THE BEST INTERESTS OF THE CHILD PRINCIPLE IN CJEU CASE-LAW ON FREEDOM OF MOVEMENT AND RESIDENCE OF UNION CITIZENS: A NEW SAFEGUARD FOR VULNERABLE PERSONS?

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Abstract: *This article explores the evolving role of the best interests of the child principle in EU citizenship and free movement case-law, as interpreted by the Court of Justice of the European Union (CJEU). The principle, enshrined in Article 24(2) of the Charter of Fundamental Rights, has traditionally been applied in asylum and migration cases, but its scope is expanding to include free movement scenarios, particularly in cases involving primary caregivers of minor EU citizens. The article analyses two strands of case-law: the genuine enjoyment doctrine, which grants residence rights to third-country national parents, and the recent judgment in Case C-709/20 CG, which extends social assistance rights to economically inactive mobile EU citizens with dependent children. This article explores whether and, if so, to what extent, the invocation of the Charter can serve as an appropriate measure for granting residence and equal treatment rights in the general context of freedom of movement of minor EU citizens and their caregivers. The article concludes that the invocation of the primacy of the interests of the child has the potential to strengthen the rights of EU citizen children and their caregivers, but also raises concerns about the fragmentation of protection standards and the potential for unequal treatment.*

Keywords: *EU Law – Union Citizenship – Free Movement of Persons – Best Interests of the Child – CJEU*

INTRODUCTION

This article focuses on the protection of fundamental rights of EU citizen children in the context of free movement rights of their own or those of their primary carers. In recent years, the Court of the European Union ("Court" or "CJEU") has provided some clarifications on the scope of protection provided by the Treaties and, notably, the Charter of Fundamental Rights of the EU ("Charter"). This article questions how much clarity these judgments have brought into case-law on the freedom of movement and residence of Union citizens and their primary carers and whether unjustified distinctions have not been made by explicitly mentioning protection of only certain EU citizen children but not others. Besides, this article also explores whether and, if so, to what extent, the invocation of the Charter can serve as an appropriate legal basis for granting residence and equal treatment rights in the general context of freedom of movement of minor EU citizens and their caregivers.

Recently, the interpretation and application of the best interests of the child principle has been analyzed thoroughly *vis-à-vis* CJEU case-law on asylum and migration on one hand and in custody disputes on the other hand.[1] The present contribution aims to

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[1] KALVERBOER, Margite, BELTMAN, Daan, VAN OS, Carla, ZIJLSTRA, Elianne. The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures. *International Journal of Children's Rights*. 2017, Vol. 25, Issue 1, pp. 114–139. FRASCA, Eleonora, CARLIER, Jean-Yves. The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights? *Common Market Law Review*. 2023, Vol. 60, Issue 2, pp. 345–390. LONARDO, Luigi. The Best Interest of the Child in the Case Law of the Court of the European Union. *Maastricht Journal of European and Comparative Law*. 2022, Vol. 29, Issue 5, pp. 596–614.

advance our understanding of this principle with regard to free movement *acquis*, since such a comprehensive assessment is still outstanding in present academic literature.

The purpose of this article is to explore the particular context in which the principle is invoked, its content as well as the wider consequences of its application. The article is structured as follows: Section 2 presents a general picture of the principle, focusing on its sources and habitual areas of application. Section 3 presents in turn the two selected lines of CJEU case-law, where the principle has recently started to make an appearance. Section 4 explores the potential consequences of this development in free movement case-law. Section 5 addresses the application of the best interests of the child principle more generally and draws some conclusions.

I. BEST INTERESTS OF THE CHILD IN CJEU CASE-LAW

The principle is codified in Article 24(2) Charter, which states that *"in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration"*. This provision originates from Article 3(1) of the United Nations Convention on the Rights of the Child ("CRC"), with a similar wording. Although the EU is not a party to the CRC, the Court does acknowledge the instrument as an interpretation aid as regards Article 24(2) Charter.[2] Given that the CRC has been ratified by all EU Member States, the Court also takes it into account when applying the general principles of EU law.[3]

It is to be noted that no right follows automatically from Article 24(2) Charter. The assessment of the best interests is not different, in substance, from that under the CRC and should, therefore, arguably, be determined in accordance with General Comment no. 14, containing guidelines on the implementation of the principle.[4] This would mean that in the assessment of the child's best interests specific elements should be taken into account, amongst which figure preservation of the family environment, maintaining relations with the family and preservation of the ties of the child in a wider sense as well as the child's right to education.[5]

Despite its wide application, there is still uncertainty as to what the principle means substantially both globally and on EU level.[6] Arguably, it can be summarized as follows:

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[2] Judgement of 11 March 2021, *Belgian State (Retour du parent d'un mineur)*, C-112/20, ECLI:EU:C:2021:197, para. 37.

[3] Judgment of 27 June 2006 *Parliament v Council*, C-540/03, ECLI:EU:C:2006:429, para. 37. For a recent reference: Judgment of 14 December 2021, *Pancharevo*, C-490/20, ECLI:EU:C:2021:1008, para. 63.

[4] 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 (Article 3, para. 1). Published on 29 May 2013, ref. CRC/C/GC/14. In: *Committee on the Rights of the Children* [online]. 29. 5. 2013 [2025-04-14]. Available at: <https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf>.

[5] See also KALVENBOER, Margite et al. *The Best Interests of the Child in Cases of Migration,* Groningen: University of Groningen, 2017, pp. 119–120 for a comprehensive list.

[6] LONARDO, Luigi. The Best Interest of the Child in the Case Law of the Court of the European Union. *Maastricht Journal of European and Comparative Law*. 2022, Vol. 29, Issue 5, p. 598 and literature cited. Elusive definition is reported also in an international context, see STALFORD, Helen. The Broader Relevance of Features of Children's Rights Law: the 'Best Interest of the Child' Principle. In: Eva Brems Elen Desmet – Wouter Vandenhole (eds.). *Children's Rights Law in the Global Human Rights Landscape,* London: Routledge, 2017, pp. 37–51, on pp. 37–39. Similarly with particular regard to the Czech legal order see WESTPHALOVÁ, Lenka, ŠÍNOVÁ, Renáta. Nejlepší zájem dítěte [Best interest of the child]. *Právník*. 2019, Vol. 158, Issue 12, pp. 1091–1108, on pp. 1094–1096.

> *"the best interests of the child is a principle which justifies a reading of other provisions of EU law, a reading aimed at giving a child the chance to maintain a meaningful relationship with a parentlike figure, and it is assessed on an individual basis, taking into account the child's concrete needs".*[7]

A full overview of CJEU jurisprudence in which the best interests of the child principle comes into application and its categorization is contained elsewhere.[8] For the purposes of the present contribution, it suffices to note that the principle's appearance in case-law usually mirrors its inclusion in secondary EU law. Consequently, since it is included in EU secondary legislation focusing on asylum and immigration policy, such as in the Family Reunification Directive,[9] the Return Directive,[10] the Reception Directive[11], the principle makes a regular appearance in case-law concerning family reunification and migrant children.[12]

On the contrary, the best interests of the child principle does not figure in any of the acts governing free movement of EU citizens and their family members. It is absent from both the Citizens' Rights Directive ("CRD")[13] as well as the Free Movement of Workers Regulation ("FMWR")[14]. Consequently, it does not appear in any case-law concerning derived right of residence based on enrolment of children in the educational system.[15] Neither does it appear in cases where family members derive a residence right from their financially self-sufficient children in a host State on the basis of Article 21 Treaty on the Functioning of the EU ("TFEU") and the CRD.[16] It can be submitted that the best interests of the child principle did not traditionally play a role in CJEU case-law on free movement of Union citizens – arguably, because it is rarely minors who are in the heart of free

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[7] LONARDO, Luigi. *The Best Interest of the Child in the Case Law of the Court of the European Union*, p. 599.

[8] Ibid., pp. 600–607.

[9] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18.

[10] 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 OJ L 348, 24.12.2008, p. 98–107.

[11] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96–116.

[12] LONARDO, Luigi. *The Best Interest of the Child in the Case Law of the Court of the European Union*, p. 604. For a comprehensive overview of CJEU asylum and migration case law applying the principle, see FRASCA, Eleonora, CARLIER, Jean-Yves. *The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?*, pp. 355–383. In general, on the assesment and determination of the best interest of the child principle in EU migration procedures, see KALVENBOER, Margite et al. *The Best Interests of the Child in Cases of Migration.*

[13] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77–123.

[14] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27. 5. 2011, p. 1–12.

[15] The right of children of (former) EU workers to access to education in the host State under the best possible conditions enshrined in Article 10 of the Workers Regulation is understood by the CJEU to cover also residence and equal treatment rights of their primary carers. For the seminal case see judgment of 17 September 2002, *Baumbast*, C-413/99, ECLI:EU:C:2004:493.

[16] For the seminal case see judgment of 19 October 2004, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:639.

movement disputes.[17] Nonetheless, recently, the Court has made the link in cases concerning residence and equal treatment rights of primary caregivers (usually parents) of minor EU citizens. Increasingly, it uses the principle both to guide interpretation of other provisions of EU law (incl. EU primary law) and to confer a right.[18] The particular context and the cases that ensued will be outlined in section 3.

Furthermore, as far as EU citizenship is concerned, there are two common categories of references to the best interests of the child principle. In particular, the principle comes into play in cases concerning "rainbow families".[19] Article 7 Charter read in light of its Article 24(2) was found to justify a teleological interpretation of the right to free movement, which would be breached if a Member State would refuse to issue a birth certificate to a child of a same-sex couple.[20] Another context which involves the principle is case-law on loss of EU citizenship, which can never be automatic but must be subject to an individual review.[21] These lines of argumentation are not the subject of the present contribution, which instead focuses on the interpretation of the principle in cases concerning the relationship of children with their primary caregivers.

II. THE BEST INTERESTS OF THE CHILD IN CASE-LAW ON FREE MOVEMENT OF EU CITIZENS

Two strands of case-law contributing towards the establishment of the best interests of the child principle in the free movement *acquis* have been selected for the purpose of the present analysis. This section will explain how exactly and to what effect the Court is invoking the Charter, and more precisely, its Article 24(2) on the primacy of the interests of the child, in order to indirectly protect EU citizen minors by securing rights for their caregivers. We will turn to situations, in which, firstly, the consideration of the best interests of the child justify the granting of residence rights to the primary carer, and, secondly, the consideration of the best interests of the child justify the granting of equal treatment rights to the primary carer.

II.1 Residence rights of third country national parents under the genuine enjoyment doctrine

Recently, the genuine enjoyment of EU citizenship rights doctrine has been elaborated so as to include an assessment of dependency between a Union citizen child and his

[17] SCHRAUWEN, Anette. Chapter 3: The Fundamental Status of Minor Union Citizens and the Best Interest of the Child. In: Sandra Mantu – Paul Minderhoud – Elspeth GUILD (eds.). *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously*. Leiden: Brill Nijnhof, 2020, pp. 36–54, on p. 52.

[18] LONARDO, Luigi. *The Best Interest of the Child in the Case Law of the Court of the European Union*, p. 603. See also a comprehensive overview of the various roles and functions of the best interests of the child principle, incl. its role as an interpretative tool: GOLDNER LANG, Iris. *The Principle of the Child's Best Interests in EU Law on Third-Country Nationals*, Berlin: Springer, 2024, pp. 63–72.

[19] For a comprehensive overview of the best interest of the child principle in the context of same-sex parenthood, see TRYFONIDOU, Alina. Rainbow Families and EU Free Movement Law. In: Elisabetta Bergamini – Chiara Ragni (eds.). *Fundamental Rights and Best Interest of the Child in Transnational Families*. Louvain-la-Neuve: Intersentia, 2019. pp. 75–96.

[20] Judgment C-490/20 *Pancharevo*, paras. 63–64.

[21] Judgment of 12 March 2019, *Tjebbes*, C-221/17, ECLI:EU:C:2019:189.

or her third-country national ("TCN") primary carer in light of the best interests of the former. The genuine enjoyment doctrine originates in *Ruiz Zambrano*.[22] It gives TCN primary caregivers of Union citizens a right to reside in the Union under the condition that a relationship of dependency so strong is established that it would compel the child to follow his or her caregiver out of the Union, were the latter to be expelled.[23] Outside the Union territory, the EU citizen child would be unable to genuinely enjoy the advantages of its status as EU citizen, which is destined to be the fundamental status of nationals of the Member States.[24]

Initially, this doctrine was confined to internal situations involving EU citizen children living in their home Member State. Nonetheless, subsequently, the Court extended the protection also to families of EU citizen children living in a host State.[25] Recently, the genuine enjoyment doctrine has acknowledged to apply also in a *Ruiz-Zambrano*-mirrored situation, where the Netherlands did not want to issue a visa for a Thai mother with a Dutch child, which has been born and raised in Thailand without ever having set foot on EU territory. The Court extended its reasoning to cover these situations as well, since, in principle, they would have "a common feature".[26]

It is important to note that this very specific legal basis for residence rights has been interpreted into Article 20 TFEU and does not follow explicitly from the Treaties. On the basis of the *Ruiz Zambrano* case-law, there are very specific situations in which a right of residence must be granted to a TCN family member of a Union citizen, notwithstanding the fact that the Union citizen might not have made use of their freedom of movement, and that EU legislation on the right of residence of TCNs does not apply.

Initially, in the landmark judgment of *Ruiz Zambrano,* no reference to the best interests of the child is made, but that changes with later judgments.[27] While both discussion of the *Ruiz Zambrano* caregiver status and the best interests of the child principle appear in the judgment in *O. and S.,*[28] no link is yet made between them. Still some years later, the primacy of the best interest of the child is taken into account in the judgments in *Rendón Marín*[29] and *CS,*[30] where the Court established exceptions, whereby Member States may deny a derived right of residence on the basis of Article 20 TFEU on grounds of public policy or public security. Both cases contain a reference to Article 7 Charter, interpreted in light of the best interests of the child under Article 24(2) thereof.[31]

It was only 6 years after the initial *Ruíz Zambrano* judgment, in *Chavez Vilchez,*[32] that the Court definitively inserted a review of the best interests of the child into the heart of

[22] Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124.
[23] Judgment C-34/09 *Ruiz Zambrano*, paras. 43 and 45.
[24] Judgments C-200/02 *Zhu and Chen*, para. 25; C-34/09 *Zambrano*, para. 41.
[25] Judgment of 13 September 20216, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675.
[26] Judgment of 22 June 2023, *X. v Staatssecretaris van Justitie en Veiligheid*, C-459/20, ECLI:EU:C:2023:499, para. 25.
[27] A summarized and exemplary overview is given here. For a comprehensive approach, see GOLDNER LANG, Iris. *The Principle of the Child's Best Interests in EU Law on Third-Country Nationals*, pp. 69–72.
[28] Judgment of 6 December 2012, *O. and S.*, C-356/11 and 357/11, ECLI:EU:C:2012:776.
[29] Judgment C-165/14 *Rendón Marín*, pronounced on the same same day as the *CS* judgment.
[30] Judgment of 13 September 2016, *CS*, C-304/14, ECLI:EU:C:2016:674.
[31] Judgments C-165/14 *Rendón Marín*, para. 66; C-304/14 *CS*, paras. 48–49.
[32] Judgment of 10 May 2017, *Chavez Vilchez*, C-133/15, ECLI:EU:C:2017:354, para. 71.

the genuine enjoyment doctrine. In particular in the assessment of who constitutes the primary carer and the relationship of dependency linking them to the minor EU citizen have been elaborated so as to include a reference to Article 24(2) Charter. In the judgment *K.A.*, the Court made an effort to consolidate its case-law on the genuine enjoyment doctrine and the two-fold references to the best interests of the child principle. The primacy of the best interests of the child thus seems to have become a constant in cases applying the genuine enjoyment doctrine, [33] and makes regular appearance in judgments.[34]

However, it is important to note from the outset that the references to the best interests of the child are intended only to justify the residence rights of the TCN parent. While further specific rights, such as the right to a work permit, can be invoked, no general equal treatment right or right to social assistance, which would also be beneficial for the child itself, are created.

In essence, under current case-law, the Court explicitly requires the best interests of the child be taken into account when assessing the relationship of dependency between the parent and the child. In particular, regard to the Article 7 respect for family life read in conjunction with the Article 24(2) best interests of the child must be had in two instances.

Firstly, national authorities must apply the principle when determining the primary carer and assessing the degree of dependency, which can be legal, financial, or emotional.[35] It might be tying the child to one or to both parents. Most, though not all, cases concern single mothers or fathers, with the other parent either completely out of the picture or just not contributing to the bringing up of the children. Whether or not these absent parents, who have not been primary carers so far, might be actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but does not override existing dependency between the child and the current TCN primary carer.[36] Rather, an assessment of the concerned child's best interests must include all the specific circumstances of the case. The Court provides an indicative list containing: *"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 the child's equilibrium"*.[37] Consequently, the Court seems to give substance to the best interests of the child by indicating specifically which circumstances need to be taken into account when assessing whether the relation of dependency would compel the child to leave the EU and thus deprive the child from the enjoyment of their EU citizenship rights.[38]

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[33] Similarly, LONARDO, Luigi. *The Best Interest of the Child in the Case Law of the Court of the European Union*, p. 613.

[34] E.g.: judgments of 8 May 2018, *K.A.*, C-82/16, EU:C:2018:308, para. 52; EU:C:2022:354, para. 53; of 2 April 2023, *M.D,* C-528/21, ECLI:EU:C:2023:341, paras. 62–69; C-459/20 X. v *Staatssecretaris van Justitie en Veiligheid*, paras. 39–45.

[35] Judgement C-133/15 *Chavez Vilchez*, para. 68.

[36] Judgements C-133/15 *Chavez-Vilchez*, para 71; C-82/16 *K.A.*, para. 52.

[37] Judgment C-133/15 *Chavez Vilchez*, para. 72.

[38] HARVEY, Darren. The Best Interests of the Child Need Not Necessarily be a Primary Consideration: ECJ 22 June 2023, Case C-459/20, X v Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais). *European Constitutional Law Review*. 2024, Vol. 20, Issue 4, pp. 569–592, p. 581.

Secondly, national authorities need to consider the best interests of the child when assessing the potential consequences of an expulsion of the TCN parent on grounds of public order and public security, in other words, when the expulsion measure would otherwise be justified by the criminal record of the person in question.[39] Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, under general provisions of the CRD,[40] to the safeguarding of public policy and public security. The assessment of the situation of an adult, however, must take into account the best interests of his or her child. Besides a general assessment of proportionality of the measure (the existence of a genuine, present and sufficiently serious threat), the relationship of dependency between the person concerned and his or her child must be considered. Indicatively, the Court lists the following factors: *"the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation"*.[41] The interests of the child can thus, in correlation with other elements, outweigh legitimate interests of the Member State even more so than Article 20 TFEU alone.

In practice, the best interests of the child principle is a very powerful tool potentially overriding Member States' legitimate interests in protecting their social assistance systems (*Chavez Vilchez*) and deporting TCNs who perpetuated grave criminal offences on their territory (*M.D.*) alike.

However, for the Court, it still weights less than Union citizenship as such. Recently, in *X v Staatssecretaris van Justitie en Veiligheid*, it did not place Article 24(2) Charter at the forefront of its analysis of a caregiver's derived right of residence. Instead, decisive weight was placed on the rights that EU citizens have by virtue of their status as Union citizens to move and reside freely within the territory of the Union – even though the facts of the case were, arguably, inviting the judges to do the opposite. This assessment is being criticized in literature, because if it were the other way around, national authorities would have a means to bar TCN parents from abusing the genuine enjoyment doctrine by acquiring a derived right of residence purely for their own benefit.[42] This only highlights the difficulty of applying the best interests of the child principle to adult-related decision-making, when the best interests of the child clash with the best interests of the adult.[43] In essence, all cases under the genuine enjoyment doctrine are adult-centered, since it is the rights and entitlements of the parental figure which are primarily and di-

[39] Judgements C-165/14 *Rendón Marín*, para 81; C-133/15 *Chavez-Vilchez*, para. 71.
[40] In particular, Articles 27 and 28 CRD.
[41] Judgments C-165/14 *Rendón Marín*, para 86; C-459/20 *X v Staatssecretaris van Justitie en Veiligheid*, para. 43.
[42] HARVEY, Darren. *The Best Interests of the Child Need Not Necessarily be a Primary Consideration: ECJ 22 June 2023, Case C-459/20, X v Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais),* pp. 577 and 582–583. Also see Opinion of AG De La Tour of 16 June 2022, *X v Staatssecretaris van Justitie en Veiligheid*, C-459/20, ECLI:EU:C:2022:475, paras. 6 and 30–36 on the reasons which lead him to assume that the applicant in the concerned case was acting fraudulently.
[43] STALFORD, Helen. The Broader Relevance of Features of Children's Rights Law: the ‚Best Interest of the Child' Principle. In: Eva Brems Elen Desmet – Wouter Vandenhole (eds.). *Children's Rights Law in the Global Human Rights Landscape,* pp. 39–42.

rectly at stake. It is argued in an international context that the best interests of the child principle was intended to enable decision-makers to isolate and distinguish children's needs from those of their parents, particularly in cases where parents are simply unable or unwilling to accept that their children's needs are not coterminous with their own needs or desires.[44] This heritage should not be forgotten by the Court.

II.2 Social assistance rights for mobile EU citizens ineligible to equal treatment

The best interests of the child principle recently made an appearance in an unexpected context. The occasion was the judgment in *CG*[45], a case concerning equal treatment rights for non-economically active mobile EU citizens. This case can be fitted into a line of jurisprudence curtailing equal treatment rights for non-economically active EU citizens established in 2014 with the CJEU judgment in *Dano*[46]. Essentially, *CG* can be understood as a confirmation and even as an extension of the Court's judgment in *Dano*, which excluded mobile EU citizens failing to meet the residence criteria established in Article 7(1) CRD from equal treatment rights not only under Article 24 CRD but also from the general non-discrimination clause of Article 18 TFEU.[47] The same equal treatment waiver has now been applied also to CG, who applied for social benefits while residing legally in the UK on the basis of national law, not the CRD. Nonetheless, given her personal circumstances, the Court wanted to relieve her situation and give her access to social assistance she was obviously in desperate need of. Thus, in order to justify an extension of social cover to her case, it invoked the Charter, and, more specifically, its Article 1 (respect of human dignity), Article 7 (respect of private and family life) and, because she was the primary carer of two children, Article 24 (rights of the child).

To understand why the judges felt so compassionate and to be able to follow their reasoning, it is useful to recall the facts of the case. CG is a Croatian-Dutch national who moved to Northern Ireland in 2018 together with her Dutch partner. In 2020, she was granted pre-settled status, a UK equivalent to temporary residence under the Withdrawal Agreement.[48] After having split from her partner on account of domestic violence, CG has been living in a shelter for women together with her two under-age children without any means of subsistence.[49] The preliminary question arose in a dispute concerning the refusal of the Northern Irish government to grant her a subsistence benefit.

In the first part of the judgment,[50] the Court applies the *Dano* case-law, thus excluding *CG* from equal treatment rights under Article 18 TFEU, since Article 24 CRD would be the

[44] Ibid., p. 40.
[45] Judgment of 15 July 2021, *CG*, C-709/20, ECLI:EU:C:2021:515.
[46] Judgment of 11 November 2014, *Dano*, C.333/13, ECLI:EU:C:2014:2358.
[47] See generally HAAG, Maria. The Coup de Grâce for the Union Citizen's Right to Equal Treatment: CG v. The Department for Communities in Northern Ireland. *Common Market Law Review*. 2022, Vol. 59, Issue 4, pp. 1081–1106, on pp. 1090–1091.
[48] This residence title provides mobile EU citizens with non-permanent residence rights post-Brexit. For details on the specific provisions applicable to the applicant in question see O'BRIEN, Charlotte. The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporated for the Vulnerable (CG v The Department for Communities in Northern Ireland). *European Law Review*. 2021, Vol. 46, Issue 6, pp. 801–817, on pp. 815–816.
[49] Judgment C-709/20 *CG*, paras. 30, 43–44 and 92.
[50] Ibid., in particular paras. 65–66, 76 and 78–80.

"specific expression" of that article applicable to mobile EU citizens. The latter, however, could only be invoked where the person in question meets the residence criteria set out in Article 7(1) CRD. For economically inactive EU citizens, pursuant to Article 7(1)(b), the right to reside in the host State for more than three months depends on having sufficient means of subsistence to prevent them from becoming a burden on the social assistance system during their stay. With reference to recital 10 of the CRD, which speaks of "unreasonable" burden and the clarification of the referring court that CG has no financial resources, the Court deducts that CG does not dispose of sufficient resources within the meaning of Article 7(1)(b) CRD, which in turn is sufficient to infer that she would be "likely" to become an unreasonable burden on the UK social assistance system. Therefore, she cannot invoke the principle of non-discrimination of Article 24(1) CRD.

However, unlike in *Dano*, the Court did not leave it at that, and, in a widely criticized move,[51] invoked the Charter for relief. It recalled that CG had made used of her fundamental freedom to move and reside within the territory of the Member States, conferred by Article 21(1) TFEU, which places her situation within the scope of EU law.[52] Consequently, the Court found the Charter to be applicable. In particular, it saw a risk of imminent violation of Article 1 (respect for human dignity), Article 7 (respect for private and family life) and Article 24 (rights of the child) of the family, since she was the sole caregiver for her two children.[53]

By invoking the Charter, the Court diverged from its *Dano* judgment[54] where it had stated that Member States would not be implementing EU law, when laying down conditions for access to social assistance benefits and, therefore, the extent of the social cover provided would not be reviewable under the Charter. The argumentation in *Dano* has been criticized in literature.[55]

While the Court refers to Article 24 Charter, it does not truly engage with the exact meaning of the concept or with the factors to be taken into account in the assessment of the child's best interests. Interestingly, this is a common feature of the Court's case-law on migration of TCNs.[56]

In this specific case, the Charter has been invoked in order to justify recourse to the social assistance system of the host State. The residence rights in the case at hand followed from national law and were not put into question; could, however, theoretically, the Charter have also been invoked to secure those? Probably not, since this would amount to a circumvention of the Article 7(1) CRD. Nonetheless, in the past, the Court did show a certain willingness towards creating a legal basis for residence of primary carers, as described in the previous sub-section.

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[51] See comments on this case published by Maria Haag, Charlotte O´Brien, Herwig Verschueren and Ferdinand Wollenschläger referred to in this article.

[52] Judgment C-709/20 *CG*, paras. 85–88.

[53] Ibid., paras. 89–92.

[54] Judgment C-333/13 *Dano*, paras. 85–92.

[55] NIC SHUIBNE, Niamh. Intergrating Union Citizenship and the Charter of Fundamental Rights. In: Daniel THYM (ed.). *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford, London, Portland: Hart Publishing Ltd, 2017, pp. 209–240, on p. 219.

[56] FRASCA, Eleonora; CARLIER, Jean-Yves. *The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?,* pp. 383–384.

III. EXTENSION OF AN EXPLICIT CONSIDERATION OF THE PRIMACY OF THE INTERESTS OF THE CHILD TO OTHER CATEGORIES OF CHILDREN AND THEIR CAREGIVERS

The introduction of EU citizenship has strengthened security of residence as an autonomous and independent right for children both in a host State and in the State of their nationality.[57] Children's EU citizenship rights are not conditional on their age or legal capacity.[58] This status implies that children enjoy a conditional right of residence in a host Member State and a non-conditional right of residence in the Member State of which they are nationals.

There is, under EU law, a variety of situations under which family members may derive residence rights from the child.[59] Relevant for the purposes of the present contribution are two legal bases, also referred to as the *Baumbast* and the *Zambrano* carer status, respectively. They are titled after the landmark judgments, which have significantly contributed to the establishment of the applicable legal framework.[60] Besides the genuine enjoyment doctrine (the so-called *Zambrano* carer status), the Union legal order recognizes also a derived right of residence for the primary carer (Union citizen or TCN) on the basis of Article 10 FMWR (the so-called *Baumbast* carer status).[61] This legal basis provides for access of children of (former) EU workers to the educational system of the host State under the best possible conditions. The provision is interpreted by the Court to comprise derived residence and equal treatment rights for their primary carers without being contingent upon their self-sufficiency.[62] However, only when assessing the right to residence of *Zambrano* carers does the Court make reference to the Charter and the principle of the best interests of the child.

EU citizen primary carers reside in host State under the CRD as economically inactive citizens, workers or family members. In such cases, it is the child, who derives residence from the parent. The autonomous residence and equal treatment rights are especially precarious for mobile EU citizens who are caregivers of young children, in particular when they are not covered by EU worker status.[63] Likewise, traditionally, with the recent

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[57] SCHRAUWEN, Anette. The Fundamental Status of Minor Union Citizens and the Best Interest of the Child. In: Sandra Mantu – Paul Minderhoud – Elspeth Guild (eds.). *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously*. Leiden: Brill Nijnhof, 2020, pp. 36–54.

[58] Judgment C-200/02 *Zhu and Chen*, para. 20. Recently also judgment C-459/20 *X v. Staatssecretaris van Justitie en Veiligheid*, para. 42.

[59] For a detailed account of all possible legal bases for derived residence as well as an assessment of their compliance with the best interests of the child principle, please see SCHRAUWEN, Anette. *The Fundamental Status of Minor Union Citizens and the Best Interest of the Child. In: Sandra Mantu – Paul Minderhoud – Elspeth Guild (eds.). EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously*, p. 52.

[60] Judgments C-413/99 *Baumbast*; C-34/09 *Ruiz Zambrano*.

[61] There is also a similar legal basis in Article 12 CRD, which is of very limited in application. Nonetheless, it might be relevant for children of Union service providers and their carers.

[62] For a concise overview of the case-law on this topic, see judgment of 6 October 2020, *Jobcenter Krefeld v JD*, C-181/19, ECLI:EU:C:2020:794, paras. 33–79.

[63] About the difficulty of combining paid work with care-giving obligations and the precariousness of care-givers' position as family members or economically inactive mobile citizens, see e.g.: MILLER WESTOBY, Nina. Care on the Move: the Gender Care Gap and Intra-EU Mobility. *Journal of Law and Society*. 2023, Vol. 50, Issue 4, pp. 558–578.

exception of *CG*, references to the Charter are missing in the line of case-law on the right to move and reside of EU citizens and their dependent children.

This differential approach fits into a more general picture of application of fundamental rights standards to cases concerning Union citizenship. This picture has been described as "fragmented" by Niamh Nic Shuibne, who notes a stark difference in CJEU's approach to intra-European mobility on one hand, and its approach to the enjoyments of rights doctrine, which typically applies in purely internal situations, on the other.[64] While the former are usually judged to be outside the scope of fundamental rights protection (either explicitly so or just by omitting to mention the Charter at all), the latter typically trigger the explicit invocation of Charter provisions. This two-fold approach results in complicated and unpredictable protection standards offered by both Union citizenship and the Charter.

In the following sub-sections, I would like to comment on the possible extension of an explicit consideration of the primacy of the interests of the child to (1) other legal bases for derived residence rights for primary carers and (2) autonomous residence and equal treatment rights of primary carers by virtue of their status as jobseekers and economically inactive EU citizens.

III.1 Explicit consideration with regard to children's right to education

The dependency tests conditioning residence rights for primary carers are similar under each of the applicable legal bases. Therefore, it is peculiar that the Court only refers to the best interests of the child and, more broadly, to the Charter, only when assessing the right to reside under Article 20 TFEU.

In the landmark Baumbast case for primary carers' derived right of residence under Article 10 FMWR, no reference to the Charter is made. Instead, the Court mentions interpreting the Union law in light of respect for family life under Article 8 European Convention on Human Rights. Some explain the lack of a Charter reference by the fact that it was still a non-binding document at the time.[65] That, however, fails to explain why the Court did not mention the CRC.

An interesting parallel can be noted between the case-law of the European Court of Human Rights and the Court, where the both courts systematically invoke the best interests of the child principle in expulsion cases.[66] It could indeed be argued that only a the prospect of factual complete removal out of Union territory, which underlies the genuine enjoyment doctrine anchored by the *Ruiz Zambrano* judgment and Article 20 TFEU, is a grave enough interference justifying recourse to the Charter. However, this argument does not seem to hold in light of the *CG* judgment, which invokes the Charter in order to protect a family of a Union citizen with not only one but two Member State nationalities.

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[64] NIC SHUIBNE, Niamh. *Integrating Union Citizenship and the Charter of Fundamental Rights.*

[65] SCHRAUWEN, Anette. The Fundamental Status of Minor Union Citizens and the Best Interest of the Child. In: Sandra Mantu – Paul Minderhoud – Elspeth Guild (eds.). *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously*, p. 41.

[66] COLLINSON, Jonathan. Making the Best Interests of the Child a Substantive Human Right at the Centre of National Level Expulsion Decisions. *Netherlands Quaterly of Human Rights.* 2020, Vol. 28, Issue 3, pp. 169–190, on pp. 169 and 171.

Furthermore, don't all children deserve their best interests taken into account? Does the child of a Union worker deserve an inferior standard of protection?

An explicit consideration of the child´s best interests might have the power to change established jurisprudence on the derived residence right of *Baumbast* primary carers. Currently, the period spent in the host State under Article 10 FMWR does not accrue toward their eligibility for permanent residence. It is questionable whether this jurisprudence would be compatible with the Charter in case of an explicit assessment.[67]

Anette Schrauwen believes we might expect the best interests of the child principle to play a role in future cases assessing derived residence based on children's enrolment in education under Article 10 FMWR.[68] She bases her assessment on the context in which the principle is invoked in the genuine enjoyment doctrine. In particular, it is used in the framework of assessing relationships of dependency between child and parents. Children basing their right of residence on their status as EU citizens would ultimately have the same bond with their parents as those basing their right on the continuation of their education in the host Member State, she argues. The question arises, why children and their caretakers residing on the basis of Article 10 FMWR should be worse off than children and their caretakers residing on the basis of Article 20 TFEU.

Before we advocate for a more extensive use of the principle, however, the question stands in the room whether the invocation of the Charter presents an added value to the protection of children and their caregivers. Does the consideration of the best interests of the child principle modify the assessment of the relationship of dependency of the child on the primary carer? In general, the relationship of dependency is assessed similarly under all three legal bases of primary caregivers' residence rights. Its content does not differ significantly between the respective legal bases, except for the fact that in *Zambrano* cases, systematically, reference is made to the Charter, whereas under other legal bases, it is not.

As recalled in the previous section, the best interests of the child principle is invoked in two assessments, which already from their definition are always subject to the proportionality test and dependent on a multitude of circumstances. In assessing the degree of dependency on the carer, Member States must consider the particular circumstances of the child. Where they reject a derived right of residence to a primary carer on grounds of public security and public order, they are obliged to take into account the imminence of threat posed by the carer in question, the degree of seriousness of the criminal offence, the time that has lapsed between the conviction and the expulsion measure.

In this sense, the reference to the Charter offers an additional layer of protection. The CJEU case-law on equal treatment rights for economically inactive mobile EU citizens is a poignant and vivid example of how quickly an obligation of a proportionality assessment can be dismantled.

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[67] NIC SHUIBNE, Niamh. *Intergrating Union Citizenship and the Charter of Fundamental Rights*, pp. 223–224.

[68] SCHRAUWEN, Anette. The Fundamental Status of Minor Union Citizens and the Best Interest of the Child. In: Sandra Mantu – Paul Minderhoud – Elspeth Guild (eds.). *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously*, p. 53.

III.2 Explicit consideration with regard to economically inactive mobile Union citizens and jobseekers

In deviation from a line of case-law which was initially very favourable towards equal treatment entitlements of economically inactive mobile EU citizens, the CJEU excluded their access to social assistance in the course of the past decade.[69] In this regard, it is perhaps significant, that in some of the most controversial cases – *Dano*[70] and *Alimanovic*[71] – the criterions of caregiving and best interests of the child is absent in the Court's reasoning, even though children were involved.[72]

To recall, in *Dano*, the social assistance rights of an economically inactive mobile EU citizen, who was the sole caretaker of a young child, were excluded because she did not possess sufficient resources so as not to unreasonably burden the host State. The fact that she did not work nor seek employment led the Court without any further argument to believe she was only abusing her free movement rights.

In *Alimanovic*, too, a single mother of three daughters, two of them underage, was refused access to social assistance, since, after having worked in temporary jobs for less than a year, she had the residence status of a jobseeker, and thus no equal treatment rights under Article 24 CRD.

In consequence of this line of case-law, Union citizens risk both their own and their children´s lawful residence status and equal treatment rights in a host State if they fail to fulfil the economic requirements for lawful residence in Article 7(1) CRD. Union citizen children in a factual free movement situation are then left with less protection under EU law than if their situation qualifies for Article 20 TFEU protection, which does not require financial self-sufficiency.[73]

In cases involving parents of young children, could the Court always and automatically privilege their status as primary caregivers of those children over individual status as jobseeker or economically inactive EU citizen under free movement case-law? Arguably, when it comes to the application of the genuine enjoyment doctrine, it already does so, as is evident especially in *Chavez Vilchez*, *K. A.* or *Rendón Marín*. They reveal how the interest of protecting Union citizen children's interests may overtake both the interest in limiting access to social assistance as well as the interest in enforcing entry bans.

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[69] See generally WOLLENSCHLÄGER, Ferdinand. Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era. In: Daniel Thym (ed.). *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford, London, Portland: Hart Publishing Ltd, 2017, pp. 171–190.

[70] Judgment in C-333/13 *Dano*.

[71] Judgment of 15 September 2015, *Alimanovic*, C-67/14, ECLI:EU:C:2015:597.

[72] LONARDO, Luigi. *The Best Interest of the Child in the Case Law of the Court of the European Union*, p. 613, VERSCHUEREN, Herwig. The Right to Social Assistance for Economically Inactive Migrating Union Citizens: The Court Disregards the Principle of Proportionality and Lets the Charter Appease the Consequences. *Maastricht Journal of European and Comparative Law*. 2022, Vol. 29, Issue 4, pp. 483–498, on pp. 496–497. WOLLENSCHLÄGER, Ferdinand. An EU Fundamental Right to Social Assistance in the Host Member State? The CJEU's Ambivalent Approach to the Free Movement of Economically Inactive Union Citizens Post Dano. *European Journal of Migration and Law*. 2022, Vol. 24, pp. 151–169, on p. 168.

[73] Judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real*, C-836/18, EU:C:2020:119, paras. 49 and 50.

In existing literature, the re-assessment of older case-law on equal treatment on economically non-active EU citizens under the newly emerging best interests of the child perspective is only rudimentary. However, on a side-note, several authors[74] believe that recourse to the criterion could have compelled a different conclusion than the one reached since the Court might have found that it was in the best interests of a dependent child that the mother should be entitled to the benefits she claimed. Arguably, their situation as a primary caregiver of children in a cross-border context should have triggered a reasoning on the children´s standing under free movement law.

In other words, the question for the future will be whether the primacy of the best interests of the child will become an alternative legal basis for equal treatment – and social assistance rights – for those mobile citizens, whose recourse to Article 24 CRD is excluded either by the wording of that provision itself or the Court's jurisprudence interpreting it. Necessarily, the equal treatment right so created would be very unequal in nature, since it would privilege parents of dependent children over childless persons, thus creating unequal treatment itself. However, under EU anti-discrimination law, differential treatment is lawful as long as it can be justified. The answer to the question depends on the Court and its assessment of the two values, thus proving that value jurisprudence permeates to the very core of EU free movement and equal treatment law.

CONCLUSIONS

THE ROLE OF THE BEST INTERESTS OF THE CHILD PRINCIPLE IN EU CITIZENSHIP AND FREE MOVEMENT CASE-LAW AND SOME PITFALLS TO AVOID

EU primary law, in Article 24(2) Charter, suggests that the Court ought to apply the best interests of the child principle widely. It is important to note that it should be taken into account also in contexts where no explicit reference to it is made in the underlying legislative acts or applicable case-law. Particularly in recent migration and asylum case-law, we see such a broad application.[75] In case-law on free movement of EU citizens, we do not (yet).

In the cases debated in this contribution, the CJEU links the principle of the best interests of the child to Union citizens who may not even be exercising a Treaty right. However, it does impose further conditions. The child must be at risk of a grave violation of fundamental rights. With either their citizenship right to live on the territory of the Union or their human dignity endangered, the threshold is quite high. Nonetheless, the question stands whether such danger can arise only in the two situations described (in section 3) or whether that case-law might have wider implications (section 4). Should the role of the best interests of the child, coupled with the protection of Union citizenship, continue to expand in the free movement domain?

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[74] VERSCHUEREN, Herwig. *The Right to Social Assistance for Economically Inactive Migrating Union Citizens: The Court Disregards the Principle of Proportionality and Lets the Charter Appease the Consequences,* pp. 496–497. WOLLENSCHLÄGER, Ferdinand. *The Right to Social Assistance for Economically Inactive Migrating Union Citizens: The Court Disregards the Principle of Proportionality and Lets the Charter Appease the Consequences,* p. 168.

[75] FRASCA, Eleonora; CARLIER, Jean-Yves. *The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children´s Rights?,* p. 386.

This question cannot be answered without a thorough contemplation of potential negative effects of an increasing focus on the best interests of the child. On the positive side of the account, we see a clear strengthening of citizenship rights of EU citizen children. Nonetheless, there are two scenarios in which the Court's case-law could have negative, or at least counter-productive, effects.

Firstly, it would seem unsatisfactory if one of the main consequences of the increased references to Article 24(2) Charter were to privilege a consideration of the best interests of the child to the detriment of the interests of other vulnerable persons. This is shown by the case *K.A.* in which the criteria for assessing the concept of dependency in adult-adult relationships differ from those assessed in minor-adult relationships. The identification of dependence between adults is "conceivable only in exceptional cases" when any form of separation seems impossible.[76] The wording seems to leave the door open to an extension of the *Zambrano*-status to caregivers of persons with disabilities. However, also for healthy individuals some sort of dependency might last into early adulthood.[77] Thus, the Court should not pivot on the element of minority too much.[78]

Secondly, the assessment of the primacy of the best interests of the child should not privilege the caring relationship between parent and child over other forms of relationships, which seem to be absent from the narrative that is developing. *X v. Staatssecretaris van Justitie en Veiligheid* illustrates this when the relationship between the applicant's son and his Thai grandmother, who brought him up, is not assessed or even mentioned. Arguably, the son's relationship to his grandmother was closer than to his mother, whom he saw only occasionally during videocalls. Unlike some Advocates General, who thematise non-blood caring relationships,[79] adult children caring for their elderly or infirm parents,[80] or, precisely, grandparents caring for grandchildren,[81] the Court generally does not give any indications in this regard.

Given the hitherto application in discussed case-law, the Court arguably does not intend for the primacy of the best interests of the child to become a general principle that would apply per se or present a right of its own, but rather as kind of "safeguard principle".[82] It is invoked when the CJEU cannot sufficiently ground its reasoning (and, consequently, its decision) on specific provisions of secondary law. This evolution is evident in both strings of the case-law presented.

The genuine enjoyment doctrine is applicable to cases where an entry ban or expulsion measure has an impact on the child's life. The jurisprudence is built upon both a dependence link between the child and the adult and the child's best interests. The

[76] Judgment in C-82/16, *K.A.*, para. 65.
[77] Judgment of 8 May 2013, *Alarape*, C-529/11, ECLI:EU:C:2013:290, paras. 30–31.
[78] Arguably, the pitfall of focusing on the minority requirement too much was noticed the the Court already in the context of *Chavez Vilchez*. While it speaks of "minor children" thoughout the judgment, it omits the "minor" and puts "young children" in its conclusions.
[79] Opinion of AG Bot of 27 September 2012, *O. and S.*, C-356/11 and C-357/11, ECLI:EU:C:2012:595, paras. 1–2.
[80] Opinion of AG Sharpston of 26 October 2017, *K.A.*, C-82/16, ECLI:EU:C:2017:821, para. 79.
[81] See opinions in C-459/20 *X v. Staatssecretaris van Justitie en Veiligheid*; of AG Sharpston of 12 December 2013, *O. and B.*, C-456/12 and 457/12, ECLI:EU:C:2013:842, para 31.
[82] FRASCA, Eleonora; CARLIER, Jean-Yves. *The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?*, p. 386.

combination of the two concepts can prevent the effects of a national measure which would violate the right to respect for private or family life (e.g. the execution of an order to leave). This setting seems to be different from many asylum and migration cases where the Court uses references to the best interests of the child to give substance to the child's right to family unity.[83] In the context of the genuine enjoyment doctrine, family unity seems to be secondary to the EU citizenship rights of the child.

As regards access to equal treatment for economically inactive mobile EU citizens, recourse to both the equal treatment proviso of the CRD and the general equal treatment clause in Article 18 TFEU has been blocked by the Court itself in its recent case-law. Subsequently, in an attempt of a hardship exemption, the primacy of the interests of the child coupled with other Charter rights has been invoked to secure the needs of a family fallen into destitution.

Both strings of case-law – the already well-developed genuine enjoyment doctrine as well as the newly introduced *CG* jurisprudence – represent, in a way, a culmination of the importance accorded by the Court to the Charter. In both, the Charter no longer represents a tool to interpret and complement secondary EU law, but a means to trigger the application of EU primary law, thus allowing the Court to intervene even in purely internal situations. The Court has brought into debate potentially far-reaching obligations incumbent on Member States. It would seem only right that the applicability of fundamental rights for EU citizens remain strictly limited to freedom of movement scenarios, lest the Court risks eroding the boundaries of Article 51(1) Charter.

[83] Ibid., p. 384.