

ABOUT THE (NON)MOVEMENT OF HEAVENLY BODIES – SOME REMARKS TO THE RECENT JURISPRUDENCE OF THE COURT OF JUSTICE IN THE AREA OF FREE MOVEMENT OF PERSONS AND TO THE FUTURE OF THE DIRECTIVE 2004/38

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Abstract: Treaty provisions on the free movement of persons do not directly address free movement of family members. The right to move to and reside in another Member State for family members of the moving EU citizens is anchored in the secondary law, namely in the Directive 2004/38. However, the Court of Justice, under certain circumstances, grants the right of residence for family members-third country nationals outside the scope of the Directive, even in the Member State of the EU citizen's nationality, by virtue of different Treaty provisions. That brings a lot of inconsistency, legal uncertainty and, in the end, risk of injustice. This article summarizes the different legal sources of residence right for family members-third country nationals in that internal situation as adjudicated by the Court of Justice until nowadays and assesses on that background whether the time is ripe for an amendment of the Directive 2004/38.

Keywords: Court of Justice of the EU, free movement of persons, family members-third country nationals, Directive 2004/38

1. INTRODUCTION

The parallel of the free movement of persons with the movement of heavenly bodies is certainly far-fetched, nevertheless the number of difficult questions connected with the free movement of persons within the EU does indeed in some regard resemble the complexity of the movement of the bodies in the space.

The Court of Justice of the EU without any doubt played in the last decades a crucial role in securing the effective exercise of that one cornerstone of the internal market – and without exaggerating a cornerstone of the EU as such. It might be surprising after more than 50 years of existence of this right in the Treaties that there are still questions which have to be clarified by the Court in this regard, but simply said: they are there. It could be even argued that some of the issues recently solved by the Court of Justice in the area of free movement of persons are of fundamental significance for the right anchored in the Treaties, and implemented through the Directive 2004/38¹.

However, it seems sometimes it is the Court itself making the already complex movements of bodies in the Union's planetary system even more complicated. One of the issues permanently retouring on the table of the Luxembourg judges in the area of free move-

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¹ 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, 30/04/2004, pp. 77–123.

ment of persons is the right of residence for family members-third country nationals. They shall not be surprized by this fact, since they let the third country nationals believe they will help them to secure the right of residence even on the territory of the Member State, whose nationality poses their relative-EU citizen (eventually further referred to as “sponsor”), thus in situations clearly out of the scope of the Directive 2004/38. In some cases, this hope is fulfilled, while in some others not. In some cases, the fulfilled hope is crowned by the assertion of the Court of Justice, that although they do not fall under the scope of the Directive 2004/38, granting of their right to residence “*should not, in principle, be more strict than those provided for by Directive 2004/38*” and that “*it should be applied by analogy*”². By some others with the fulfilled hope this is not the case, so that there are probably no conditions (and thus no related benefits) at all. In some cases, the right of residence seems to be granted for unlimited period, while in some others only so long as their sponsors pursue an economic activity in another Member State.

As many argued in the past³, such approach interferes with Member States’ competence to regulate their immigration policy. Of course, the Directive 2004/38 does not in an exhausting manner cover every possible situation connected with the residence of family members-third country nationals, which might appear in real life, especially not that one concerning the residence in their relative-EU citizen’s own Member State (this aspect will be discussed more deeply even though the problem is complex and includes situations where the third country nationals seek to obtain their right of residence in the host Member State on the ground of the Directive 2004/38 even if they do not fulfil its other criteria, like to be EU citizen’s dependent direct relative in the ascending line⁴). As the Court rightly reminds, “*Directive 2004/38 is intended only to govern the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he is a national*” and therefore “*Directive 2004/38 is [...] also not intended to confer a derived right of residence on third country nationals who are family members of a Union citizen residing in the Member State of which the latter is a national.*”⁵ The question is however whether such a “gap” in the Directive (and thus leaving the decisions on the right of residence in these situations in hand of Member States) is a failure of the EU legislator or on the contrary his intention. In the latter case, the above mentioned argument with interference in competences logically arises.

However worse than that, legal uncertainty seems to be the consequence of that rather chaotic approach. It does not touch the Member States’ authorities only, but the individuals as well – many of them are simply trying the EU law way, of course under certain costs, but since the Court’s approach lacks on consistency and the (non)granting of the right of residence by the Court is somewhat arbitrary (or “a lottery” as called by the Advocate General Sharpston in *Ruiz Zambrano*⁶), the desired (and believed) result is far from being sure.

² Case C-456/12 *O. & B.*, ECLI: EU:C: 2014:135, para 50.

³ See e.g. the observations of governments in the Report for the hearing in the case C-370/90 *Singt*, ECLI:EU:C:1992:296, or the Opinion of Advocate General Geelhoed in the case C-109/01 *Akrich*, ECLI:EU:C:2003:112.

⁴ See the judgement in the case C-200/02 *Zhu & Chen*, ECLI:EU:C:2004:639.; the judgement refers to the Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, pp. 26–27, which has been nevertheless replaced by the Directive 2004/38.

⁵ *O. & B.*, cited supra note 2, paras 42 and 43.

⁶ Opinion of Advocate General Sharpston in the case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2010:560, para 88.

No doubt, the Court of Justice is (sometimes) led by the good will to help people in difficult situations. The political incentive to start with such approach was most probably that throughout the 1980s and 1990s, many EU countries introduced conditions limiting the previous modes of acquiring citizenship by declaration for spouses of their own nationals⁷. As a result, the Court in some cases pronounces – apparently on rather emotional bases, respectively on the ground of (non)sympathy to one or another claimant in the proceeding before the referring court – its own findings of “facts” (like in *Ruiz Zambrano*⁸ or *McCarthy*⁹), while in some others it acknowledges that this is the domain of the national courts (so in *Dereci*¹⁰)¹¹. Shuibhne rightly observes in this regard, that “*Despite the Court’s undoubted intention in McCarty and Dereci to contain the impact of Ruiz Zambrano by reviving the purely internal rule in most situations, we will probably see an avalanche of further preliminary references each one highlighting narrow factual tweaks to test and distinguish existing case law. This scenario seems profoundly removed from the objectives of the preliminary references procedure. It also empowers the Court in an unusual and dangerous dual way: it becomes at once a lower court engaged in detailed analyses of facts (but without the knowledge that the referring court necessarily has, demonstrated acutely by the Court’s failure to note the existence of children and issues of dependency in McCarthy) and a constitutional court embedding every one of these factual decisions in a bizarrely over-detailed matrix of primary Union law.*”¹²

The author is convinced that the deepest source of all these troubles lies in the fact that the Court does not factually decide about the free movement, but every judgement “ultimately concerns family unification which is intended to be achieved circuitously via EU law because domestic law [in the United Kingdom] does not permit it.”¹³ That brings the cases close to the fundamental rights protection, in particular to the right to respect for family life protected by Art 8 of the European Convention of Human Rights (ECHR) and Art 7 of the Charter of Fundamental Rights of the EU. After all, the Court, apart from one

⁷ COSTELLO, C. Metock: Free Movement and “Normal Family Life” in the Union. *Common Market Law Review*. 2009, No. 587, p. 589; Advocate General Sharpston in her Opinion in the case *O. & S.*, ECLI:EU:C:2013:837, para 86, observes in this regard, that “*Why a Member State would wish thus to treat its own nationals less favourably than other EU citizens (who, except for their nationality, might very well be in identical or similar circumstances) is curious. So is the fact that, by denying residence, that Member State might be at risk of de facto ‘expelling’ its own nationals, forcing them either to move to another Member State where EU law will guarantee that they can reside with their family members or perhaps to leave the European Union altogether. Such a measure sits oddly with the solidarity that is presumed to underlie the relationship between a Member State and its own nationals. It is also difficult to reconcile with the principle of sincere cooperation that, in my view, applies between Member States just as it does between Member States and the Union.*” That might be correct, depending on the angle of political view, but it still does not justify the interference with the Member States’ competences. (the Court deals with the cases *O. & B.* and *S. & G.* separately, while Sharpston joined them for the purposes of her Opinion – for that reason it will be referred to *O. & S. Sharpston’s Opinion*).

⁸ Judgement in the case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124.

⁹ Judgement in the case C-434/09 *McCarthy*, ECLI:EU:C:2011:277.

¹⁰ Judgement in the case C-256/11 *Dereci*, ECLI:EU:C:2011:734.

¹¹ SHUIBHNE, N. N. (Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*. *Common Market Law Review*. 2012, Vol. 49, p. 366; to this risk of expansion of further preliminary references by such *ad hoc* approach see also see also Sharpston in *O. & S.*, *supra* note 7, para 44.

¹² *Ibid.*, p. 371; in general terms see KOMÁREK, J. In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure. *European Law Review*. 2007, No. 32, p. 484.

¹³ See Opinion of Advocate General Kokott in the case C-434/09 *McCarthy*, ECLI:EU:C:2010:718, para 21.

surprising exception in *McCarthy*¹⁴, refers to these provisions in the judgements in question. The reliance on the ECHR would be correct and the right of residence for the third country nationals could be certainly, at least in some cases, granted on that bases. The problem is however that through the magic judicial formula of the interference with the exercise of fundamental freedoms guaranteed by the TFEU¹⁵ the Court gets the cases in the scope of EU law. That changes of course a lot. If we are under the scope of the EU law, then the Charter applies by virtue of its Art 51 para 1, including the Court of Justice interpretation. Advocate General Mengozzi observes in this regard in *Dereci*: “*With particular regard to family life, the protection afforded to it by these three legal orders – national, Union and treaty law – proves to be complementary. Thus, in the case of a Union citizen who has exercised one of the freedoms laid down in the TFEU, the right to respect for family life is, at present, protected at national level and in Union law. In the case of a Union citizen who has not exercised one of those freedoms, that protection is provided at national level and in treaty law.*”¹⁶ The author fully shares this view and adds that since the internal cases (i.e. cases where the third country nationals and their sponsors-EU citizens reside in the Member State of the sponsors’ nationality) do not have, at least in their majority, as will be shown further, any relevant link to the Union law, so that the right of residence of third country nationals shall be treated on the bases of the national law only, and thus under the protection as described by Mengozzi in the latter case (national level and ECHR law). However, as Shuibhne summarizes referring to Ruiz Zambrano, “*The acceptance of impediments to prospective movement as a sufficient cross-border connection is undoubtedly hugely expansive; it has the potential to bring virtually anything within the scope of the free “movement” law. But, like it or not, it has long happened.*”¹⁷ Even though the author would extend this allegation beyond the *prospective movement* to all movements without relevant causal nexus with the right of residence of the family members-third country nationals, the last sentence is fully correct. It does not make much sense to dwell in the past but to look at the future development (nevertheless that should not prevent us from discovering the erroneous prerequisites of the Court in the following).

For that reason the article will focus on the exploration of the current state of play and assess on that background whether the time is (again) ripe for thoughts about the possible Directive 2004/38 amendments. The very recent judgements of Court of Justice in the cases C-456/12 *O. & B.*¹⁸ and C-457/12 *S. & G.*¹⁹ issued on the same day, both concerning the attempt to get the right of residence of third country nationals in their relative-EU citizen’s own Member State, offer a perfect occasion for such exercise.

¹⁴ See supra note 9.

¹⁵ Judgement in the case C-457/12 *S. & G.*, ECLI:EU:C:2014:136, para 41.

¹⁶ Opinion of Advocate General Mengozzi in the case C-256/11 *Dereci*, ECLI:EU:C:2011:626, para 40; the Court’s approach in *Dereci* is completely confusing in that regard – while the Court concludes that the situation in question does not fall under the scope of EU law, it subsequently mentions the obligation of the national judge to examine “*whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter.*” (see *Dereci*, supra note 10, para 72). It could be understood that the Court recognizes Art 7 of the Charter as a separate (further) legal basis for right of residence, critically to that argumentation see Sharpston in *O. & S.*, supra note 7, paras 56 to 58.

¹⁷ Shuibhne, op. cit supra note 11, p. 377.

¹⁸ See supra note 2.

¹⁹ See supra note 15.

The article will start with somewhat broader perspective and sum up the different sources of the right of residence of the third country nationals in the Member State whose nationality poses their sponsor as being acknowledged by (or better to say established in) the Court of Justice jurisprudence (part 2). After this, we will turn to the recent judgements in *O. & B.* and *S. & G.* and have a more detailed look on the “style” of movement needed to be able to benefit from the EU law prerogatives as far as the right of residence for the third country national in the sponsor’s own Member State is concerned (part 3). Finally we will assess on that background the future possible changes of the Directive 2004/38.

2. DIFFERENT APPROACHES OF THE COURT – TOO MUCH COMPLEXITY (AND FORTUITY) IN THE COMPLEX SPACE?

The Treaties themselves do not say anything as far as the free movement of family members of the EU citizens is concerned. As the Court observes in this regard, “*the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals.*”²⁰ The quite reserved Art 21 TFEU (“*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.*”) refers to the implementing measures.

As far as the right of residence of family members is concerned, this is laid down in the Directive 2004/38. The notion of “family member” used in the previous Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community²¹ has been extended by the Directive 2004/38 so that today not only the spouse, the direct descendants who are under the age of 21 or are dependants and the dependent direct relatives in the ascending line, but also the partner with whom the Union citizen has contracted a registered partnership are considered the family members, the latter under the condition that the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.

There are in principal three main cumulative conditions which the family members must fulfil to be able to benefit from the free movement of persons as anchored by the Directive:

- there must be a EU citizen “*who moves to or resides in a Member State other than that of which [he or she is] a national*”,
- there must be a relationship between the third country national and the moving or residing EU citizen of the appropriate quality, as describe above and
- the family member must “*accompany or join*” the EU citizen moving to or residing in a Member state other than that of his nationality.

These rules apply irrespective of the nationality of the family members so that the family members-third country nationals may benefit from the Directives’ rights similarly as the family members who are themselves EU citizens. However, as the latter are concerned,

²⁰ Judgement in the case C-40/11 *Iida*, ECLI:EU:C:2012:691, para 66.

²¹ Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19. 10. 1968, p. 2.

there are significantly less problems with the right of residence, since first they can in principle derive these rights from their own capacity as EU citizens and second there is no question on the right of residence in their own Member State since “*under a principle of international law, a State cannot refuse its own nationals the right to enter its territory and remain there*”²².

The family members-third country nationals do not possess such capacity, therefore they are fully dependent – as for the free movement to and the residence in another Member State – on their sponsor. The logic behind this concept is simple: the EU citizens could be in fact deterred from using the right to free movement if they would be hampered to use this right together with their family members (of course irrespective whether their family members are themselves EU citizen or not²³). As far as the third country nationals are concerned, the EU neither wants to (nor has the competence) to regulate their circulation among Member States. Thus the right of the family members-third country nationals to the free movement does not exist because there is a (political) will to equip them with such a right but as a necessary consequence of the free movement of EU citizens.

More generally, the only reason for the establishment of the right to free movement for the family members-third country nationals is to facilitate the movement of the EU citizens to another Member State by balancing the possible negative effects which might arise from crossing the border. In other words, the purpose is not to make the position of the moving EU citizen worse *compared to* the domestic situation (i.e. when he or she does not move to another Member State to reside there). Therefore, it is necessary to look at the issue from the perspective of the EU citizen only – if there is a danger that the situation of the EU citizen would be worsened as a consequence of his or her decision to move to and to reside in another Member State, than there is certainly a good reason to apply the Union’s rules which aim to eliminate such negative impacts. On the contrary, where there is no such danger, there is no reason to produce the right to the free movement for his or her family members-third country nationals. As far as the EU citizen resides in the Member State of his own nationality (internal situation), there is simply no free movement, which could be hampered by the fact that the family member cannot accompany or join the EU citizen and thus no need to facilitate it.

The Court of Justice applied this logic e.g. in the judgement in the case *Iida*²⁴. In this case, the EU citizen-relative (a spouse) of a family member-third country national decided to move from one Member State to another without being accompanied nor joined by her husband. The husband-third country national rested in the country of his spouse nationality and applied for a residence permit there, among others on the basis of the Directive 2004/38. The Court dismissed to grant the right of residence on that ground arguing that *the right of a third-country national who is a family member of a Union citizen who has*

²² *O. & B.*, cited supra note 2, paras 42 and 43.

²³ Sharpston in *O. & S.*, supra note 7, para 46, fittingly observes: “*Workers are human beings, not automata. They should not have to leave behind their spouse or other family members, in particular those who are dependent on them, in order to become migrant workers in another Member State. (10) If they cannot bring their family with them when they move, they might be discouraged from exercising those rights of free movement. Moreover, the family’s presence can help a worker to integrate in the host State and therefore contribute to successful free movement.*”

²⁴ See supra note 20.

*exercised his right of freedom of movement to install himself with that Union citizen pursuant to Directive 2004/38 can be relied on only in the host Member State in which that citizen resides*²⁵. In other words, there is no need to produce rights for family members-third country nationals under the Directive 2004/38, if there is no danger that the EU citizens will be discouraged from the free movement and that danger can exist only with movement to the host Member State, *a contrario* not in the Member State of origin of the EU citizen. Granting Mr Iida the right of residence on basis of the Directive 2004/38 would only give him a bonus,²⁶ even though he is a third country national, which was certainly not the purpose neither of the Treaties provisions on free movement nor of the Directive 2004/38.

Exactly for that reason the Directive 2004/38 covers only those situations, where the EU citizen *moves to or resides in a Member State other than that of which [he or she is] a national* and where his or her family member *accompanies or joins* him or her. It could be even argued that the Directive could not make it otherwise, since it is based on the primary law which refers unambiguously to the situation in another Member State only. If the primary law aims to facilitate the free movement of the EU citizen to another Member State *only* then there is no room for implementing measures, as far as the right of residence of family members is concerned, other than to connect such right with the movement of the residence of the EU citizen to another Member State.

However, the Court sees that differently and namely acknowledges the concept whereby *“the purpose and justification of those derived rights are based on the fact that a refusal to allow them 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.”*²⁷, but interprets the notion of the “movement” in such a way, that it in fact requires no genuine movement at all or connects the right of residence with a movement of the EU citizen which is in no way related to his family situation. It is true, neither the Court can deduce under the circumstance, where both the EU citizen and his or her relatives-third country nationals reside in the Member State of EU citizen’s nationality, the right of residence from the Directive 2004/38 since such an interpretation would run counter its wording. However, this does not stop the Court searching for other possibilities in the EU law with the purpose to grant the right of residence in the territory of the EU citizen’s own Member State. As the Court observes e.g. in the *O. & B.* case, *“since third country nationals in situations such as those of Mr O. and Mr B. are not entitled, on the basis of Directive 2004/38, to a derived right of residence in the Member State of which their sponsors are nationals, it must be examined whether a derived right of residence may, in some circumstances, be based on Article 21(1) TFEU.”*²⁸

Art 21 TFEU is not the only one, which the Court used until now as an appropriate legal basis for granting the right of residence of third country nationals in the Member State of the nationality of their sponsor. Until today, at least four legal sources can be found in the Court’s jurisprudence:

²⁵ *Ibid*, para 51.

²⁶ See further note 31.

²⁷ *Iida*, supra note 20, para 68.

²⁸ *O. & B.*, supra note 2, para 42.

- Art 21 TFEU (*Singh*²⁹, *Eind*³⁰ and *O. & B.*³¹ cases)
- Art 56 TFEU (*Carpenter*³² case)
- Art 20 TFEU (*Ruiz Zambrano*³³ case)
- Art 45 TFEU (*S. & G.*³⁴ case)

Singh, Eind and O. & B. cases

In *Singh*³⁵ and *Eind*³⁶ the Court decided, that where a Union citizen has resided with a family member who is a third country national in a Member State other than the Member State of which he or she is a national for a period exceeding two and a half years and one and half years respectively, and was employed there, that third country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State. The Court reasoned this conclusion as follows: “*If that third country national did not have such a right, a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification.*”³⁷ That might be correct only if the loss of the right of residence of the third country national would be the consequence of the EU citizen’s decision to leave the country of his own nationality, e.g. if the third country national could obtain unlimited right of residence if his or her relative-EU citizen would not exercise his or her right to free movement. That was apparently neither the case in *Singh*³⁸ nor in *Eind*³⁹.

In the *Singh*⁴⁰ case, after Mr and Mrs Singh, the latter having British nationality, pursued economic activity between 1983 and 1985 in Germany, they returned back to United Kingdom and subsequently, in 1986, Mr Singh was granted limited leave to remain in the United Kingdom as the husband of a British national – the loss of his right of residence in 1988 was not a consequence of his spouse’s decision to move to Germany in 1983 but of a decree nisi of divorce pronounced against him in 1987 in proceeding brought by his wife. Costello observes in this regard, that “*The rationale for the ECJ’s expansions in Surinder Singh was to avoid deterring citizens from leaving their home State in the first place. That rationale is not entirely persuasive: It suggests that a worker would be deterred from leaving her home State if her State would apply to her the same national law it would have applied had she remained.*”⁴¹

²⁹ Judgement in the case C- 370/90 *Singh*, ECLI:EU:C:1992:296.

³⁰ Judgement in the case C-291/05 *Eind*, ECLI:EU:C:2007:771.

³¹ See supra note 2.

³² Judgement in the case C-60/00 *Carpenter*, ECLI:EU:C:2002:434.

³³ See supra note 8.

³⁴ See supra note 15.

³⁵ See supra note 29.

³⁶ See supra note 30.

³⁷ See supra note 2, para 46.

³⁸ See supra note 29.

³⁹ See supra note 30.

⁴⁰ See supra note 29.

⁴¹ COSTELLO, C. op. cit. supra 6, p. 618.

In *Eind*⁴², the third country national, a daughter of Mr Eind being the Dutch national, did not live with her father in the Netherlands nor had the right of residence there before he decided to move to the United Kingdom. Under such circumstances it cannot be argued that the EU citizen was or would be discouraged to exercise his right of free movement. In this connection, the position of the European Commission, displayed in the Report for the hearing in *Singh*⁴³, is noteworthy: “*The Commission believes that if Mrs Singh had exercised her right of free movement before her marriage, there would be no logical nexus between the exercise of that right and the question of whether Mr Singh should have a Community law right to reside in the United Kingdom.*”

In the *O. & B.*⁴⁴ case, which will be explored later in more detail, the Court took over the same logic, even for significantly shorter residence period in the host Member State before returning to the Member State of the sponsor’s nationality. Simply said, the result of granting the right of residence under the EU law in all these cases is not a compensation of eventual negative impacts stemming from the exercise of the free movement, as compared to the domestic situation, where such a right has never been granted, but a *better treatment*. Former Advocate General Maduro characterized such approach fittingly as “*a ‘bonus’ right that is in no way linked to the protection of their freedom of movement to another Member State.*”⁴⁵

Notwithstanding that, as far as the content and the extent of the derived right of residence under the auspices of the Art 21 TFEU is concerned, the following can be observed. First, the Court specifies, that the conditions *for granting* the right of residence “*should not, in principle, be more strict than those provided for by Directive 2004/38.*”⁴⁶ That means that a Member State of the sponsor’s nationality is not entitled to require more than stated in the Art 7 of the Directive 2004/38 (inter alia the Member State may require that the third country national has comprehensive sickness insurance and sufficient resources not to become a burden on the social assistance system). Second, it seems that the right of residence, once obtained due to the joint residence in a host Member State, remains granted in the Member State of the sponsor’s nationality for unlimited period of time (dependent on the conditions of the Directive 2004/38 used analogically⁴⁷). Third, the content of the right of residence of the third country national is that as in the Directive 2004/38, applied *per analogiam*. Practically speaking, the third country national, to whom the right of residence has been granted by virtue of Art 21 TFEU, is entitled e.g. to social assistance in the Member State of the sponsor’s nationality under the same conditions as laid down in the Art 24 Directive 2004/38. The *Eind*⁴⁸

⁴² See supra note 30.

⁴³ See supra note 29.

⁴⁴ See supra note 2.

⁴⁵ MADURO, P. M. The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations. In Kilpatrick, Novitz and Skidmore (eds.). *The Future of Remedies in Europe*. Oxford: Hart Publishing, 2000, p. 125.

⁴⁶ *O. & B.*, supra note 2, para 50.

⁴⁷ See supra note 30, paras 39 and 40, where the Court observes: “*That right remains subject to the conditions laid down in Article 10(1)(a) of Regulation No 1612/68, which apply by analogy. [...] Thus, a person in the situation of Miss Eind may enjoy that right so long as she has not reached the age of 21 years or remains a dependant of her father.*”

⁴⁸ See supra note 30.

judgement does not mention the analogical application of the Directive at all, but the judgements in *Singh*⁴⁹ and *O. & B.*⁵⁰ do, although in somewhat confusing way. On one hand the judgments speak about the analogical application of the Directive 2004/38 as for the *conditions of granting* the right. (in *Singh*⁵¹, the term “equivalent” is used, the *O. & B.* judgement⁵² uses the notion of “not more strict”). On the other hand in *Singh*⁵³, the first clear statement as for the analogical application of the rights linked in the secondary law with the right of residence appears in the final part of the judgment (“*The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State.*”). The slight confusion in *O. & B.*⁵⁴ stems from the fact, that the analogical application of the Directive 2004/38 as whole appears apart from the final section of the judgment only once, in the same para as the statement about the analogical application of the conditions for *granting* the right of residence, that is after it⁵⁵. Nevertheless, in the final part, the judgment is clearer: it is stated there, first, that if the right of residence is granted by virtue of Art 21 TFEU, “*the provisions of that directive apply by analogy*”, and subsequently, that the conditions for granting that right shall not be stricter than those in the Directive 2004/38. Although the second sentence might then be regarded superfluous (application of the whole Directive 2004/38 includes certainly also those of its provisions regulating the conditions for granting of the right of residence), it shall be understood probably as nothing more than a solely reassurance that application by analogy does not allow the application of stricter conditions for granting the right of residence. In any case, the application of all the benefits from the Directive 2004/38 for the third country national to whom the right of residence was granted on the basis of the Art 21 TFEU could be deduced from the very concept of acquired rights apparently used by the Court (the third country national should enjoy in the Member State of his or her sponsor’s nationality the same rights as for their content and extent as he or she acquired because of the previous joint residence with the sponsor in another Member State⁵⁶).

Carpenter case

In *Carpenter*⁵⁷, a British national, Mr Carpenter, pursued an economic activity which consisted of a significant proportion of providing services to advertisers established in other Member State. Such services come certainly within the meaning of ‘services’ in the current Article 56 TFEU. However, the Court granted on the basis of this Treaty provision the right of residence to his spouse, third country national, arguing that “*It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, there-*

⁴⁹ See supra note 29.

⁵⁰ See supra note 2.

⁵¹ See supra note 29.

⁵² See supra note 2.

⁵³ See supra note 29.

⁵⁴ Ibid.

⁵⁵ Ibid, para 50.

⁵⁶ See also Sharpston in *O. & S.*, supra note 7, para 79.

⁵⁷ See supra note 32.

fore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse”.⁵⁸ The detrimental effect to his family life and thus for the exercise of his freedom to provide and receive services in other Member States rest with the fact that Mrs Carpenter was looking after his children from his first marriage, so he could exercise his freedom under the Treaty “more easily”⁵⁹. If Mr Carpenter would provide the same sort of services in the United Kingdom territory only, even e.g. from London to Belfast, his spouse could not derive her right of residence from the EU law. The words “more easily”, used in the Mrs Carpenter’s appeal, are not to be understood as more easily because of the difficulties connected to the free movement of his husband, but *more comfortably* compared to the purely domestic situation. In other words, similarly to the *Singh*⁶⁰, *Eind*⁶¹ and *O. & B.*⁶² situation, the result of granting the right of residence to the third country national represented a *better treatment* than that in the purely internal situation without a logical nexus to the free movement as such.

As far as the conditions of granting and the content of right of residence are concerned, the following can be observed. First, there are no conditions for granting the right of residence by virtue of Art 56 TFEU mentioned in the judgment at all. Most probably, they do not exist. The Court was apparently convinced that no such conditions, most importantly the sufficient resources not to become a burden on the social assistance, are needed since the family will have sufficient resources already by virtue of the economic activity pursued by the sponsor. That will be so probably in majority of cases, but not necessarily. Apart from that, Art 7 of the Directive 2004/38 requires comprehensive sickness insurance – while when granting the right of residence by virtue of Art 21 TFEU, such condition clearly applies, it is not the case when granting the right of residence by virtue of Art 56 TFEU. Second, the right of residence is indivisibly connected with the economic activity pursued by the sponsor on a regular basis in another Member State. Once such an activity ends (for whatever reason) the reason for the right of residence of the third country national falls off. Third, the right of residence granted by virtue of Art 56 TFEU does not include any other benefits that the sole right not to be deported from the territory of the Member State whose nationality the sponsor possesses, so to say metaphorically a sort of “*nuda proprietas*”. This flows first from the wording of the judgment, where “*In those circumstances, the decision to deport Mrs Carpenter constitutes an infringement which is not proportionate to the objective pursued.*”⁶³ and second from the fact that the Court did not accept the Advocate General Stix-Hackl proposal to apply the same approach as in *Singh*⁶⁴, i.e. the *per analogiam* application of the secondary law⁶⁵.

⁵⁸ Ibid, para 39.

⁵⁹ Ibid, para 17.

⁶⁰ See supra note 29.

⁶¹ See supra note 30.

⁶² See supra note 2. ⁶³ See supra note 32, para 45.

⁶⁴ See supra note 29.

⁶⁵ See Opinion of the Advocate General Stix-Hackl in the case C-370/90 *Singh*, ECLI:EU:C:1992:229, paras 69 and 70, see also Costello, op. cit. supra note 7, p. 613.

Ruiz Zambrano case

The famous *Ruiz Zambrano* case⁶⁶ has not even a shadow of any cross-border movement. In that case, the Court found that minor Union citizens who have never used any of the free movement rights nor have any connection to another Member State could nonetheless engage the protection of Union citizenship against the State of their birth (and so of their nationality thanks to *ius soli* applicable under the circumstances in question at that time in Belgium⁶⁷) to secure right of residence for their third country nationals parents. The Court granted this right on the basis of the Art 20 TFEU, thus on the Treaty provision establishing the EU citizenship. The Court held in this surprisingly short judgment that “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”⁶⁸ and subsequently it came to the conclusion that the refusal to grant a right of residence to the parents-third country nationals has such an effect. The Court also held on the same basis that the work permit must be granted to the relative-third country nationals. The Court reasons that approach as follows: “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.”⁶⁹ However, a closer look at the Art 20 TFEU shows that nothing in the *Ruiz Zambrano* circumstances impeded the children enjoying in a genuine manner the rights anchored in that Article. The elections and petition right (letters b and d) could not anyway be exercised by minors. The right to consular protection (letter c) could be exercised in the third country, as observes Sharpston⁷⁰. Even if we consider that there is a hierarchy among the rights in the Art 20 TFEU where the right to move and reside (letter a) is a privileged one representing the “substance” of that Treaty provision, they could still invoke that right and move to another Member State, similarly as *Iida* or *Alopka* could. Of course, to stay in the Belgium territory was more comfortable for their parents since they have already established there. But again then the result is not more than a bonus, not facilitating the movement to another Member State.

As far as the conditions for granting the right of residence are concerned, there are none. The only element of the other benefits linked with the right of residence granted by virtue of Art 20 TFEU, i.e. the right to working permit, is apparently linked solely to the particular circumstances of the case.

⁶⁶ See supra note 8.

⁶⁷ For more detail see EIJKEN. H. van, VRIES, S. A., de. A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*. *European Law Review*. 2011, No. 5, pp. 704–721.

⁶⁸ See supra note 8., para 42.

⁶⁹ *Ibid*, para 44.

⁷⁰ See supra note 6, para 87.

S. & G. case

Finally, in *S. & G.*⁷¹ case, which will be explored further in more detail, the Court applied the same logic as in *Carpenter*⁷² extending it to the free movement of workers (Art 45 TFEU). As for the conditions for granting and the content of the right acquired by virtue of this Treaty provision, the same considerations as in *Carpenter*⁷³ case apply.

CONCLUSIONS

It could be deduced quite logically from this short route cross the judgments dealing with the right of residence of the family members-third country nationals in the Member State of their sponsor's nationality, that this right is fully governed today by the EU law. If the sponsors would not be able to show even not related movement to another State, they could rely on the Art 20 TFEU without any cross-border connection. However, two months after *Ruiz Zambrano*⁷⁴, the Court limited granting the right of residence by virtue of Art 20 TFEU arguing that although “As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States”⁷⁵ however [...] no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU”⁷⁶. Some months later it did it in *Dereci* case⁷⁷ as well, thus limiting heavily the right of residence granted to the family members-third country nationals by virtue of Art 20 TFEU. Interestingly, the Court observed in *McCarthy*, that “the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation.”⁷⁸

We can draw from all of this the following conclusions. First, the family members-third country nationals are not excluded from the scope of the Union's law for the sole fact that they reside together with their sponsor in the Member State of the latter nationality (such situation is not a purely internal situation *per se*). Second, to be able to obtain the right of residence in their sponsor's own Member State, they must show either “some” movement to another Member State (the quality of this movement will be explored further) or, exceptionally, the deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of the EU citizenship of their sponsor.

⁷¹ See supra note 15.

⁷² See supra note 32.

⁷³ Ibid.

⁷⁴ See supra note 8.

⁷⁵ See supra note 9, para 48.

⁷⁶ Ibid, para 49.

⁷⁷ See supra note 10.

⁷⁸ Ibid, para 46, to the diverse discrimination of the purely internal situation see Judgement in the case C-127/08 *Metock*, ECLI:EU:C:2008:449, paras 77 and 79.

It follows that nowadays there are three situations as far as the right of residence of the family members-third country nationals is concerned (the second and the third one very similar) governed by three different legal standards. First, the external situation (the EU citizen and their family members-third country nationals reside in the territory of another Member State than that of the EU citizen's nationality). In the external situation, the right of residence is fully regulated by the Directive 2004/38. Second, the internal situation (the EU citizen resides with his or her family members-third country nationals in the Member State of his nationality and they are able to demonstrate one or another circumstance as mentioned above under "second"). The right of residence in this situation is governed by virtue of different Treaty provisions, where there are huge differences in the conditions for granting and the content of the right of residence depending on which Treaty provision the right has been acquired. Third, the purely internal situation (circumstances are the same as in the internal situation, but without ability to demonstrate the necessary elements as in the internal situation), where the right of residence is fully governed by the national law.

3. O. & B. AND S. & G.: SOME BUT NOT THAT MUCH MOVEMENT OF PLANETS?

In previous part we explored the different legal bases for granting the right of residence to the family members-third country nationals in the Member State of the sponsor's nationality, the conditions and the content of such right. The recent judgments in cases *O. & B.*⁷⁹ and *S. & G.*⁸⁰, which cover apart from the *Ruiz Zambrano* case⁸¹ all other situations of acquiring right of residence in the sponsor's own Member State, offer an excellent opportunity to look in more detail at the very conditions whose fulfillment is necessary to be able to base the right of residence on the said Treaty provisions. The *O. & B.*⁸² and *S. & G.*⁸³ judgments represent in fact four cases – preliminary references from the Dutch Raad van State, which from the legal point of view include two sets of situations. For that reason they will be dealt separately in the following.

O. & B. case

The *O. & B.*⁸⁴ case stands for the "return situation" like in *Singh*⁸⁵ and *Eind*⁸⁶, as mentioned above. The central question in the discussion in the preliminary reference procedure as for the conditions necessary for the establishment of the right of residence on that basis was the length of the previous joint residence in another Member State. Contrary to the situations in *Singh*⁸⁷ and *Eind*⁸⁸, where the residence of the EU citizen and his or her

⁷⁹ See supra note 2.

⁸⁰ See supra note 15.

⁸¹ See supra note 8.

⁸² See supra note 2.

⁸³ See supra note 15.

⁸⁴ See supra note 2.

⁸⁵ See supra note 29.

⁸⁶ See supra note 30.

⁸⁷ See supra note 29.

⁸⁸ See supra note 30.

family member-third country national exceeded the period of two and a half years and one and half years respectively, the period in *O. & B.*⁸⁹ case was significantly shorter. In *O.*⁹⁰ case, the couple resided together in another Member State than that of the O sponsor's nationality for the period of two months (the sponsor, a spouse of the Nigerian national, returned after that two months period from Spain back to the Netherlands because she could not find work in the previous State). In *B.*⁹¹ case, they never really resided together in another Member State, but the sponsor, a Dutch spouse of a Moroccan national, visited regularly (each weekend) the relative third country national in the territory of another Member State (in Belgium). The question was whether under such circumstances the joint residence in another Member State is enough for granting the right of residence in the sponsor's own Member State. Advocate General argues that "*The length of an EU citizen's stay in another Member State is (obviously) a relevant quantitative criterion. However, I consider that it cannot be applied as an absolute threshold for deciding who has, or has not, exercised rights of residence and can therefore be joined or accompanied by their family members.*"⁹² That rejection of the length of residence in the host Member State as the decisive factor flows from the following consideration: "*I am not persuaded by the argument that an EU citizen (whether he is, or is not, a migrant worker or a self-employed person) must have resided in another Member State for a continuous period of at least three months or some other 'substantial' period of time before his third country national family members can derive rights of residence from EU law in the home Member State [...]. That argument presupposes that enforced separation from a family member, such as a spouse, will not deter an EU citizen who wishes to move to settle temporarily in another Member State from exercising his rights of free movement and residence. I see no basis for saying that, in such circumstances, the EU citizen should be required temporarily to sacrifice his right to a family life (or, put slightly differently, that he should be prepared to pay that price in order subsequently to be able to rely on EU law as against his own Member State of nationality).*"⁹³ There must be either a misunderstanding or the argument is completely wrong. The only reason on which the Court founded his statement on the impediment effect for the free movement of the EU citizen in the return situation was that the residence in the host Member State "*goes hand in hand with creating and strengthening family life in that Member State.*"⁹⁴ It is hard to imagine how the EU citizen could *create and strengthen* his or her family live in a host Member State without having his or her family there. In other words, the EU citizen residing in the Member State other than that of his or her nationality is not enforced to separation from his or her family, but right on the contrary – if they afterwards want to establish on the basis of the EU law the right of residence of the third country national in his or her sponsor's own Member State, they necessarily need to reside *together* in the host Member State. If the logic of the Advocate General would be right, it would e.g. mean *ad absurdum* that a spouse-third country national could derive her right of resi-

⁸⁹ See supra note 2.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² See supra note 6, para 111.

⁹³ Ibid, para 110.

⁹⁴ See supra note 2., para 53.

dence in her sponsor own Member State on the basis of Art 21 TFEU arguing that her husband studied ten years ago (thus long time before they ever met) as an Erasmus student in another Member State.

For the Court, the length of the residence in another Member State is apparently decisive. In the author's view that is correct – it would be hardly imaginable to assess the residence in a host Member State on the basis on whatever qualitative criteria (e.g. if the third country national and his or her sponsor sufficiently deepened and strengthened their emotional relations during their residence in another Member State). The quantitative factor in the sense of length of time is the only rational one. At that, the Court, maybe quite surprisingly, does not define it in vague terms but referring analogically to the Directive 2004/38 it specifies that “*Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State [...]*”⁹⁵ In practical terms, it means that the minimum length of residence in the host Member State for the purpose of granting the right of residence to the third country nationals in the Member State of the sponsor's nationality are three months. Of course, we can ask why not two months or half a year. Searching any sophisticated answer would be a failure. In absence of any legislative regulation the Court simply took a figure from the closest legislative act which seemed to be most appropriate. Although the three months period in the Art 7 of the Directive 2004/38 was naturally chosen for different purpose, it does not necessarily mean that the Court's approach is wrong. The author would argue it is always better than a solution where the minimum residence length in the host Member State would be defined as a period assessed by a national judge as genuine residence taking into account all relevant circumstances of the individual case. That would again enhance the already existing legal uncertainty and a risk of injustice. It could be certainly argued that the reference to the Art 7 of the Directive 2004/38 can serves as a clear guidance how to circumvent difficulties eventually existing in the national law – it seems to be sufficient to “survive” three months abroad to gain right of residence for the family member-third country national plus the interconnected benefits from the Directive 2004/38 (and so principally from the other related EU law provisions). In practice, that could be the case indeed. The Court's assertion, that “*the scope of Union law cannot be extended to cover abuses*”⁹⁶ does not change anything on that since first there will be always huge difficulties as to burden of proof on the side of the authorities and second after the constant jurisprudence of the Court, the intentions are not regarded as abuse of rights: “*Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the Singh judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.*”⁹⁷ But still, although the three months are certainly not that much, it is still at least a clear condition which shall be of assistance to restore at least partially the legal uncertainty existing in this area.

⁹⁵ See supra note 2., para 53.

⁹⁶ Ibid, para 58.

⁹⁷ See Judgement in the case C-109/01 *Akrich*, ECLI:EU:C:2003:491, para 56; see also Sharpston in *O. & S.*, supra note 7, para 42.

S. & G.

The situation in *S. & G.*⁹⁸ is significantly different. As described above, it is in principle the *Carpenter*⁹⁹ case, thus a situation of “static” third country nationals residing with their sponsor in the Members State of sponsors’s nationality, who nevertheless pursues an economic activity in another Member State. In *S.*¹⁰⁰ case, the sponsor, a Dutch national, has worked for an employer established in the Netherlands and spends 30 % of his weekly working time on preparing and making business trips to Belgium. He has resided in the Netherlands with his mother-in-law having Ukrainian nationality. She has taken care of her grandson, the son of the sponsor. In *G.*¹⁰¹ case, the sponsor, again a Dutch national, has worked for an undertaking established in Belgium. He has traveled daily between the Netherlands and Belgium for his work. He has resided together with his Peruvian spouse in the Netherlands. She has a daughter with her sponsor and besides that they live together with her son who was received into her and sponsor family.

First, both the Advocate General and the Court came to the conclusion that under such circumstances the sponsors are workers by virtue of Art 45 TFEU, irrespective the Member State where their employers are seated. On that background the Court simply overtakes without others the logic from *Carpenter*: *“Admittedly, the Court’s interpretation of Article 56 TFEU in Carpenter is transposable to Article 45 TFEU. The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third country national who is a family member of the worker – a Union citizen – in the Member State of which the latter is a national.”*¹⁰² [...] *“However, the purpose and justification of such a derived right of residence is based on the fact that a refusal to allow it would be such as to interfere with the exercise of fundamental freedoms guaranteed by the FEU Treaty”*¹⁰³ The assessment whether the cases in question have such capacity to interfere with the exercise of fundamental freedoms is left by the Court fully on the national judge. It is not helpful that much. The only practical guidance seems to be the statement at the end of para 43: *“However, it must be noted that, although in the judgment in Carpenter the fact that the child in question was being taken care of by the third country national who is a family member of a Union citizen was considered to be decisive, that child was, in that case, taken care of by the Union citizen’s spouse. The mere fact that it might appear desirable that the child be cared for by the third country national who is the direct relative in the ascending line of the Union citizen’s spouse is not therefore sufficient in itself to constitute such a dissuasive effect.”*¹⁰⁴ In other words, mother-in-law’s care of children is not the same as the spouse’s care of children. Sociologically and probably psychologically, it is certainly true. Anyway, there are hundreds of jokes commenting the relations between sons-in-law and mothers-in-law. The Court’s reasoning was certainly not meant as a joke – however it reveals the illogic behind the whole argumentation. If the interference with the exercise

⁹⁸ See supra note 15.

⁹⁹ See supra note 32.

¹⁰⁰ See supra note 15.

¹⁰¹ Ibid.

¹⁰² See supra note 15, para 40.

¹⁰³ Ibid, para 41.

¹⁰⁴ Ibid, para 43.

of fundamental freedoms relies on the fact, that the EU citizen has children which need care, and without such care the EU citizen would not be able to pursue an economic activity in another Member State (and so he would be deprived of the exercise of his right to free movement), who cares whether the necessary care is being provided by the spouse, mother-in-law or by someone else, e.g. by a paid babysitter?

Second, the quality and quantity of the sponsor's movement in another Member State should not be taken out of account. In *Carpenter*¹⁰⁵, the Court anticipates that the *significant proportion* of sponsor's business consists of providing services in other Member States. In *S.* case¹⁰⁶, it is sufficient that the worker spends 30 % of his weekly working time on preparing and making business trips to another Member State. Would the same logic apply if he would spent only 10 % of his weekly working time on preparing and making trips to another Member State? Or if he would go abroad for a business trip regularly once a month? Or if the business trips, due to the character of the work, are irregular (e.g. the worker spends one month per year working in another Member State)? Neither the judgment nor the Advocate General opinion provide any answers on these questions.

As it is apparent from the previous, there are number of questions still waiting for unambiguous answers. It will be therefore explored now whether the eventual amendments to the Directive 2004/38 could provide at least some of them.

4. DIRECTIVE 2004/38/EC LOST IN THE MILKY WAY?

After *Metock*¹⁰⁷, some Member States called for amendments of the Directive 2004/38¹⁰⁸. The issue was brought on the agenda of the 2890th meeting of the Council of the European Union (Justice and Home Affairs), held in Brussels on 25 September 2008.¹⁰⁹

In the minutes from that Council meeting, there is however nothing about the possible Directive 2004/38 amendments: *“The Council discussed the action to be taken following the judgment of the Court of Justice in the Metock case and on the question of the residence of third-country nationals married to EU citizens in the context of tackling illegal immigration. The Council welcomed the Commission's intention to present, by the end of 2008, a report evaluating the transposition of the Directive on the right of EU citizens and their family members to move and reside freely within the territory of the Member States. The Council noted that the Commission would be prepared, on the basis of that evaluation, to present all appropriate guidelines or proposals which might prove necessary, inter alia in order to combat any misuse, offences or abuse. The Council awaits the outcome of that evaluation with interest and will examine the issue immediately thereafter.”*¹¹⁰

At the almost same time, some academics proposed the same, although for obviously completely opposite reasons than Member States. As Costello argued: *“It remains to be*

¹⁰⁵ See supra note 32.

¹⁰⁶ See supra note 32.

¹⁰⁷ See supra note 78.

¹⁰⁸ See e.g. <http://www.europeanfoundation.org/n-spice-of-denmark-and-ireland-requests-the-european-commission-has-no-intention-to-revise-the-free-movement-directive/>.

¹⁰⁹ See e.g. https://www.nyidanmark.dk/en-us/news/news/integrationsministeriet/2008/september/political_agreement_handling_of_the_eu_legislation_on_free_movement.htm.

¹¹⁰ Doc. 13483/08, PV CONS 57, JAI 480; Accessible via <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2013483%202008%20INIT>.

seen how the Commission will respond. The best response would be to pick up the promise from the family Reunification Directive and urgently seek to establish analogous for entry TCN [third country nationals - author's remark] family members of static EU citizens. Although Metock is an easy transborder case, denying the EC dimension to the family reunification claims of static EU citizens against their Member States is becoming increasingly untenable."¹¹¹

The Commission, not surprisingly, did nothing (the then commissioner Jacques Barrot allegedly stated in this regard that “we will say ‘no’ to any change.”¹¹²). If the Commission would take any action, it would certainly run in the direction of making the rights of residence of third country nationals more comfortable – such approach would immediately crash into opposition of many Member State. However, after *O. & B.*¹¹³ and *S. & G.*¹¹⁴, the question arises again, probably with more urgency. As shown in the previous, there are today two different standards for granting the right of residence to family members-third country nationals in the Member State of the sponsor’s nationality, which causes unequal treatment and legal uncertainty. Apart from that, since the Directive 2004/38 is applicable only when both the EU citizen and his or her relative-third country national intent to move to another Member State, the right of residence in the internal situation (so be it not pure internal to use the wording of the Court of Justice) do not have clear conditions nor content and extent respectively. Depending on the applicable Treaty provisions, the right of residence as adjudicated by the Court has very different contours for the “return situation” on one hand and for the “situation of static citizens” on the other. Whereas in the previous the Directive 2004/38 applies *per analogiam*, there are no detailed rules for the right of residence granted by virtue of Art 45 and 56 at all.

For all these reason, the author, although he disagrees with the whole approach of granting the right of residence to family members-third country nationals in the sponsor’s nationality Member State, considers an amendment of the Directive 2004/38 inevitable, otherwise it will get lost one day somewhere in the milky way of Union’s space being overruled by the Court of Justice jurisprudence. The amendment shall principally consist of unambiguous inclusion of both the “return situation” and “static citizen situation” and the regulation of the conditions for granting the rights of residence on that basis. Another question is however whether to extend such approach to “purely internal situations” so that the discrimination of those without any cross-border element would be removed. The author would argue against. Of course, such elimination of the discrepancy would make the life more comfortable for family members-third country nationals and their sponsors, which is indisputably a praiseworthy aim. But because of *Metock*¹¹⁵, it would completely set aside the Member State immigration policy, even though it could be argued that it would still be limited to family members. Nevertheless, as argued above, there is no such need for the proper functioning of the internal market freedoms.

¹¹¹ COSTELLO, C. op. cit. note 7, p. 622.

¹¹² See <http://www.europeanfoundation.org/n-spite-of-denmark-and-ireland-requests-the-european-commission-has-no-intention-to-revise-the-free-movement-directive/>.

¹¹³ See supra note 2.

¹¹⁴ See supra note 15.

¹¹⁵ See supra note 74.

Instead of prolog, the author will draw attention to one pending case, which could make the issue even one level more complex. The case is *McCarthy*¹¹⁶ again, although another than Mrs Shirley McCarthy in the C-434/09 case¹¹⁷ (the identical surnames is apparently a coincidence not providing any proof that McCarthyies would be leading families in Court of Justice jurisprudence in the area of free movement). The opinion of Advocate General Szpunar¹¹⁸ shows that soon there could be even more strike in the Directive 2004/18 “removing” one of its central element, that is the reference to the *nationality principle*.

¹¹⁶ Pending case C-202/13 *McCarthy*.

¹¹⁷ See *supra* note 9.

¹¹⁸ See Opinion of Advocate General Szpunar in the case C-202/13 *McCarthy*, ECLI:EU:C:2014:345.