by taxpayers of the host state⁵.

The ECJ case law, starting with *Martinez-Sala*, 1998 and continuing into the new century with *Grzelczyk*, 2001, *Bidar*, 2005, *Trojani*, 2004 plus also the *Brey* ruling, 2013 in the present decade, has promoted the following reasoning: an EU citizen, legally residing in another Member State, has the right to non-discrimination and equal treatment even in social issues. In doubtful situations, where an EU migrant is economically inactive and becomes dependent on the host State’s welfare system (and could lose his residence right according to Directive 2004/38 as well

5 Welfare systems and also EU legal acts (see Regulation 883/2004 and Directive 2004/38) distinguish between social security (insurance-based) that normally belong to those who are insured and contribute, social assistance (needs-based) and so-called special non-contributory cash benefits. The two latter categories can become controversial as any person in need legally residing on the territory of a Member State can apply for them. See for details Fernandes, 2016, p. 11. The ECJ by its case law adopted at the beginning of the new millennium opened up access of economically inactive EU migrants not only to social assistance benefits, but also to student maintenance grants and benefits to facilitate labour market access, even though it never did so unconditionally, always attempting to strike a fair balance between different rights and interests. See for instance in Munta, 2018, p. 6.

as to its predecessors repealed by its coming into force⁶), the ECJ required that the host Member State show “a certain degree of financial solidarity”, carry out the “assessment of the individual situation”, and recognize “the genuine link” that might already exist between the applicant in need and the society of the host state (Šmejkal, 2016, pp. 154-170). An applicant could thus be refused social assistance only in cases where it would be unfounded and disproportionate, where it would represent an unreasonable burden for the social system of the host Member State (see Art. 14 (1) of Directive 2004/38). No wonder, that in disputes which reached through the channels of the preliminary ruling procedure the level of the ECJ, the applicants in need had good chances to win – to the dissatisfaction of Member States with generous (rather needs-based than insurance-based) social systems. Their means to change this tendency have been rather limited as a mere rewording of the secondary law provisions does not constrain the ECJ in applying directly the Treaty (i.e. EU primary law) provisions and the general principles of EU law derived by its judges from constitutional traditions common to Member States and international (human-rights) instruments.

The solution, not requiring the consensus of all (and the subsequent national ratification of Treaty changes), thus was in the interpretation of the ECJ judges and their willingness to use more extensively “the limitations and conditions laid down in the Treaties and by the measures adopted” to give effect to the EU primary law provisions establishing rights of EU citizens (see Art 21(1) of the Treaty on the Functioning of the European Union, hereinafter: TFEU). To get a well-balanced picture, it has to be admitted that even in the “euro-optimistic” period, the ECJ issued judgments supportive of the limitation of “naked” welfare tourism. In the *Rundgren* case, 2001, it clearly stressed that “a person who has moved his place of residence from one Member State, in which he had ceased to be in employment, to another Member State, in which he is not employed and is not seeking employment” does not enjoy the advantages belonging to moving workers (*Rundgren*, 2001, para 35). In cases such as *Skalka*, 2004 and *de Cuyper*, 2006 the ECJ supported Member States in their refusal to pay specific unemployment benefits to persons who left their territory in order to reside at the Mediterranean seacoast (without seeking any employment there). The ECJ could therefore rather be blamed for setting ambiguous conditions (“genuine link”, “a certain degree of solidarity” etc.), which did not give to national judicial and administrative bodies a clear enough guidance (see for instance in

6 Rights of moving of EU citizens are specified in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and in Regulation 883/2004 on the coordination of social security systems. Although both acts were adopted at the same time, and in the perspectives of the EU Eastern enlargement, they are not mutually consistent and only the current proposal of amendment to Regulation 883/2004 [proposal COM(2016) 815 final] seeks to align the conditions of lawful residence in another Member State in these two most relevant EU secondary law acts.

Blauberger and Schmidt, 2017, p. 443), than for a bias in its judgments towards unconditional generosity at the expense of national welfare systems.

The series of recent ECJ judgments, limiting somewhat surprisingly welfare tourism, can therefore be seen as a change in the approach to the interpretation of existing provisions and principles of EU law, which has responded both to the need for clearer application in practice and to the growing appeal for removal of politically sensitive pressure on the welfare systems of some Member States (see Blauberger, Heindlmaier & Kramer et al., 2018, p. 24).

Recent case law of the ECJ: a break to welfare tourism?

The new wave of case law began in 2014 with the decision of the Grand Chamber of the ECJ in *Dano*, 2014, followed by *Alimanovic*, 2015 (Grand Chamber), *García-Nieto*, 2016 and the *Commission against the United Kingdom*, 2016 rulings. Despite the varying situations that the migrating EU citizens found themselves in their preferred destinations (especially Germany and the UK), these cases had a clear common denominator: the ECJ did not require the host Member States to recognize the value of EU citizenship as an individual's "fundamental status" nor to show a degree of solidarity. In those judgments, the ECJ judges stood for the uncomplicated and rigorous application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of other Member States (for a detailed analysis of the judgments see Lanceiro, 2017, pp. 154-170 and Šmejkal, 2016, pp. 154-170). Even if an individual resides in the territory of the host Member State in accordance with its own laws (and even if the individual receives there certain types of support, becomes unemployed and looks for a job, etc.), this Member State is not obliged to grant him the same benefits as to its own citizens in the same situation if he does not meet the conditions laid down in the relevant EU Directive for equal access to social assistance (especially to needs-based and special non-contributory cash benefits).

According to this new ECJ case law, such solution is not to be complicated by any consideration for the applicant's personal circumstances (in the cases of *Dano*, 2014 and *Alimanovic*, 2015 the children were born to applicants in Germany; the case *García-Nieto*, 2016 was about unification of an unmarried couple raising a child) or by references to EU citizens' fundamental rights derived directly from EU primary law. Standards laid down in Directive 2004/38 are to be regarded as *lex specialis*, which expresses the will of the Member States to regulate the rights of economically inactive migrant EU citizens in host Member States. The understanding of the need to sustain the balance of social systems of Member States, was clearly manifested by the ECJ's assertion that even if the granting of an individual claim to a certain social assistance would not burden these systems, all potential claims of that kind in the

aggregate would certainly cause such an unreasonable burden (*Alimanovic*, 2015, para 62).

In the ruling *Commission against the United Kingdom*, 2016 it was not, unlike the three above cited cases, the ECJ's answer to a preliminary reference by a national court, but the decision about a direct action of the European Commission. "The Guardian of the Treaties" considered the UK practice of testing the fulfilment of conditions of residence of EU migrants from other Member States in order to decide on their access to certain family allowances and child tax rebates, to be discriminatory and contrary to Regulation 883/2004 on the coordination of social security systems. The alleged discrimination consisted in the fact that while the British citizens pass the test "automatically", the citizens of other Member States must show that they really meet the conditions of Directive 2004/38, i.e. that they deserve in the UK the status of an EU migrant worker or his family member, when they apply for a social benefit. If they do not enjoy this status, they must have enough resources to stay in the UK to avoid becoming a burden on its social system. The ECJ supported the UK regarding such requirement: "... the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State" (para 80 of the judgment). Thus, the Commission's conclusion of discrimination is not appropriate, provided such control by the host Member State's authorities meets the conditions of proportionality, can guarantee the attainment of the objective of protecting public finances and does not go beyond what is necessary to achieve that objective (for a detailed analysis of the judgment see O'Brian, 2016).

By not entering into discussion about softening of the requirements of Directive 2004/38 with respect to the directly effective provisions of Articles 18 and 21 of the TFEU (equal treatment, non-discrimination, rights of EU citizens to move and reside in another Member State), the ECJ gave to national authorities relatively clear guidelines. Instead of pondering about whether and to what extent EU primary law principles should impregnate the text of the EU Directive, the national authorities could now stick to the *lex specialis derogat legi generali* rule and take guidance from the Directive's provisions. Quite naturally, even these provisions are opened to interpretation as terms, like the aforementioned "sufficient resources" or "unreasonable burden" must be applied in a variety of individual situations. This still may create difficulties as the Directive is not itself entirely clear in answering the question under what conditions an EU migrant in social need can be expelled from the host Member State ("an expulsion measure should not be the automatic consequence of recourse to the social assistance system" - recital 16 and Article 14(3) of the Directive 2004/38).

This apparent U-turn in the ECJ's approach has been widely discussed in academic literature. Opinions diverge from quite critical ones ("the heyday of a justice-driven EU social citizenship is behind us" - Kramer, 2016 or "a spectacular turnaround on EU citizens' benefits" – Schiek, 2015) to assertions of continuity and therefore of "no break with the past" (Menghi & Quéré, p. 68). The question whether it is the beginning of a different social policy towards EU migration is step-by-step being answered by national courts and authorities. As the first reports show, national authorities have mostly adapted to this "wind of change" and apply now a policy that can be called "Enter at your own risk". The nature of such a policy can be summarized as follows: it is still rather difficult to expel an EU citizen without job and resources, but it is now relatively easy to refuse any social assistance to him or her (Heindlmaier & Blauburger, 2017, pp. 1206-1214. For specifically German reaction see Munta, 2018, pp. 10-15.). Time will tell to what extent it is a ticking bomb to leave unsuccessful applicants for social assistance in the country to live there without sufficient resources⁷.

The ECJ on the guard of an open rather than social EU

Another question still open for discussion asks what type of "Social Europe" is going to be built following the ECJ's "new approach"? Should it be labelled as not social enough due to a lesser accent on solidarity among Europeans, thus moving away from an "ever closer union" of European nations? Some commentators already came to the conclusion that "EU member states seem to be moving towards the stable closure of national welfare systems, facilitated by recent ECJ case law and reinforced by the crisis of the EU" (Heindlmaier & Blauburger, 2017, p. 2014). Another view is, however, also possible: in the absence of any deep-rooted solidarity among Europeans that would be expressed in a federal social system supported by an EU-wide social consensus reached through a pan-European political debate, it is the ECJ who by recognizing that no common EU social security scheme is about to replace different national social security schemes, is saving the EU Internal market freedoms (i.e. the hard-core of European integration) in their original meaning.

It must at the same time be stressed that no change can be so far noticed in the ECJ judgments that concern the rights of economically active persons, including their access to social assistance in a host Member State. The ECJ judges thus recently repeatedly supported the claims of cross-border workers to get support for their children's studies, although these children were not students in the country where

7 Statistics for the time being show that economically inactive mobile EU population account for a very low proportion – between 0,7 % and 1 % – of the total population of the EU and out of these citizens around 80 % reside in a household in which at least one member is employed. See Fernandes, 2016, p. 7.

their parents were employed (see for instance *Commission v. Netherlands*, 2012 or *Maria do Céu Bragança Linares Verruga and others v. Ministre de l'Enseignement supérieur et de la recherche*, 2016). Similarly, in their recent ruling *Florea Gusa*, 2017, they compared the position of an independent tradesman who had been forced out of the host country's market by economic circumstances to the status of a worker who lost his job in the host country (both of them have equal access to benefits of a social nature as have the citizens of that country). And in the judgment in the *Rosario Martinez Silva* case, 2017 the ECJ supported the right of a national of a non-EU country, holding a single work permit in a Member State, to the social security benefits provided for nationals of that Member State.

The free movement of economically active persons remains therefore an irreplaceable priority for the ECJ, and it can be assumed that a truly crucial conflict over the EU's social role could be evident in this field. The ECJ keeps insisting that the status of an EU migrating worker (giving an immediate right to equal access to tax and social benefits in the host Member State) belongs to everyone contracted for genuine, non-negligible work by an employer. No condition such as that the employment is the effective means of subsistence has ever been laid down. Following old case law in *Kempf*, 1986⁸, just 12 hours of work per week, for a remuneration insufficient to meet the basic needs of such a worker, is still enough to be protected by EU law as a legally migrating worker. As it is rightly noted by many analysts of today's labour market, atypical forms of employment, including various small jobs, are common and the welfare systems of Member States can really become burdened by claims of poorly paid migrant workers and their dependent family members (Davies, 2016, pp. 5 and 22-23).

The deal that the EU wanted to strike with the UK to prevent the Brexit vote⁹ relates to these situations. The then discussed gradual access to in-work tax-funded benefits (with limitations of up to four years from the start of employment in the host Member State) or a reduction of child benefits paid to worker's children not moving with him or her into the host Member State, have not disappeared from political debate¹⁰ and would be seriously raised by some Member States in the near future (Connolly, 2016). Already today the ECJ is stricter than the Commission wants it to be in the issue of the number of months that a job-seeker must be supported by unemployment benefits exported after him to another Member State where he looks

8 It can even be claimed that the ECJ so far prohibits to determine the status of an EU worker in terms of a minimum amount of working hours or income. See Blauberger & Schmidt, 2017, p. 445.

9 European Council meeting (18-19 February 2016) – Conclusions. EUCO 1/16, Annex I Section D.

10 The EU Regulations (883/2004 and 987/2009) on the coordination of social policy systems are currently being revised and the indexation of child benefits to the real cost of living as well and the issue of their exportability from the Member State that provides them are in the center of political debate. See for instance Loekegaard & Poulsen, 2018.

for employment (*Klein*, 2018)¹¹. It is to be closely watched whether the judges would recognize also a categorization within migrant EU workers that would give to each category different access to social benefits in a Member State of their employment. If this happens, the social landscape of the EU would really become different from what used to be and still is the rule.

The status of third country nationals as family members of Union citizens – introductory comments

Under primary law in force – as was mentioned above - each EU citizen has the right to move and reside freely within the territory of a Member State, to work or pursue economic activity there etc. These rights are elaborated in secondary law, the Directive 2004/38 being of specific importance in this respect. The beneficiaries of these rights are particularly Union citizens, but third country nationals also have rights deriving from status of a family member of an EU citizen. Under recital 5 of Directive 2004/38, “[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.” Rights of Union citizens and their family members are currently reinforced by the Charter of Fundamental Rights of the EU (hereinafter: Charter), its Article 9 protecting the right to marry and the right to found a family and Article 7 providing respect for private and family life.

Under Directive 2004/38, family members have very favourable status though they do not have any autonomous rights. Family members (regardless of whether they are Union citizens or third country nationals) have derived right of residence in EU Member States, they are entitled to take up employment or self-employment (Art. 23) and they shall enjoy equal treatment with the nationals of that Member State, within the scope of EU law (Art. 24(1)) as well as increased protection against expulsion (Art 27 et seq.)¹².

Decisions of the ECJ deepen Union citizenship and thus facilitate not only free movement of Union citizens but also free movement of their family members even in case they are third country nationals. A plentiful number of scholars has welcomed this case law. For instance, Kochenov states that “[b]y shaping a strong

11 The ECJ in this decision, issued on March 21, 2018, stated that EU law does not force the Member States to extend the unemployment benefit export period beyond three months (para 54). The Commission in its proposal amending Regulation (EC) No 883/2004 on the coordination of social security systems, tabled on December 13, 2016, wants to fix this export period at six months.

12 Apart from that, third country nationals also have significant rights deriving from secondary law adopted in the area of migration policy of the EU, e.g. Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.

and legally consequential personal legal status, the EU is turning into a mature legal system.” (Kochenov, 2011, p. 107). Sánchez holds that cases like *Zambrano*, 2011 or *Rottmann*, 2010 “ensure a basic protection uniformly awarded by the Union to the citizens notwithstanding the previous exercise of free movement, reinforcing the bond between the Union and the citizen ensuring protection of the most basic attributes of membership (nationality and residence)” (Sánchez, 2014, p. 480). However, in the context of Brexit a question arises if the ECJ has changed its case law. Before the referendum in the UK, the European Council adopted conclusions at its meeting on 18 and 19 February 2016, including the Declaration of the European Commission on issues related to the abuse of the right of free movement of persons. Under the Declaration, “[t]he Commission intends to adopt a proposal to complement Directive 2004/38 on free movement of Union citizens in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State.” Such legislation would be contrary to the conclusion of the ECJ in the case *Metock*, 2008 as will be explained below. However, due to the negative result of the referendum the Commission shall not be obliged to submit an appropriate proposal. It should be added that it was not only the United Kingdom which found *Metock*, 2008 controversial. German Federal Minister for Home Affairs Schäuble stated that such conclusion of the ECJ complicated efforts of the Member States to combat illegal immigration (Scheu, 2009, p. 157). As a result, one may think that the ECJ might reconsider its previous case law and change its approach concerning the status of third country nationals as family members of Union citizens.

Earlier case law of the ECJ on the status of family members

As was already mentioned above, the ECJ makes decisions usually in favour of free movement including free movement of family members of Union citizens. There are plenty of cases regarding the status of family members who are third country nationals. To give some examples, in *Singh*, 1992 the Court of Justice holds that when a Community national returns to his or her country of origin from another Member State, his or her spouse (an Indian national in this case) “must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State” (*Singh*, 1992, para 23). Otherwise Community nationals might be deterred from leaving their country of origin in order to pursue an activity as employed or self-employed persons in another Member State (*Singh*, 1992, para 19).

Since secondary law (currently Directive 2004/38) does not explicitly cover such a return it is obvious that the interpretation of Community law given by the ECJ is extensive. The ECJ has confirmed its conclusion repeatedly in subsequent case law and has further elaborated it, especially after Union citizenship was introduced. In *O. and B.*, 2014, for instance, the Court of Justice rules that even if family members of Union citizens cannot rely on Directive 2004/38 they may derive their rights of entry and residence from Article 21(1) TFEU¹³. Nevertheless, the Directive should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national.

In *Metock*, 2008 third country nationals resided unlawfully in Ireland where they married Union citizens coming from other Member States (for a detailed analysis of the judgment see Král, 2012). Although all third country nationals in this case had no right of residence in Ireland, the ECJ recognized their right to reside under Directive 2004/38. The Grand Chamber of the ECJ interpreted the Directive and came to the conclusion that, based on the right to lead a normal family life in the host Member State, the Directive “does not distinguish according to whether or not they have already resided lawfully in another Member State” (*Metock*, 2008, para 50). Moreover, as regards family members of EU citizens, no provision of the Directive “makes the application of the directive conditional on their having previously resided in a Member State” (*Metock*, 2008, para 49). It should be pointed out that the Court reconsidered its conclusion made in the *Akrich* case, 2003 issued before *Metock*, 2008. Objections of some Member States to the judgment are mentioned above. This conclusion of the ECJ is problematic also with respect to the principle of sincere cooperation. Pursuant to this principle, the Union and the Member States shall assist each other in carrying out tasks which flow from the Treaties (Art. 4(3) of Treaty on European Union: hereinafter TEU). The Union shall respect essential State functions, including maintaining law and order (Art. 4(2) TEU). But, the ECJ’s decision weakens Member States when combating unlawful immigration, as minister Schäuble noted.

In *Zambrano*, 2011 the ECJ’s reasoning is based on Union citizenship. Mr and Mrs Zambrano, Columbian nationals, were unsuccessful applicants for asylum in Belgium (see also Lenaerts, 2015, pp. 1-10). Despite that, they resided in Belgium where Mrs Zambrano gave birth to their two children who acquired Belgian nationality (i.e. Union citizenship as well). Mr and Mrs Zambrano had no right of residence and no work permit. All Member States which submitted their observations in this case argued that the situation did not fall within the scope of Union law because no interstate element was present. There was no free movement

13 “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

of EU citizens between Member States. The Grand Chamber of the Court of Justice did not share their view. It ruled that “citizenship of the Union is intended to be the fundamental status of nationals of the Member States (...). Article 20 TFEU, introducing Union citizenship, precludes national measures, which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (...). A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect” (*Zambrano*, 2011, paras 41-43).

All cases mentioned above have a common denominator: third country nationals had no right of residence in the EU Member State where authorities of the Member State concerned decided to deport them or at least there was a threat of deportation. Yet, they successfully invoked EU law before the Court of Justice. The approach of the ECJ is based on broad interpretation of provisions of free movement of persons and Union citizenship. However, its conclusions are sometimes controversial. In *Zambrano*, 2011 there is no interstate element, which means EU law should not apply at all (similarly in *Carpenter*, 2002). In *Metock*, 2008 interpretation of the Directive 2004/38 generously favours Union citizens and their family members but neglects sovereign rights of Member States over their territory including their right to expel foreigners whose residence is unlawful.

After the *Zambrano* case, 2011 the ECJ issued other judgments which mitigated the impact of this case, e.g. *McCarthy*, 2011 and *Dereci*, 2011. In *Dereci*, for instance, the applicants in the main proceedings were all third country nationals who wished to live with their family members, Union citizens resident in Austria who were Austrian nationals. Unlike in *Zambrano*, 2011 there was no risk, in the ECJ's opinion, that the Union citizens concerned may be deprived of their means of subsistence (*Dereci*, 2011, para 32). Therefore, the Grand Chamber of the Court of Justice held that Austria in such cases might have refused to allow these third country nationals to reside on its territory “provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union“ (holding of the judgment). In *McCarthy*, 2011 and *Dereci*, 2011, the ECJ seemed to become a bit less generous towards family members of Union citizens in order to better balance Member States' legitimate interests on the one hand and free movement of persons together with fundamental rights on the other. However, the ECJ maintains reservation in both cases that measures of the Member States may not deprive Union citizens of genuine enjoyment of the substance of the rights conferred by virtue of their status as a Union citizen.

Recent case-law of the ECJ: developing Union citizenship and concentrating on the rights of children

In following chapters, recent case law in this area will be focused on. In the *Marín* case, 2016, Mr Marín, a Colombian national, was the father of two minor children, a boy of Spanish nationality and a girl of Polish nationality and was granted sole care and custody of his children (Shuibhne, 2017, pp. 233-234). The children have always resided in Spain. Since Mr Marín had a criminal record, his application for a residence permit was – automatically - rejected by Spanish authorities. In this case, the Grand Chamber of the Court of Justice referred both to Article 21(1) TFEU and Article 20 TFEU. First, the Court interpreted Directive 2004/38 broadly and concluded that the Polish daughter of Mr Marín was a beneficiary within the meaning of Article 3(1) of the Directive although she never exercised her right to free movement between Member States. It has to be added that such a view was shared by the Spanish, Greek, Italian and Polish Governments, as well as the Commission. Although Directive 2004/38 presumes that a family member is dependent on the migrating Union citizen, which is not the case here, the Court holds that Mr Marín and his daughter may rely on the Directive 2004/38. However, it is for the referring court to establish whether Mr Marín’s daughter has (herself or through her father) sufficient resources and comprehensive sickness insurance cover.

If this condition is not satisfied, Mr Marín may still invoke Article 20 TFEU on Union citizenship. Thus, if the refusal to grant residence to Mr Marín were to mean that he had to leave the territory of the EU, and this could result in a restriction of his children’s right to move and reside freely within the territory of the EU, as the children could be compelled to go with him (*Marín*, 2016, para 78)¹⁴. As to the restriction of free movement due to a criminal record, it is settled case law that such an automatic prohibition to issue a residence permit cannot be in conformity with EU law. It follows that the *Zambrano* case, 2011 is not forgotten, as the ECJ refers to the case and its reasoning. Moreover, the ECJ interprets the Directive 2004/38 extensively when ruling that the situation of a Union citizen who was born in a Member State having a nationality of another Member State is covered by the Directive although there has been no factual free movement between Member States.

The *Chavez-Vilchez*, 2017 concerns several cases of residence of third country nationals who are mothers of Netherlands nationals whose fathers are also Netherlands nationals (for comments on the judgment see Peers, 2017). All live in the Netherlands but in only one case did the family (including the mother) exercise the right of free movement to another Member State. The other cases are similar to *Zambrano*, 2011 and even more to *Dereci*, 2011 both of which are referred to by

¹⁴ However, it is for the referring court to check whether Mr. Marín may in fact enjoy the derived right to go with them to Poland and reside with them in Poland (para 79).

the Court of Justice. Regarding the latter cases in *Chavez-Vilchez*, 2017 the Grand Chamber concentrates on rights of children and of Union citizens. It reminds that in very specific situations “a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status” (*Chavez-Vilchez*, 2017, para 63). Since the situation in particular families vary especially when it comes to relationship with the father, the ECJ gives instructions to the referring court in order to decide whether the mothers (third country nationals) may derive a right of residence under Article 20 TFEU and if so, successfully apply for social benefits. The core issue is the relationship of dependency between a parent and a child.

The ECJ also rules on the burden of proof. It is for the third country national to provide evidence that a decision to refuse a right of residence to the mother would deprive the child of the genuine enjoyment of the substance of the rights attached to status as a Union citizen by obliging the child to leave the territory of the EU (*Chavez-Vilchez*, 2017, para 75)¹⁵.

As in *Marín*, 2016 the ECJ refers to the *Zambrano* judgment, 2011 and suggests that *Zambrano* was not just a specific decision in a case with specific circumstances, as the ECJ further develops this line of reasoning. Both cases, *Marín*, 2016 as well as *Chavez-Vilchez*, 2017 are sensitive from the perspective of children and their fundamental rights, of course, and the Court of Justices refers to the Charter (Article 7) as well. On the other hand, the ECJ tries to reconcile different rights and interests, i.e. rights of children, respect for family life, free movement of persons, and sovereign rights of Member States over their territory and population. This effort is especially visible in the *Chavez-Vilchez* case, 2017.

ECJ keeps broadening the status of third country nationals

The *Lounes*, 2017 follows up the *Metock* judgment, 2008. Mr Lounes, an Algerian national, was not lawfully resident in the UK. He met and married Ms Ormazabal, who was a Spanish national when she came to the UK but later acquired nationality of the UK and retained Spanish nationality as well (see for details Polak, 2018). After marriage, Mr Lounes was served with notice of a decision to remove him from the UK. The crucial question in this case concerns the applicability of EU law since the Union citizen acquired nationality of the host state. The Grand Chamber

15 Nevertheless, “the competent national authorities must ensure that the application of national legislation on the burden of proof such as that at issue in the disputes in the main proceedings does not undermine the effectiveness of Article 20 TFEU.” – Para 76 of the judgment.

of the Court of Justice rules that the Directive 2004/38 does not apply in the case due to the acquisition of the nationality of the state of residence and accordingly, Mr Lounes does not have the status of a family member in terms of the Directive. Nevertheless, the ECJ bases its reasoning on Union citizenship and effectiveness of Article 21(1) TFEU (similarly in *O. and B.*, 2014 or *Marín*, 2016). Mr Lounes has a derived right of residence based on this TFEU provision as a husband of a Union citizen. The ECJ refuses the argument of the UK that the situation of the couple has to be treated in the same way as a purely domestic situation since Ms Ormazabal acquired UK nationality. The ECJ stresses that Ms Ormazabal exercised her right of free movement in the past so the interstate element is present in the case. The ECJ thus confirms its previous conclusion contained in *Metock*, 2008 although it does not refer to Directive 2004/38 but to the TFEU. In fact, the ECJ goes one step further because the interstate element in this case is much weaker than in *Metock*, 2008.

In the controversial judgment *Coman*, 2018 a Romanian (and American) national - Mr Coman - worked in Brussels and married Mr Hamilton, an American national, i.e. it was a same sex marriage (for comments on the judgment see Tryfonidou, 2018). Both men wanted to move to Romania and applied for a residence permit for Mr Hamilton for more than three months but the application was rejected. It should be added that marriage between people of the same sex is not recognized under Romanian law. The Grand Chamber of the Court of Justice reiterates that derived right of residence in Romania for Mr Hamilton could be accorded by virtue of Article 21(1) TFEU. As regards the conditions under which such a derived right of residence may be granted, they must not be stricter than those laid down by Directive 2004/38 which applies by analogy. It is apparent from the case law analysed above that such approach of the Court is settled already. What raises controversy is the ECJ's interpretation of Article 2(2)(a) of the Directive, which defines family members of migrating Union citizens, including a "spouse". The ECJ concluded "that the term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned" (*Coman*, 2018, para 35). A number of Governments objected that the institution of marriage is a union between a man and a woman, which is protected in some Member States by constitutional law (*Coman*, 2018, para 42). However, the ECJ stresses that Member States are obliged to recognize such marriages for the sole purpose of granting a derived right of residence to a third country national which does not undermine the national identity or pose a threat to the public policy of the Member State concerned. Once again, the ECJ applies the principle of primacy of EU law over national legal order in its absolute form, i.e. precedence of EU law even over constitutional law.

A question arises whether primacy in this case will be accepted by all Member States and their constitutional courts (e.g. Poland)¹⁶.

To sum up, the ECJ in its recent case law has not changed its approach. The status of third country nationals as family members of Union citizens is not only confirmed in the recent decisions but also extended. The core issue is the right of residence of these family members in the Member States. The ECJ refers to its previous judgments (*O. and B.*, 2014, *Metock*, 2008, *Zambrano*, 2011) and elaborates its conclusions applying Articles 20 and Article 21(1) TFEU. In *Lounes*, 2017 the ECJ applies its approach from the *Metock* case, 2008 in a situation having a much weaker interstate element, and in *Coman*, 2018 it interprets Directive 2004/38 extensively and rules that the term “spouse” contained therein covers same-sex spouses as well. In *Marín*, 2016 and *Chavez-Vilchez*, 2017, the ECJ refers to *Zambrano*, 2011 and *Dereci*, 2011 and further develops this line of reasoning. In *Banger*, 2018 the ECJ confirms the applicability of Art. 21(1) TFEU and, by analogy, Directive 2004/38 on the situation of a third country national being an unmarried/unregistered partner of a Union citizen who exercised the right of free movement when the couple returns to the home state of the Union citizen. It should also be pointed out that all above-mentioned recent judgments (except for *Banger*, 2018) have been given by Grand Chambers of the Court of Justice, which demonstrates the significance of these issues for the EU. It is clear that the ECJ in principle does not take into consideration objections of the Member States even under pressure of Brexit which can be demonstrated in particular on *Lounes* case, 2017. Thus, the ECJ case law remains problematic from the perspective of territorial sovereignty of the EU Member States because the ECJ keeps recognizing generously the right of residence to third country nationals residing, usually unlawfully, on their territory.

Conclusion

Analysis of the recent rulings shows that the ECJ has “sacrificed” so far only welfare tourists’ rights - by tightening the interpretation of EU law in force. It refuses, however, to do the same in cases of economically active migrants. The same applies to cases involving the right to move and reside of EU citizens and their family members, where the ECJ, despite the resistance of a number of Member States, maintains an approach that maximizes the *effet utile* of free movement provisions up to the limits set by the existing EU legislation.

16 Protection of family and marriage is of great importance in Poland. It should be born in mind in this context that concerns in this area led Poland to negotiate Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

The change in the ECJ case law on welfare tourism can be seen as a partial concession in the area which is the most sensitive for voters in the Member States with the highest numbers of intra-EU migrants, but also the least relevant area for the functioning of the EU internal market and also for the maintenance of the substance of EU citizenship *stricto sensu*. Migrating EU citizens may not be eligible for certain type of social support in host Member States (if they remain economically inactive), nevertheless, they still enjoy the protection by EU legal rules and escape the exclusive dependence on the rules of either the host country or that of their origin.

The politically important question now is whether relieving pressure on the social budgets of those EU Member States that are the most popular migration targets would be a sufficient concession for maintaining the rest of the EU in its current state of affairs. The rights of family members of EU migrating citizens, and in the context of the current migration crisis, in particular the rights of third-country nationals settled in the EU, will probably lead Member States to push for the amendment of secondary legislation in order to reverse the current ECJ approach. If such amendment is adopted at the EU level, it will again be up to ECJ judges to interpret these new provisions of secondary legislation in light of general principles of EU law and the rights enshrined in the EU Treaties. The judgments of the ECJ will thus continue to shape the development of the economic and social rights of EU citizens, and simultaneously set the boundaries of national autonomy of the Member States in this field – until there is unanimity between Member States to amend substantively also the EU primary law, i.e. the EU Treaties.

Brexit shows that the free movement of persons was one of the key issues leading to the withdrawal from the European Union. Although economic studies do not confirm that Union citizens coming from other Member States to the UK constitute serious problems and the issue is rather political, one may identify certain objections from Member States to the free movement of persons (together with the free movement of services) within the European Union. Transitional periods for free movement of workers in accession treaties, as well as so called “social dumping” can be mentioned in this respect. Social tourism or the “*Metock*” rule have been analysed above. It follows that, after the Brexit experience, the ECJ should, more than ever, interpret EU legislation deliberately and take also account of the legitimate interests of Member States in line with the principle of sincere cooperation between the EU and its Member States. It is clear that the free movement of persons is a sensitive area connected with fundamental rights. This is especially true for the right to marry, the right to found a family, the right to respect for private and family life, and social rights. Nevertheless, the ECJ should carefully balance and try to reconcile free movement rights, fundamental rights, as well as the sovereign rights of Member States in order to contribute to the prevention of European disintegration.

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