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Bettina Maurer-Kober, Austrian Supreme Administrative Court

Right of residence for third-country family members of Union citizens who have not exercised their right of freedom of movement

Overview of the CJEU's relevant jurisprudence

In a series of cases, the most debated probably being the Case *Zambrano*, the CJEU has developed its doctrine of the "substance of Union citizenship rights" according to Arts. 20 and 21 TFEU, which under certain circumstances can serve as legal basis for a right of residence (and, as in *Zambrano*, also a right of being granted a work permit) for third country nationals who are family members of a Union citizen who has not exercised his/her right of free movement, thus not being a beneficiary under the Directive 2004/38/EC.

The Court has in all relevant cases at all occasions pointed out that the Treaty provisions on citizenship rights do not confer autonomous rights on third-country nationals but only rights derived from the exercise of freedom of movement by a Union citizen. (eg. *Iida* [67], *Mc Carthy* [42], *Dereci* [55]).

In a nutshell, the Court declared that there can be a derived right of residence (or: right not being expelled) for a third country national, who is a family member of a Union citizen, who has not made use of his right of freedom of movement, thus not falling within the scope of relevant secondary law, if the denial of such a right (of residence for the third country national) would result in a denial of the substance of the rights conferred by virtue of the Union citizenship status. This again is the case if the Union citizen is in fact forced to leave the EU territory if his family member is denied a right to stay (and to work, if he is maintaining the dependent Union citizen, cf *Zambrano)* or is expelled.

The purpose and justifications of those derived rights are based on the fact that a refusal to allow the third-country nationals to stay or to grant them a residence permit would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State.

The most relevant cases are probably the following:

Case C-200/02, Zhu and Chen, 19.10.2004

(Chinese mother of an Irish child - dependent on her mother -applying for residence permit in UK)

The Court held in this case that a **right of residence for a (third country national or Union citizen) parent, who is the primary carer for his/her minor child, who is a Union citizen, has to be granted in the host Member State where the child resides, in order for them to stay together in the host country.**

Para. 45:

"On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see, mutatis mutandis, in relation to Article 12 of Regulation No 1612/68, Baumbast and R, paragraphs 71 to 75)."

C-291/05, Eind, 11.12.2007

Right of residence for a third-country national family member of a Union citizen, who has returned to his country of origin after working gainfully in a host Member State in this country of origin, even though the Union citizen does not continue to work.

The argument was that if the third-country national did not have such a right, the Union citizen might be discouraged to make use of his freedom of movement and would thus not leave his own MS to work in another MS just because he could not be sure to be able to continue to live with his family member after returning to his own MS.

Paras. 45, 35, 36:

"[35] A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.

[36] That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.

[37] Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.

[45] In the light of all the above considerations, the answer to Questions 2 and 3(b) must be that, when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State."

The above mentioned cases related to situations, in which secondary EU law on the right of residence (i.e. primarily:

- the Directive 2004/38/EC on the right of citizens of the Un ion and their family members to move and reside freely within the territory of the Member States,
- the Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents and
- the Directive 2003/86/EC on the right to family reunification)

was applicable.

However, the Court found that there are also very specific situations, in which the secondary law on the right of residence does not apply and the Union citizen has not made use of his freedom of movement, but still a right of residence cannot be refused to the third-country family member of such a Union citizen because otherwise that citizen would be obliged in practice ("be de facto forced") to leave the EU territory, thus the effectiveness of the Union citizenship rights that the citizen enjoys would be undermined. The Court held that in such a case the Union citizen would be deprived of the "genuine enjoyment of the substance of rights conferred by virtue of his status. Such an exceptional derived right of residence for the third- country national family members would therefore be inherent in and therefore based on Arts. 20 and 21 TFEU:

C-34/09, Zambrano, 8.3.2011

(Application of residence by the Colombian parents to a Colombian child and two Belgian children, who were born in Belgium and who were dependent on their parents.)

The Court held that **Art. 20 TFEU precludes national measures, including refusals to grant rights of residence in the Union citizen's MS of residence to family members of a Union citizen, which have the effect of denying Union citizens the genuine enjoyment of the substance of the rights conferred by their status.**

"[41] As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82; Garcia Avello, paragraph 22; Zhu and Chen, paragraph 25; and Rottmann, paragraph 43).

[42] In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42).

[43] 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.

[44] It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the

Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

[45] Accordingly, the answer to the questions referred is 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."

C-434/09, Mc Carthy (5.5.2011)

(Ms McCarthy held both the British and the Irish nationality and had always lived only in the UK. She married a Jamaican who did not maintain Ms Mc Carthy; the Court did not a basis for granting him a residence right)

The Court held that Ms McCarthy was not a beneficiary according to Art 3 of the Directive 2004/38. **The sole fact of holding two MS nationalities without having moved to another MS is not equivalent to the exercise of the right of freedom of movement.** The situation involved does not entail a denial of the substance of citizenship rights nor does it impede the exercise of the right of the freedom of movement. So, Art. 21 TFEU is not applicable to the situation – **no de facto obligation to leave the territory of the EU for the Union citizen** (= Ms Mc Carthy).

"[54] As stated in paragraph 49 of the present judgment, in the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.

[55] In those circumstances, the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State."

C-256/11, Dereci (15.11.2011)

(Several cases, in which the Union citizens had not exercised their right of freedom of movement, lived in Austria and were not dependent on the third country national family member.)

The Court **reaffirmed the Zambrano doctrine** but did not declare whether in the cases referred the *Zambrano* criteria were fulfilled or not. It restated that there is an **exceptional right of residence in situations where secondary law on right of residence of third country nationals does not apply and the Union citizen has not moved, if the Union citizen would be obliged in practice to leave the EU territory and would thus be denied the genuine enjoyment of the substance of rights conferred by virtue of his Union citizenship status.**

The Court held that

- the Zambrano-criterion (relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole) is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined [paras. 65-67].
- the **mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union**, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, **is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted** [para. 68].
- that finding is **without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused**. Thus, it must be examined 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 the national court 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** [paras. 70-74].

C-40/11, Iida (8.11.2012)

Mr. Iida, a Japanese national, was married to a German national; the couple had a daughter, who also had (among others) the German nationality. He had got a residence permit for family reunion in Germany. The couple separated (though did not divorce), mother and daughter moved to Austria, where the mother started full-time work and the daughter attended school. Both spouses held and exercised parental responsibility. Mr. Iida stayed in Germany but had regular contact with his daughter. His application for a "residence card of a family member of a Union citizen" was denied. He could have got a permit as long-term resident but withdrew that application.

Decision:

The Court found that in this case, the **denial of a derived Union right of residence for Mr Iida, a third-country national and father of a daughter with (amongst others) German nationality, who had moved with her German mother to another Member State, in the child's country of origin (Germany) was not liable to deny his spouse or his daughter the genuine enjoyment of the substance of rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States**. [76]

The Court reminded that the **purely hypothetical prospects of the right of freedom of movement being obstructed (or being exercised) could not establish a sufficient connection with EU law** to justify the application of that law's provision. [77]

As to the question if the situation has to be examined in the light of the Charter's rights as to its conformity with fundamental rights, the Court came to the conclusion that Mr Iida's situation was not governed by EU law – merely because he did not fall within the scope of the Directives 2004/38

or 2003/86. Therefore, the refusal to grant a residence right was not considered as implementation of EU law within the meaning of Art 51 of the Charter, so the **Charter was not applicable**. [80-81]

Joined Cases

C-356/11, O. and S. (6.12.2012) – patchwork families

Ms S, a national of Ghana, lived in Finland on the basis of a permanent residence permit. She got married to a Finnish national, with whom she had a child, who also has the Finnish nationality and has always lived in Finland. The couple divorced, Ms S had the sole custody of the child. The Finnish father stayed in Finland. Later on, Ms S married Mr O, a national of Ivory Coast. They had a child, who had Ghanaian nationality; the couple had joint custody of the child. Mr O was denied a residence permit on the grounds of lack of means of subsistence.

C-357/11, L.

Ms L, an Algerian national residing lawfully in Finland, got divorced from her Finnish spouse with whom she had a child. The child had Algerian and Finnish nationality and has always lived in Finland. Ms L got married to an Algerian asylum seeker, Mr M, who was returned to Algeria. The couple had a child, who was in joint custody of both parents and had Algerian nationality; Ms L lived on subsistence support. Mr M was denied a residence permit on the basis of their marriage for lack of means of subsistence.

In both cases the applicant for a residence permit lives together with his spouse, is not the biological father of the child who is a Union citizen, and does not have custody of the child.

Decision:

The Court held in these joined cases that **also in the context of a patchwork family a derived right of residence for the purpose family reunification might have to be granted if otherwise the Union citizen would be denied the genuine enjoyment of the substance of his citizenship rights**.

When evaluating such a situation, the **relationship of dependency (legal, financial or emotional)** between the minor Union citizen and the third country national, who is refused a right of residence, has to be taken into consideration. Another point to consider was the fact that the mothers (who had sole custody of the Union citizen children) had a permanent right of residence in the MS.

The Court pointed out that the principles stated in *Zambrano* are **not limited to** situations in which there is a **blood relationship** between the third country national and the Union citizen child in question [55].

So, in these cases, the CJEU for the first time listed **concrete criteria** to be taken into consideration when evaluating if a situation in question entailed a "de facto obligation to leave" (which remains to be established by the national courts):

*"[51] For the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the **custody** of the sponsors' children and the fact that the children are **part of reconstituted families** are also relevant. First, since Ms S and Ms L have sole custody of the Union citizens concerned who are minors, a*

decision by them to leave the territory of the Member State of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present. Secondly, any decision to stay in the territory of that Member State in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers would have the effect of harming the relationship of the other children, who are third country nationals, with their biological fathers."

"[56] On the other hand, both the permanent right of residence of the mothers of the Union citizens concerned who are minors and the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are ***legally, financially or emotionally dependent*** *must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status. As the Advocate General observes in point 44 of his Opinion, it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see Ruiz Zambrano, paragraphs 43 and 45, and Dereci and Others, paragraphs 65 to 67)."*

View of the Advocate General Bot:

[44-45]:"The reasons linked to the departure of the citizen of the Union from its territory are therefore particularly limited in the case-law of the Court. They concern situations in which the Union citizen has no other choice but to follow the person concerned, whose right of residence has been refused, because he is in that person's care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs.

Those situations may concern parents who are third-country nationals, on whom young children who are citizens of the Union are dependent, as in Ruiz Zambrano. They might also concern adult children on whom a parent is dependent because of an illness or a disability. However, they do not concern third-country nationals who exercise no responsibility, either parental or financial, over the Union citizen. Indeed, if that was the case, we would risk founding a right of residence for third country nationals on the sole basis of Article 20 TFEU and outside the provisions of secondary law expressly provided for by the Union legislature in, inter alia, Directive 2003/86."

To sum this up, in order to judge the **intensity of the dependency** between Union citizen and his/her third country family member, the following criteria are to be taken into account:

- Permanent right of residence of the mother [56]
- Custody of the minor Union citizen [51]
- Legal, financial and emotional dependency of the minor Union citizen [56]

Without any relevance are:

- Living in the same household [54]
- Biological ties (blood relationship) [55]

As far as the question of the applicability of the Charter in these cases was concerned, the Court found that the Family Reunification Directive 2003/86 was applicable (since the mothers also had third-country national children), therefore the Charter was applicable. Thus, the provisions of the Directive, especially its restrictions according to Art. 7 (requirements for which evidence has to be provided – such as sufficient resources), have to be interpreted in the light of Art. 7 and Art. 24 (2) and (3) of the Charter.

C-87/12, Ymeraga (8.5.2013)

Kreshnik Ymeraga, a Kosovar national entered Luxemburg at the age of 15 in order to join his uncle, who eventually also became his legal guardian. After an unsuccessful asylum application his stay was legalised. Some years later, his parents and two (adult) brothers, all Kosovar nationals, joined him. Their applications for asylum (international protection) were rejected. In the meanwhile, Kreshnik acquired Luxembourg nationality. The rest of his family then filed applications for a residence permit as family members of a citizen of the Union. They were not considered dependent (within the meaning of the law on the freedom of movement) on Kreshnik, even though he had made financial contributions to the family's expenses while they stayed in the Kosovo, and they could not be considered as members of the same household in the Kosovo.

Decision:

Directive 2003/86 (family reunification for third country nationals residing lawfully in a MS) does not apply to family members of a EU citizen

Directive 2004/38 (freedom of movement) does not apply because in case of the EU citizen has not exercised his right of freedom of movement, the EU citizen is no beneficiary of this Directive, thus his third country national family member is not covered either (because: only derived right!)

The Court held, after repeating the *Zambrano/Dereci* criteria and their exceptionality, that in this case the only factor which could justify a right of residence being conferred in the family members of the citizen concerned is the **mere wish (intention) of the Union citizen to bring about family reunification in the MS, in which he resides and of which he holds the nationality**. This **is not sufficient** to support the view that a refusal to grant such a right of residence may have the effect of denying him the genuine enjoyment of the substance of rights conferred by virtue of his status as citizen of the Union. [cf. para. 39].

The Court also reiterated (as it had already done in the Case *Iida*) that the Charter does not extend the field of application of EU law beyond the powers of the Union (cf. Art. 51 (2) Charter). Therefore, if the situation of the person concerned is not governed by EU law (because the Directives are not applicable, as in the *Ymeraga* Case and the refusal to grant a right of residence does not result in a denying of the genuine enjoyment of the substance of the Union citizen status-rights), the refusal to grant a right of residence to the third-country family member is not a situation involving the implementation of EU law within the meaning of Art 51 of the Charter. Thus, there can be **no examination of the conformity of this situation with fundamental rights in the light of the rights established by the Charter.**

Finally, the Court refers (just as he did in *Dereci*) to the necessity to examine, nonetheless, the situation in the light of the ECHR [44].