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## ***Freedom of Movement and Residence of Persons within the EU*** **Dr Sonia Morano-Foadi**

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#### **EU CITIZENS**

##### **Primary legislation:**

Article 45 TFEU – Free movement of workers

Articles 20 & 21 TFEU – EU Citizenship

EU Charter of Fundamental Rights (Arts 39 – 46), Art 45 Charter refers to free movement

Art 21 Charter non-discrimination

##### **Secondary legislation:**

Directive 2004/38 (Citizenship Rights Directive - CRD): formalities of entry and residence

Regulation 492/11 and Directive 2004/38:

- A) Equal access to and conditions to employment
- B) Equal treatment in matters of employment, remuneration and conditions of work for EU workers and members of their families

Commission Regulation 635/2006/EC repealing Council Regulation 1251/70/EEC : right to remain in the host Member State after being employed there with the status of permanent residence

#### **THIRD COUNTRY NATIONALS**

##### **Primary legislation:**

Article 67-80 TFEU

See in particular: Article 78 TFEU and Article 79 TFEU

**Secondary legislation:**

Long-Term Residence Directive 2003/109/EC

EU Blue Card Directive 2009/50/EC

Students and Researcher Directive 2016/801

Intra-Corporate Transfer Directive 2014/66/EU

Single Permit Directive 2011/98/EU

Qualification Directive 2004/83/EC and (Recast) Qualification Directive 2011/95/EC.

Family Reunification Directive 2003/86/EC.

Return Directive 2008/115/EC.

**Selected case law on freedom of movement and residence**

Case 34/09, Zambrano, 8 March 2011 (reference to Chen and Zhu case) (leading case)

Case C-434/09, Shirley McCarthy v Secretary of State for the Home Department, 5 May 2011 (covered)

Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké, Dragica Stevic v Bundesministerium für Inneres, 15 November 2011 (covered)

Opinion of Advocate General, Case C-254/11, Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi, 6 December 2012 (covered)

Case C-145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, 23 November 2010 (mentioned)

Case 162/09, Secretary of State for Work and Pensions v Child Poverty Action Group, 7 October 2010 (just mentioned)

Case-86/12, Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration, 10 October 2013 (covered)

Case C-165/14 Alfredo Rendón Marín ase C-165/14 v Administración del Estado, 13 September 2016 (covered).

## **EU CITIZENS**

### **1. WHO CAN BENEFIT FROM THE FREEDOM OF MOVEMENT AND RESIDENCE?**

#### **Free movement of workers - Article 45 TFEU –**

##### **Article 45 TFEU**

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - (a) to accept offers of employment actually made;
  - (b) to move freely within the territory of Member States for this purpose;
  - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Who is a worker? The concept of “worker” is a Union Law concept (Levin Case 53/61).

The CJEU has been generously construed by the Court of Justice (see CJEU case-law)

#### **EU Citizens - Articles 20 & 21 TFEU -**

##### **Article 20 TFEU**

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

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

## Article 21 TFEU

1. 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.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

## EU Charter of Fundamental Rights (Free movement rights)

### Article 45 Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

## Who is covered by Directive 2004/38/EC?

- Citizens of an EU or EEA member state who visit, live, study or work in a different member state
- The EU citizen's direct family members, including their non-EU spouse/partner and the spouse/partner's direct family members (such as children)
- Other family members who are "beneficiaries", including common law partners, same sex partners, and dependent family members, members of the household, and sick family members

## Family Members

Direct family members Article 2(2) Directive 2004/38/EC:

"Family member"	<i>Examples, notes and interpretation</i>
(a) the spouse;	<i>A partner in a legal same-sex marriage should also be considered a "spouse". See discussion on same-sex marriage.</i>
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [EU/EEA] Member	<i>This applies when the member state treats registered partnership "as equivalent to marriage". Where that is not true, the partner is not considered a "family member" in this definition, but still has a right of entry</i>

State, if 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;	as a beneficiary (see beneficiary below). This only covers registered partnerships done by an EU member state.
(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);	Children (or grandchildren!) under 21 or those who are older than 21 but still dependent (e.g. students supported by their parents). The child can be of the EU citizen or of the non-EU citizen. This would include a child from a previous relationship or from before the EU-citizen obtained their citizenship.
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);	Dependent parents and dependent grandparents of either the EU citizen or of the non-EU spouse or partner. Dependent usually means financially dependent, though there may be other legally reasonable interpretations. For non-dependent parents, see beneficiary below.

These are the people who have the easy-evidence route through the Directive. They can usually prove their relationship with a simple document, like a birth certificate or a marriage certificate, that legally documents the family link. These “family members” (as the Directive states) “enjoy an automatic right of entry and residence in the host Member State” when they are with their EU citizen relative.

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into this explicit definition of “family member”, but who are none the less “part of the family”.

Other family members who are “beneficiaries”, including common law partners, same sex partners (if not in a registered partnership), and dependent family members, members of the household, and sick family members.

### **Other beneficiaries**

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into the explicit definition of “family member”, but who are none the less “part of the family”.

For these beneficiaries, Directive 2004/38/EC says in the preamble:

*In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.*

Later, in the text of the Directive, it becomes a little more explicit about who these other beneficiaries are:

### *Article 3 Beneficiaries*

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:  
 (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;  
 (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Who can be a beneficiary of Directive 2004/38/EC is worth breaking up and looking at in more detail, category by category:

<b>“Other beneficiaries”</b>	<b>Notes and interpretation</b>
2 (a) any other family members [...] who, in the country from which they have come, are [either] dependants or members of the household of the Union citizen	This covers two separate groups, either: 1. other family members who are dependent on the EU citizen, or 2. other family members who live (or have lived recently) in the same household (even if they are not dependent).  Another key phrase is “in the country <u>from which they have come</u> “. The phrase is quite open and covers a number of situations. For a Japanese person, it can include their original home country (e.g. Japan), a country they have recently lived in (e.g. USA) or where they currently live (e.g. France).
[2 (a) continued] or where serious health grounds strictly require the personal care of the family member by the Union citizen;	e.g. a non-EU parent who has been quite independent but who now needs intensive assistance because of a medical condition such as a stroke or Alzheimer’s
2 (b) the partner with whom the Union citizen has a durable relationship, duly attested	This category covers all other long term “durable” partnerships, including both opposite-sex and same-sex relationships. There is no official definition of how long the relationship must have existed. Some countries expect to see two years of living together, but if you have a child with somebody and live with them it would clearly be incompatible with the Directive to require two years of relationship history. When a member-state does not recognize civil partnerships as equivalent to marriage, this is the category which is used for entry.

Family members (as outlined above) are also covered in situation where the EU citizen has worked in another member state and now wishes to return to his/her “home” country to work (Case C-370/90 *Surinder Singh*).

See Case C-83/11 - Rahman and Others – State’s obligation to facilitate, in accordance with national legislation, entry and residence for ‘any other family members’ who are dependants of a Union citizen

### **Who is NOT covered by Directive 2004/38/EC?**

- If a citizen is living in their home EU member state and has not worked in other EU member state, then this Directive does not apply. All movement of non-EU family members into the home state is governed by national law.
- Some old-EU member states have special “transitional” arrangements that curb the ability of citizens of new EU states (Bulgaria and Romania) to move freely for work. The curbs were maintained until 2017. Citizens of new EU member states can however travel without visas throughout Europe, and their non-EU family members can travel freely with them.
- Citizens of non-EEA countries who are not travelling with or joining family members who are EU/EEA citizen.

## **2. NON-DISCRIMINATION ON GROUNDS OF NATIONALITY**

- A. Free movement of workers: Article 45 and Directive 2004/38 and Regulation 492/11 gives a general right of non-discrimination on grounds of nationality in matters relating to employment, remuneration and other conditions of work and employment.

**Art 45 (2) TFEU** - Such freedom of movement shall entail the abolition of *any discrimination based on nationality* between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

**Recital 20, Preamble to Directive 2004/38** “In accordance with the *prohibition of discrimination on grounds of nationality*, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law”.

### **Regulation 492/11, Section 2 Employment and equality of treatment**

#### **Article 7**

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers.
3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

#### **Article 8**

A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by

public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.

The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

#### **Article 9**

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

B. Access to social citizenship entitlements under the free movement provisions is based on the principle of non-discrimination and citizenship of the Union (art 18 TFEU) which supplements art 45 TFEU and its associated secondary legislation.

#### **Article 18 (1) TFEU**

1. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

#### **Article 21 Charter (Equality Title III) - Non-discrimination -**

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

### **3. POSSIBLE RESTRICTIONS**

**Art 45 (3) TFEU.** It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health [...]

#### **Article 27(1) Directive 2004/38).**

[...] Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Restrictions on the right of entry and the right of residence: Union citizens or members of their family may be expelled from the host Member State on grounds of *public policy, public security or public health*. Under no circumstances may an expulsion decision be taken on economic grounds. Measures affecting freedom of movement and residence must comply with the proportionality principle and be based exclusively on the personal conduct of the individual concerned. Such conduct must represent a sufficiently serious and present threat affecting the fundamental interests of the state. Previous criminal convictions do not automatically justify expulsion. The mere fact that the entry documents used by the individual concerned have expired does not constitute grounds for such a measure. Only in exceptional circumstances, for overriding considerations of public security, can expulsion orders be served on a Union

citizen if he/she has resided in the host country for ten years or if he/she is a minor. Lifelong exclusion orders may not be issued under any circumstances and persons concerned by exclusion orders may apply for a review after three years. They also have access to judicial review and, where relevant, administrative review in the host Member State.

#### **Article 28 Directive 2004/38 - Protection against expulsion**

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Finally, the directive enables Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred in the event of abuse of rights or fraud, such as marriages of convenience (**Article 35 Directive 2004/38**).

Moreover, the CJEU in the Case C-430/10 *Hristo Gaydarov v Director na Glavna direktsia 'Ohranitelna politzia' pri Ministerstvo na vatreshnite raboti* has stated that "Article 21 TFEU and Article 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States do not preclude national legislation that permits the restriction of the right of a national of a Member State to travel to another Member State in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law".

In the Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, the CJEU has stated that Article 28(3) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years. Article 28(2) of Directive 2004/38 must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security'.

## **4. CASE-LAW on EU CITIZENSHIP PROVISIONS AND THE CHARTER**

**Is still intra-mobility the trigger for citizenship rights?**

**Case C-34/09 Zambrano [2011] ECR**

- Case involved a family (Mr Zambrano, his wife and child) who arrived in Belgium on a visa and immediately applied for asylum, on the basis that they had faced persecution in Colombia. Application denied but appeal lasting 12 years. In the meantime, Mr Zambrano found stable employment and had two more children.
- Two children by virtue of Belgian law became Belgian citizens, corollary of EU citizenship.
- The Employment Tribunal in Brussels decided to refer three questions to the CJEU. Firstly, it asked whether Articles 18, 20 and 21 TFEU taken together or separately could 'confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?' Secondly, it asked whether these three articles of the TFEU, when put together with Articles 21, 24 and 34 of the EU Charter of Fundamental Rights meant that these rights must be protected on behalf of an infant-citizen, even where the infant citizen has not exercised free movement rights and is dependent for their enjoyment upon a third country national (TCN) parent.  
Finally it asked the CJEU whether, given this constellation of rights in EU law and the circumstances of a non-migratory infant-citizen, where the TCN parent 'fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State', national law must grant the TCN parent an exemption from the requirement to hold a work permit.
- The Grand Chamber simplified the three questions into one: 'whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.'
- Could Mr Zambrano rely on the citizenship rights of his children to enjoy a derived right of residence, as had been the case in Chen? The difference here was that the children had remained in the member state of which they were nationals: would the absence of a cross-border element make this a 'wholly internal' situation?
- CJ: Test of 'genuine enjoyment of the substance' of citizenship rights in favour of Mr Zambrano: "Article 20 TFEU precludes a MS from refusing a TCN upon whom his minor children, who are EU citizens, are dependent, a right of residence and from refusing to grant a work permit to him, in so far as such decisions deprive those children of the genuine enjoyment of the substance of EU citizen rights".
- No application Citizenship Directive - Zambrano family not 'beneficiaries' Article 3(1) - they were not 'Union citizens who move to or reside in a Member State other than that of which they are a national.

### **Case C-434/09 McCarthy [2011] ECR**

- Case involved a British/Irish national (Mrs McCarthy) who was born in the UK and always lived there. Following her marriage to a TCN applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the United Kingdom on rights associated with European citizenship.

Consequently, her husband applied for a residence document as the spouse of a Union citizen.

- Both applications refused: she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Charter was briefly mentioned in McCarthy:

Para 27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C-162/09 Lassal [2010] ECR I-0000, paragraph 29).

- Test of 'genuine enjoyment of the substance' of citizenship rights (Zambrano test) to the fact = art 21 do not apply in this case. Mrs McCarthy was not deprived of the genuine enjoyment of Union citizen rights, or exercise of her right to move and reside freely within the territory of the Member States (para 49).

### **Case C-256/11 Dereci [2011] ECR**

- 5 joint applications: TCNs married to Austrian citizens: residence permits rejected by the Austrian Authority.
- 4 of them subject to expulsion orders and individual removal orders. Austrian Authority refused to apply Directive 2004/38 family members of EU citizens: Union citizens concerned not exercised right of free movement.
- Re-assertion of the 'genuine enjoyment' test (Zambrano test) and its limitations: the Union citizen must be forced to leave not only home MS but also Union as a whole. (para 66). Decision left to the national court.

In Dereci, the Charter was mentioned when the Court looked at the issue of 'The right to respect for private and family life'.

Para 70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C-400/10 PPU McB. [2010] ECR I-0000, paragraph 53).

Para 71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB., paragraph 51, see also Joined Cases C-483/09 and C-1/10 Gueye and Salmerón Sánchez [2011] ECR I-0000, paragraph 69).

Para 72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

### **Case C-40/11 Yoshikazu Iida v Stadt Ulm (case decided on 8 November 2012)**

- Case involved a Japanese national (Mr Iida), married in 1998 to a German national and separated but not divorced since 2008. Since 2005, Mr Iida lives and works (with a permanent job) in Germany. The wife moved to Vienna (Austria) with her daughter. The spouses jointly exercise parental responsibility for their daughter. Their daughter was born in 2004 in the US, and she has German, Japanese and American nationality.
- German authorities refused to grant residence card as a family member of an EU citizen on the basis of Directive 2004/381 on European citizenship. Mr Iida obtained a right of residence in Germany in connection with family reunion, extending his residence permit was a matter of discretion.
- CJ: application of the 'genuine enjoyment' test (Zambrano test): the refusal to grant him a right of residence derived from their status of EU citizen is not liable to deny his daughter or his spouse genuine enjoyment of the substance of rights.
- Mr Iida cannot base a right of residence directly on the TFEU by referring to the EU citizenship of his daughter or his spouse. He has always lived in Germany in accordance with national law and can be granted a right of residence in Germany on another legal basis.
- Finally, he cannot rely on the Charter of Fundamental Rights of the European Union, which lays down a right to respect for private life and certain rights of the child. Since Mr Iida does not satisfy the conditions of Directive 2004/38 and has not applied for a right of residence as a long-term resident within the meaning of Directive 2003/109, his situation shows no connection with EU law, so that the Charter of Fundamental Rights of the European Union does not apply.

The Charter was referred to extensively in Case C-40/11 Yoshikazu Iida:

Para 32 In that context, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On Articles 2, 3 and 7 of [Directive 2004/38]:

(a) Does "family member" include, in particular in the light of Articles 7 and 24 of the [Charter of Fundamental Rights ("the Charter")] and Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, "the ECHR"]], on an extended interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national, has parental responsibility for a child who is a Union citizen entitled to freedom of movement, and is not maintained by that child?

(b) If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, on an extended interpretation of Article 3(1) of the directive, even where there is no "accompanying" or "joining" with respect to the Member State of origin of the child who is a Union citizen and has moved away?

(c) If so, does it follow that that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, has a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on an extended interpretation of Article 7(2) of Directive 2004/38, at least as long as parental responsibility subsists and is actually exercised?

2. On Article 6(1) TEU in conjunction with the Charter:

(a) (i) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply where the subject-matter of the dispute depends on a national law (or part of a law) which *inter alia* – but not only – transposed directives?

(ii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply because the claimant is possibly entitled to a right of residence under Union law and could accordingly, under the first sentence of Paragraph 5(2) of the FreizügG/EU, claim a residence card for a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of [Directive 2004/38]?

(iii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the case-law deriving from Case C-260/89 ERT [1991] ECR I-2925, paragraphs 41 to 45, where a Member State restricts the right of residence of the father who is a third-country national with parental responsibility for a Union citizen who is a minor and resides predominantly with her mother in another Member State of the Union because of the mother's employment?

(b) (i) If the Charter is applicable, can a right of residence under European Union law for the father who is a third-country national be derived directly from Article 24(3) of the Charter, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, even if the child resides predominantly in another Member State of the Union?

(ii) If not, does it follow from the freedom of movement of the child who is a Union citizen under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, that the father who is a third-country national has a right of residence under European Union law, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of all practical effect?

3. On Article 6(3) TEU in conjunction with the general principles of European Union law:

(a) Can the "unwritten" fundamental rights of the European Union developed in the Court's case-law from Case 29/69 Stauder [1969] ECR 419, paragraph 7, up to, for example, Case C-144/04 Mangold [2005] ECR I-9981, paragraph 75, be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?

**Para 78** As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the

Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see *Dereci and Others*, paragraph 71).

**Para 79** To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraphs 21 to 23).

**Para 80** While Paragraph 5 of the *FreizügG/EU*, which provides for the issue of a 'residence card of a family member of a Union citizen', is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

**Para 81** In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.

**Para 82** In the light of the foregoing, the answer to the referring court's question is that, outside the situations governed by Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen.

### **Case C-86/12 *Adzo Domenyo Alopka***

- The case involves a Togolese national (Mrs Alopka) who was rejected asylum seeker application in Luxembourg but discretionary leave to remain was granted until 31 December 2008, as she had given birth to twins requiring care. Her French children acquired Union citizenship. Then, residence permit was rejected and she appealed, questions referred to the CJEU.
- Questions referred by the Administrative Court to the CJEU: 'Is Article 20 TFEU – if necessary, read in conjunction with Charter 'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

In Case C-86/12 *Adzo Domenyo Alokpa*, the Charter was only mentioned by the referring national court:

Para 19 In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?’

Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?’

- CJEU: Articles 20 TFEU and 21 TFEU do not preclude a MS from refusing to allow a TCN with sole responsibility of two EU minor children to reside in its territory... in so far as those Union citizens do not satisfy the conditions set out in CR Directive or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights ... to be determined by the referring court.
- Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.
- In that regard, as the Advocate-General stated in his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France. (points 55 and 56)
- It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case.
- Nearly 10 years ago, the CJEU in the case of *Chen* C-200/02 ruled that self-sufficient Union national children have the right to be accompanied by their TCN parents, but *Alokpa* case relates to the interpretation of Article 20 TFEU.
- It was not undertaken in the light of fundamental rights, as it was primarily concerned with the satisfaction of the conditions laid down by CR Directive.

- Thus, the lack of human rights dimension in the judgement and the mere application of the test leaving the national court to decide is unsatisfactory as the referring Court in Alokpa asked to interpret art 20 TFEU in light of the Charter.

### **Case C-165/14 Alfredo Rendón Marín**

- Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), namely a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain. Mr Rendón Marín was granted sole care and custody of his children. The whereabouts of the children's mother, a Polish national, are unknown. The two children are receiving appropriate care and schooling.
- Mr Rendón Marín has a criminal record. In particular, he was sentenced in Spain to a term of nine months' imprisonment. However, he was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. On the date of the order for reference, namely 20 March 2014, he was awaiting a decision on an application for mention of his criminal record to be removed from the register (cancelación).

On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit on the basis of exceptional circumstances, pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

By decision of 13 July 2010, Mr Rendón Marín's application was rejected pursuant to Article 31(5) of Law 4/2000 because he had a criminal record.

Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National High Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court, Spain).

Mr Rendón Marín based his appeal against the judgment on a single plea in law, alleging (i) misinterpretation of the judgments of 19 October 2004, Zhu and Chen (C-200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C-34/09, EU:C:2011:124), since the case-law resulting from those judgments should, in his submission, have led to him being granted the residence permit sought, and (ii) infringement of Article 31(3) and (7) of Law 4/2000.

The referring court states that, leaving aside the specific circumstances of the main proceedings, in this case, as in the cases which gave rise to the judgments of 19 October 2004, Zhu and Chen (C-200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C-34/09, EU:C:2011:124), the refusal in Spain to grant Mr Rendón Marín a residence permit would result in his removal from Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. That court observes, however, that, in contrast to the situations examined in the judgments of 19 October 2004, Zhu and Chen (C-200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C-34/09, EU:C:2011:124), the applicable national legislation lays down a prohibition on the grant of a residence permit when the applicant has a criminal record in Spain.

Consequently, the referring court is uncertain whether national law, which prohibits, without any possibility of derogation, the grant of a residence permit when the applicant has a criminal record in the country where the permit is applied for, even though that has the unavoidable consequence of depriving a minor, a Union citizen who is a dependant of the applicant for a

residence permit, of his right to reside in the European Union, is consistent with the Court's case-law, relied on in the case, relating to Article 20 TFEU.

It was in those circumstances that the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, Zhu and Chen (C-200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C-34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

In Case C-165/14 Alfredo Rendón Marín, the Charter was referred to in the following two paragraphs:

Para 66 As regards, moreover, the possible expulsion of Mr Rendón Marín, it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to this effect, judgment of 23 November 2010, Tsakouridis, C-145/09, EU:C:2010:708, paragraph 52) and, secondly, to observe the principle of proportionality. Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) thereof (see, to this effect, judgment of 23 December 2009, Detiček, C-403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

Para 81 Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marín's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

CJEU: Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State;

Left the decision to the national court – however told the national court to use art 20 TFEU "In the event that the referring court, when reviewing the conditions laid down in Article 7(1) of Directive 2004/38, comes to the conclusion that those conditions are not fulfilled and, in any event, so far as concerns Mr Rendón Marín's son, a minor, who has always resided in the Member State of which he is a national, it should be examined whether a derived right of residence for Mr Rendón Marín may, where appropriate, be founded on Article 20 TFEU".

Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he

has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

## **THIRD COUNTRY NATIONALS**

### **5. LEGALLY RESIDENT TCNs**

The entry and residence status of TCNs in the host country determine the set of rights that each category enjoys. Some groups of third-country nationals enjoy free movement rights to varying extents as it is shown by a number of directives (see below).

#### **Primary law**

##### **Article 78 TFEU**

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

##### **Article 79 TFEU**

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
- (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

### **Long-Term Residence Directive 2003/109/EC**

This directive covers long-term resident TCNs – those who resided in one EU MS for at least 5 years. Allows rights of residence and movement to other EU Member States after obtaining permanent residence in the first Member State (which is after 5 years of legal continuous residence there). But subject to conditions, if residence over 3 months (Article 14).

#### **Article 14(2):**

“A long-term resident may reside in a second Member State on the following grounds:

(a) exercise of an economic activity in an employed or self-employed capacity (2<sup>nd</sup> MS can apply labour market test, give preference to EU citizens (art 14(3))

(b) pursuit of studies or vocational training;

(c) other purposes.”

In the 2<sup>nd</sup> MS, a TCN must apply for residence permit (art 15(1))

2<sup>nd</sup> MS may require stable and regular resources (art 15 (2)(a), comprehensive sickness insurance (art 15 (2)(b)).

Family member can move too if constituted as a family in the 1<sup>st</sup> MS (art 16(1)).

### **EU Blue Card Directive 2009/50/EC**

This directive covers TCNs, who are in highly qualified employees. A highly-qualified employee is defined as a person who

“in the Member State concerned, - is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else,

- is paid, and,

- has the required adequate and specific competence, as proven by higher professional qualifications” (art 2(b)).

EU Blue Card Holders enjoy more favourable rules on obtaining permanent residence status and free movement compared to long-term residents:

- accumulation of 5 years of legal and continuous residence, even within several Member States (art 15(2))

- application for PR as an EU Blue Card holder maybe submitted already after 2 years of continuous legal residence (art 15(2)(b))
- opportunity to change employer after in highly skilled employment after 2 years (art 12)
- movement to 2<sup>nd</sup> MS possible after 18 months of continuous legal residence in 1<sup>st</sup> MS, for the purpose of high-skilled employment (art 18(1))
- within 1 month after entry TCN/employer must submit application for Blue Card in the 2<sup>nd</sup> MS
- family members can move too, if family constituted in the 1<sup>st</sup> MS (art 19)

The current EU Blue Card Directive has demonstrated intrinsic weaknesses such as restrictive admission conditions and very limited facilitation for intra-EU mobility. This, combined with many different sets of parallel rules, conditions and procedures for admitting the same category of highly skilled workers which apply across EU Member States, has limited the EU Blue Card's attractiveness and usage. This is neither efficient, as such fragmentation entails a burden for employers and individual applicants, nor effective, as shown by the very limited overall number of highly skilled permits issued.

*Note:* Proposal EU Blue Card Directive (Recast) because the original Directive considered ineffective (see [http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive\\_conditions\\_entry\\_residence\\_third-country\\_nationals\\_highly\\_skilled\\_employment\\_en.pdf](http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf) )

### **Students and Researchers Directive 2016/801/EU (recast)**

This Directive is not in force as yet. It will enter into force on 23<sup>rd</sup> May 2018.

It simplifies the rules on intra-EU mobility and transfer of skills and knowledge. More flexible rules will increase the possibility for researchers, students and remunerated trainees to move within the EU, which is particularly important for students and researchers enrolled in joint programmes. Family members of researchers will also be granted certain mobility rights.

The text of the Directive is available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL\\_2016\\_132\\_R\\_0002](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2016_132_R_0002)

### **Intra-Corporate Transfer Directive 2014/66/EU**

It covers TCNs subject to intra-corporate transfer, which is defined as “the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States” (art 3(a)).

Very limited chance to obtain permanent residence, max residence 3 years for managers and specialist and 1 year for trainee employees, then they need to leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law. (art 12(1))

MS may apply 6 months cooling of period (art 12(2))

No opportunity to change employer.

But have conditional intra-EU mobility rights (art 20)

Short-term mobility a period of up to 90 days in any 180-day period per Member State, based on the permit granted in the 1<sup>st</sup> MS, but 2<sup>nd</sup> MS may require notification of movement (art 21)

Long-term mobility a period of more than 90 days, 2<sup>nd</sup> MS may require notification or even application for permit (art 22).

Family member can move as well (art 19(1))

### **Seasonal Workers Directive 2014/36/EU**

It covers a TCN “who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State;” (art 3(b))

There is a total maximum limit of between five and nine months per calendar year of residence for a seasonal worker; they must then return to a third country (art 14).

Within the maximum time limit, seasonal workers will be able, on one occasion, to change employers or to obtain an extension of their stay with their employer, if they still meet the criteria for admission, although the grounds for refusal will still apply. The preamble makes clear that this possibility is intended to avoid abuse, since the worker will not be tied to a single employer. Member States will have an option to allow further extensions or changes of employer.

The directive facilitates the re-entry of seasonal workers who were admitted at least once within the previous five years, if they complied with immigration law during their stay (art 16). This could include a simplified application process, an accelerated procedure, priority for previous seasonal workers, or the issue of several seasonal worker permits at the same time.

There are no intra-EU mobility rights.

### **Single Permit Directive 2011/98/EU**

It covers TCNs admitted to the EU for the purpose of employment, who have not yet achieved long-term residence status (art 3(1)).

There are no intra-EU mobility rights.

The following table summarises the free movement rights:

<b>Category of migrants</b>	<b>Free movement rights</b>
EU citizens	This is a fundamental right, which is now not only guaranteed in the TFEU and the Citizenship Directive but also in the Charter of Fundamental Rights.
Legally residing TCNs	Article 45 (2) of the Charter states that freedom to move and reside in the Member States can also be granted to them. However, the facultative nature of this provision makes it difficult to consider this as a fundamental right.
Long-term residents, students, researchers and highly qualified workers	Subject to restrictions

Refugees, beneficiaries of subsidiary protection and non-EU family members of TCNs	Not entitled to free movement. Differential treatment compared to EU citizens. Refugees, beneficiaries of subsidiary protection acquisition of free movement when they acquire the status of long term residents.
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<b>Category of migrants</b>	<b>Security of residence</b>
Long-Term Residents Directive (LRD)	Most legally residing TCNs become eligible for permanent resident status when they have stayed in a Member State for five years.
Legally residing TCNs	<ul style="list-style-type: none"> <li>• <u>Students</u> are excluded from the scope of the LRD, not entitled to permanent residence.</li> <li>• <u>ICT</u> no right to permanent residency – max stay in the host country, 3 years.</li> <li>• <u>Refugees and beneficiaries of subsidiary protection</u> only recently included within the personal scope of application of the amended Long-Term Residents Directive (see also Recast Qualification Directive 2011/95/EU).</li> </ul>
Citizenship Directive (2004/38)	Family members of EU citizens are, however, entitled to permanent residence after five years without any further conditions being imposed
Blue Card Directive	For highly qualified workers, the directive contains more favourable criteria by which the period of five years residence is calculated

## European Parliament and Council Regulation No 1931/2006

This Regulation establishes a local border traffic regime at the external land borders of the Member States and introduces for that purpose a local border traffic permit. This Regulation authorises Member States to conclude or maintain bilateral Agreements with neighbouring third countries for the purpose of implementing the local border traffic regime established by this Regulation. The local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

### 6. ILLEGALLY RESIDENT TCNS

The **Return Directive 2008/115/EC** is the key legal instrument for returning TCNs. It provides guidelines for EU Member States and Schengen Countries to follow return and removal procedures.<sup>1</sup> The common standards and procedures cover areas such as the use of coercive force, return, removal, detention, and re-entry. The Directive also provides provisions on postponement of removal (art 9), specifying criteria for when a Member State shall and may postpone a removal, and on safeguards pending return (concerning rights to family unity, health care, access to education for minors and specific needs of vulnerable persons).

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<sup>1</sup> Except Ireland and the UK who have decided not to opt into this area of Community law.

The Return Directive also takes into consideration the 'Twenty guidelines on forced return', adopted in May 2005 by the Committee of Ministers of the Council of Europe.<sup>2</sup> These twenty guidelines form a non-binding code of good conduct for expulsion procedures that Member States can bear in mind when developing national legislation and regulations on returning illegal TCNs. They are based on detailed research by bodies such as the European Court of Human Rights, as well as a questionnaire on forced return sent to the Member States. For the most part, the issues discussed under the twenty guidelines are included in the Return Directive.

According to the Return Directive, a Member State can issue a return decision to TCNs if they are staying illegally on the Member State's territory, although they may refrain from making the decision, for example if the Member State decides to grant the TCN a residence permit based on humanitarian reasons. Also, a Member State should not issue a return decision if the TCN is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations, the return decision should include a period ranging from seven to 30 days, depending on each individual case<sup>3</sup>, for the TCN to return voluntarily. If the TCN does not return within the voluntary period, then the Member State can take the necessary measures to enforce return of the TCN.

The Return Directive provides that the return decision itself should be issued in writing, and if the TCN requests it, then also with a written or oral translation of the main elements, in a language that the TCN is believed to understand. The TCN should also be able to appeal against or seek review of the decision. In the case of detention, TCNs should be kept in detention for the shortest period possible, and for the most part only when there is a risk of absconding or the TCN avoids or hampers the preparation of return. If the use of coercive measures is required, as a last resort, then they shall not exceed reasonable force.

Special attention should be paid to vulnerable persons throughout the entire return process, particularly in relation to forced return. According to the Return Directive, vulnerable persons are defined as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical, or sexual violence'. For example, in the case of minors, the best interests of the child must be considered, and minors should only be detained as a measure of last resort. This is also one of the goals of the Return Fund, which specifically states that it will provide assistance for the proper treatment of these vulnerable persons. For example, it will support the exchange of information of best practices for the return of vulnerable persons.<sup>4</sup>

This directive was interpreted in the *Case M.G., N.R. v Staatssecretaris van Veiligheid en Justitie*. The CJEU (Second Chamber) hereby ruled that: "Article 15(2) and (6) of 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, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon".

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<sup>2</sup> Council of Europe 'Twenty Guidelines on Forced Return', September 2005.

<sup>3</sup> According to Art. 7(4) of the Return Directive, Member States may in some cases refrain from granting a period for voluntary departure or may grant a period shorter than seven days, if there is a risk absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person poses a risk to public policy, public or national security.

<sup>4</sup> Decision No 575/2007/EC.

## 7. CASE-LAW ON FREE MOVEMENT OF TCNS

### Case C-254/11 Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi

- Case concerned a Ukrainian national (Mr Shomodi) who is in possession of a valid local border traffic permit, issued pursuant to Regulation No 1931/2006, which authorises him to enter the border area of Hungary. On 2 February 2010 he requested entry into Hungary at the Záhony border crossing. The Hungarian border police established that he had stayed in Hungarian territory for 105 days during the period from 3 September 2009 to 2 February 2010, entering that territory almost daily for several hours. Since Mr Shomodi had thus stayed for more than three months in the Schengen area during a six-month period, the Hungarian border police refused him entry into Hungarian territory on the basis of Hungarian national law, interpreted in the light of the Convention implementing the Schengen Agreement.
- Mr Shomodi brought an action against the decision of the border police before the Hungarian courts. In the appeal proceedings on a point of law before it, the Hungarian Supreme Court, referred to the Court of Justice the question of whether the agreement at issue as interpreted by the Hungarian authorities, limits the total length of a stay of a cross-border worker in the border area of Hungary to three months over a six-month period is compatible with the local border traffic regulation.

The CJEU found:

1. First that the general rule in the Schengen acquis, which limits the stay of foreign nationals to three months over a six-month period, does not apply to local border traffic. The three-month limit laid down in the local border traffic regulation relates only to 'uninterrupted stays', whereas the limitation resulting from the Schengen acquis does not relate to such stays. In the Court's view, the fact that that limitation is, as in the Schengen acquis, limited to three months cannot cast doubt on its special nature in relation to the ordinary rules in place for third-country nationals who are not subject to visa requirements. It is not apparent from any provision of the regulation that those three months must fall within the same six-month period.
  2. Second by adopting the regulation on local border traffic, the EU legislature intended to put rules in place for local border traffic which are independent of, and distinct from, those of the Schengen acquis. The purpose of those rules is to enable the residents of the border areas concerned to cross the external land borders of the EU for legitimate economic, social, cultural or family reasons, and to do so easily – that is to say, without excessive administrative constraints – and frequently, even regularly.
  3. Third, in relation to the concerns expressed by certain Member States in relation to the alleged negative consequences of such an autonomous interpretation of the regulation, the Court responds that the easing of border crossing is intended for *bona fide* border residents with legitimate and duly substantiated reasons for frequently crossing an external land border. In addition, the Member States remain free to impose penalties on those who abuse or fraudulently use their local border traffic permit.
- Accordingly, the Court considered that the holder of a local border traffic permit must be able to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted.
  - Finally, the Court stated that the stay of the holder of a local border traffic permit must be regarded as interrupted as soon as the person concerned crosses the border back into his State of residence in accordance with the conditions laid down in his permit, irrespective of the frequency of such crossings, even if they occur several times daily.

The Charter was not referred to in the judgment of Case C-254/11 Oskar Shomodi.

However, it was mentioned rather extensively in the **Opinion of Advocate General CRUZ VILLALÓN**. The case is decided in the light of the scheme of the border crossing regime laid down by Regulation No 1931/2006 read in conjunction with Article 20 of the Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990. The suggestion of the Advocate General Villalon is to read Article 5 of Regulation No 1931/2006 in conjunction with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

### **Compliance with the Charter and the ECHR**

Para 65. In the light of the foregoing, the main question which is therefore submitted for the assessment of the Court is whether the regime established by the bilateral agreement concluded by Hungary, as interpreted and/or implemented by the competent Hungarian authorities, is compatible, in the first place, with the spirit of the local border traffic regime which I have just examined in detail, as interpreted in accordance with primary EU law, and, more specifically, with the relevant provisions of the Charter, or, if appropriate, of the ECHR and, in the second place and more widely, with all EU law, in accordance with Article 4(3) TEU.

Para 66. It should be noted, in that regard, that recital 13 in the preamble to Regulation No 1931/2006 states that the regulation respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter.

Para 67. Moreover, the conclusion of bilateral agreements such as the one at issue in the main proceedings falls within the scope of the implementation of the local border traffic regime, so that those agreements, which must be in accordance with the rules of Regulation No 1931/2006, must, more generally, be concluded in compliance with primary law and in particular with the provisions of the Charter, in accordance with Article 51(1) thereof or, failing that and as appropriate, the provisions of the ECHR, in accordance with Article 6(3) TEU.

Para 68. One may, very intuitively, be prompted to approach the question initially from the point of view of freedom of movement.

Para 69. However, it should be pointed out, putting aside the situation of 'persons enjoying the Community right of free movement' or equivalent rights, within the meaning of Article 3(4) of Regulation No 1931/2006, that Article 45(1) of the Charter, which establishes the right of every citizen of the European Union to move and reside freely within the territory of the Member States, does not apply *ratione personae* to the main proceedings, any more than Article 45(2) of the Charter, which provides that those same rights may be granted to third-country nationals legally resident in the territory of a Member State.

Para 70. However, and without the need to question whether the main proceedings fall, in any way at all, within the scope of Article 2 of Protocol No 4 to the ECHR, which enshrines the right to freedom of movement, it is clear that it is covered, in any event, owing to the scheme of the local border traffic regime, by Article 7 of the Charter, which guarantees respect for private and family life, a provision which, in accordance with Article 52(3) of the Charter, must be interpreted in the light of Article 8 ECHR.

Para 71. Third-country nationals who are not included within the definition of family members of a European Union citizen, within the meaning of the aforementioned Directive 2004/38 and who therefore do not enjoy an automatic right of entry and residence in the host Member State, but who fall within the scope of Regulation No 1931/2006, must, in my view, be able to have, in the implementation of the regulation, guarantees of the right to a private

and family life in the broad sense, as do, reciprocally, the border residents in the Member States.

### **Application of Article 7 of the Charter and Article 8 ECHR**

Para 72. In the end, therefore, it is definitely in the light of the relevant provisions of the Charter and the ECHR and also the general principles of EU law, and in particular the principle of proportionality, that Regulation No 1931/2006 must be interpreted and that the application of the relevant provision of the bilateral agreement concluded by Hungary must be assessed.