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## The Fundamental Status of Minor Union Citizens and the Best Interests of the Child

*Annette Schrauwen*

Since its inception a little over 25 years ago, the status of EU citizenship has gradually increased the impact of the position of children on decisions regarding residence of non-EU citizens. Parents or primary carers can derive rights from the status their child has under EU law. Children with EU citizenship have more secure residence rights under EU law compared to their situation before the introduction of EU citizenship. The Court of Justice of the European Union (hereafter ECJ or Court) developed these rights in its interpretation of the EU citizenship provisions and has fine-tuned them in cross-referencing to children's rights under other EU law provisions.<sup>1</sup>

Within the EU increasing attention is given to rights of children.<sup>2</sup> The Court has held that the principle of the primacy of the best interests of the child is the prism through which the provisions of EU law must be read.<sup>3</sup> The principle is enshrined in Article 24 of the EU Charter of Fundamental Rights (Charter) and in Article 3 of the 1989 United Nations Convention on the Rights of the Child (CRC). The CRC binds each of the Member States and is one of the international human rights instruments of which the Court takes account in applying the general principles of EU law.<sup>4</sup> Furthermore, the explanations relating to the Charter indicate that its Article 24 is based on the CRC, in particular on Articles 3, 9, 12 and 13 thereof.

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- 1 I have written elsewhere on the case law developments regarding children providing derived rights of residence to their parents or carers. This chapter builds upon that (Dutch) text: Schrauwen, A. (2018), *Kinderen als verblijfgever, A&MR* (6–7), pp. 280–285.
  - 2 Helen Stalford notes how a 2011 Commission's communication, *An Agenda for the Rights of the Child* COM(2011) 60 final, marks a more active stance of the EU towards children's rights, in: Stalford, H. (2012), *Children and the European Union. Rights, welfare and accountability*, Oxford and Portland: Hart Publishing, p. 27.
  - 3 AG Szpunar in Case C-133/15 *Chavez and others*, EU:C:2016:659, para. 45. He refers to Case C-356/11 and 357/11 *O.S. and L.*, EU:C:2012:776, paras. 76 to 78; Case C-244/06 *DynamicMedien*, EU:C:2008:85 paras. 39 to 42 and 52; Case C-523/07 *A.*, EU:C:2009:225, paras. 61 and 64.
  - 4 Case C-540/03 *European Parliament v. Council* (family reunification directive), EU:C:2006:429, para. 37.

On the basis of an analysis of relevant case law of the ECJ, the text below examines the sponsor position of EU children in EU families or families of mixed nationality and that of non-EU children in families of mixed nationality under EU law. The sponsor position designates children who reside lawfully in a Member State and whose family members apply for residence with him/her. The notion “sponsor” is taken from the context of family reunification. Under Article 2 (c) of the Family Reunification Directive the “sponsor” is defined as “a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her”.<sup>5</sup> Under the Family Reunification Directive, the general rules allow for family reunification of first-degree relatives in the ascending line who are dependent on the sponsor. In a similar way, Directive 2004/38 only includes direct relatives in the ascending line who are dependent on the Union citizen or her spouse or partner.<sup>6</sup> Where sponsors are minor children, the relationship of dependence is often reversed, and one would expect that, in the light of the “best interests of the child” principle, dependence of the parents on the child is not examined.<sup>7</sup> However, the sponsorship relation implies that parents derive their residence rights from the child. I use the label “mixed nationality” to designate families that are composed of both members with a nationality of a EU Member State and members with a nationality from a third state. Thus, family reunification of non-EU children with non-EU family members without any connection to EU citizens is excluded from the analysis.

The framework for analysis is an adapted version of the framework Cathryn Costello developed in order to understand family reunification.<sup>8</sup> It turns on the recognition of two sets of connections: between the child and the (host) State

5 Directive 2003/86 of 22 September 2003 on the right to family reunification, *OJ* L251, 03/10/2003, pp. 12–18.

6 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* L158, pp. 77–123, 30/04/2004, Article 2(2) under d.

7 See also Groenendijk, K., R. Fernhout, D. van Dam, R. van Oers & T. Strik (2007), *The Family Reunification Directive in EU Member States, the First Year of Implementation*, Nijmegen: Wolf Legal Publishers, p. 43; for a further comment on the “best interests of the child” principle in family reunification in case law of the European Court of Human Rights and in cases concerning minor refugees, see Council of Europe (2017), *Realising the right to family reunification of refugees in Europe*, Issue paper published by the Council of Europe Commissioner for Human Rights, Brussels: Council of Europe (available via <reliefweb.int/report/world/realising-right-family-reunification-refugees-europe>).

8 Costello, C. (2016), *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, p. 103.

on the one hand, and between the child and the family members on the other. From that follow two sources of stratification.<sup>9</sup> The first one concerns residence categorization of the child by the host State, and the other concerns the conditions under which family members may accompany or join the child. It results in a variety of situations in which family members may derive residence rights from the child.

In this chapter I will describe and comment upon the question whether in all situations where children take the position of sponsor the principle of the best interests of the child is taken duly into account and regardless of nationality of the child. I will start with a few words on the analytical framework for the description of the case law. Next, the case law is introduced in categories that follow from the analytical framework. The selection of cases is not meant to be exhaustive. It serves as illustration of how both EU citizenship status and focus on the best interests of the child have strengthened the sponsor position of EU children since the formal inclusion of the status of EU citizenship in the Maastricht Treaty.

### 3.1 The Analytical Framework

Under EU law, a recognized connection with a State providing lawful residence for children in mixed families can be the child's inclusion in that State's educational system, EU citizenship or both. It results in children having a right to reside that may be unconditional or conditional, temporary or permanent. The right to reside can exist in the Member State of nationality of the child, or in a Member State other than that of its nationality (here after: host State).

Family members come in all sorts. They may be primary caretakers of the children or others with whom the child has a biological connection or not, or who have legal custody over the child or with whom the child has a connection of emotional, financial or affective dependence. Some family members may have the nationality of an EU Member State, others may not. The combination of the child's residence status and the family connection with the child determines what type of residence rights, if any, family members may derive from the child.

The presentation of the case law below follows the child's connection with the State where their family members apply for residence. It starts with

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9 *Idem*; stratification refers to the creation of several migration statuses, each with their own rights attaching.

enrolment in the educational system as connecting factor before addressing the connection based on EU citizenship.

### 3.2 The Child's Enrolment in the Educational System of a Host State under Regulation 1612/68

On 8 November 1968, Regulation 1612/68 on the free movement of workers entered into force, 25 years before the formal introduction of EU citizenship in the Maastricht Treaty.<sup>10</sup> Article 12 thereof provided children of (former) EU workers admittance to general education, vocational training and apprenticeship under the same conditions as nationals of the host State, provided the children resided on the territory of the host State. Furthermore, Member States were obliged to encourage "all efforts to enable these children to attend such courses under the best possible conditions".<sup>11</sup> Article 10 of Regulation 492/2011 replacing the 1968 Regulation is identical in wording.

The first cases on this provision evolved around admittance to education under equal financial conditions.<sup>12</sup> In the 1980's and 1990's the Court ruled that the concept of "education" covered all education, including vocational training and university education. The residence rights children derive from the parent EU worker were discussed in the cases *Brown* and *Gaal*,<sup>13</sup> where it was determined that the concept of "children" within the scope of the education provision also covers children over the age of 21 and no longer dependent on an EU worker. This position differs from Article 1 CRC that in principle takes 18 years as limit to the concept of child for the purpose of the Convention, and more notably also differs from the conditions that Article 10 of the Regulation requires for installment of children with their parent EU worker. Under Article 10 of Regulation 1612/68 and its successor, persons who may install themselves with the EU worker as "children" are descendants of the EU worker or his/her spouse or registered partner who are under the age of 21 years or are dependents.<sup>14</sup>

10 Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ English Special Edition* 1968(11), p. 475, repealed and replaced by Regulation (EU) 492/2011 of the European Parliament and the Council of 5 April 2011 on freedom of movement for workers within the EU, *OJ L141*, 27/05/2011, pp. 1–12.

11 *Idem*, Article 12.

12 Case 9-74 *Casagrande*, EU:C:1974:74; Case 76-72 *Michel S.*, EU:C:1973:46.

13 Case 197-86 *Brown*, EU:C:1988:323 and Case C-7/94 *Gaal*, EU:C:1995:118.

14 Article 10(1) (a) of Regulation 1612/68 did not include children of the registered partner. Whenever Member States treat registered partnerships as equivalent to marriage, these

It needs to be noted that in case non-EU partners cohabit(ed) with an EU worker without being married or having a registered partnership, the children of the non-EU partners do not qualify as “children” of EU workers under Regulation 1612/68. Therefore they do not have a right under EU law to continue their education in the host State.<sup>15</sup> Furthermore, in interpreting Article 2 (2) under (c) of Directive 2004/38 that repealed and replaced Article 10 of Regulation 1612/68 the Court has made clear that “direct descendants” of EU citizens (including workers) or their spouses presupposes a parent-child relationship, either biological or legal.<sup>16</sup> Therefore, the concept “direct descendant” includes biological and adopted children. However, it does not cover children placed in legal guardianship of an EU citizen since legal guardianship does not establish a parent-child relationship. In the case at hand, an Algerian child was placed in the guardianship of a French couple under the Algerian *kafala* system. The child did not have the right to enter the UK with her guardians as “direct descendant” of the French couple, but the Court did indicate the UK had to facilitate the entrance and residence of the child as “other family member” under Directive 2004/38 and should take into account respect for family life under Article 7 of the Charter in conjunction with the best interests of the child under Article 24(2) of the Charter when examining the personal circumstances of the child relevant for the decision on his/her entry and residence. The factors that should be taken into account are inter alia, “the age at which the child was placed under the Algerian *kafala* system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child”.<sup>17</sup> The authorities must also take into account a possible risk that the child will be the victim of abuse, exploitation or trafficking. However, if the authorities conclude that there is genuine family life and the child is dependent

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are included in Article 2(2) under (c) of Directive 2004/38/EC that applies to all Union citizens who move to or reside in a Member State other than that of their nationality and that repealed Articles 10 and 11 of Regulation 1612/68; 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* L158, pp. 77–123 of 30/04/2004.

15 Case C-45/12 *Radia Hadj Ahmed*, EU:C:2013:390, para. 51.

16 Case C-129/18 *SM*, EU:C:2019:248.

17 *Idem*, para. 69.

on its guardians, the child must be granted a right of entry and residence as “other family member”. It seems unlikely, in view of the Court’s ruling on children of non-EU partners cohabiting with EU workers, that under these circumstances the Algerian child in the future will have an independent right to complete her education in the UK, as she does not qualify as “child” of an EU citizen or his spouse/partner.

In contrast to the relevance of the biological or legal parent-child relationship, in the joined cases *Baumbast and R.*,<sup>18</sup> the Court argues that nationality of the children is not relevant. It does so on the basis of the definition of “family members” in Article 10 of Regulation 1612/68. The Baumbast family included two girls, one German and one of dual German-Colombian nationality. The children of Mrs. R. had dual French-American nationality. All these children went to school in the UK and were entitled to pursue and complete their education based on Article 12 of Regulation 1612/68. They had that right regardless the fact that the parent EU worker was no longer working or was divorced from the non-EU parent and no longer lived with them. The right to continue their education under Article 12 of Regulation 1612/68 gives the children a right to reside that is independent from the residence status of their parents and regardless of their nationality. In the more recent case *NA* the Court in an obiter dictum added that children of a former migrant worker, who have resided in the host State since their birth, have a right to *commence* or continue their education in the host State irrespective of whether the EU worker does or does not reside in the host State on the date when the child begins to attend school.<sup>19</sup>

The independent residence right of the children based on Article 12 of Regulation 1612/68 may form the basis for a derived residence right for family members taking care of the children. The phrase in Article 12 that Member States must enable the children to continue their education “under the best possible conditions” implies that the child has “the right to be accompanied by the parent who is the primary carer” of the child.<sup>20</sup> Refusing residence to the parent taking care of the children would render ineffective the children’s right to continue their education in the host State.<sup>21</sup> In the *Baumbast and R.* case, the Court interprets Regulation 1612/68 in the light of respect for family life under Article 8 ECHR. The lack of any reference to the rights of children under Article 24 of the Charter in that ruling may be explained by the fact that the Charter was non-binding at the time. The lack of any reference to Article 3 CRC is not very

18 Case C-413/99 *Baumbast and R.*, EU:C:2002:493.

19 Case C-115/15 *NA*, EU:C:2016:487, para. 63.

20 Case C-413/99 *Baumbast and R.*, EU:C:2002:493, para. 72 and dictum, para. 2.

21 *Idem*, para. 74.

remarkable in view of the fact that the first references to the CRC appeared in AG Opinions since 2001.<sup>22</sup> The first case in which the Court mentioned that both Article 24 Charter and the CRC are general principles of EU law dates from 2006.<sup>23</sup> The 2016 *NA* case also lacks reference to Article 24 Charter or the CRC, but arguably that would not have made any difference since the children were granted their right to commence and continue education based on Regulation 1612/68.

The generous interpretation of the right to education of children of (former) EU workers must be seen in light of the context and aims of Regulation 1612/68, notably to guarantee free movement of workers “in compliance with the principles of liberty and dignity” and therefore the Regulation requires the best possible conditions for the integration of the EU worker’s family in the host State.<sup>24</sup> That context and the interpretation in light of Article 8 ECHR make that a restrictive interpretation of Article 12 of Regulation 1612/68 cannot be accepted.<sup>25</sup> The generous interpretation also implies that both EU and non-EU children may continue their education when they reach the age of twenty-one, and that the right of residence for the parent in principle comes to an end at that stage unless the child needs presence and care of the parent to be able to pursue and complete his or her education. In order to determine whether that is the case, circumstances such as the age of the child, whether the child lives with the parent or receives financial or emotional support may be taken into account.<sup>26</sup> However the Regulation covers only the free movement of workers, and children of self-employed or economically inactive EU citizens do not derive any rights from Article 12 of Regulation 1612/68. Their right to education in the host State can only provide derived residence for their family members on the basis of Directive 2004/38<sup>27</sup> to which we now turn.

22 AG Stix-Hackl in Case C-459/99 *MRAX*, EU:C:2001:446, para. 26; AG Jacobs in Case C-148/02 *Garcia Avello*, EU:C:2003:311, para. 36; AG Kokott in Case C-105/03 *Pupino*, EU:C:2004:717, para. 56.

23 Case C-540/03 *European Parliament v. Council* (Family reunification Directive), EU:C:2006:429, para 37. The first case in which the Court attached *decisive weight* to the CRC dates from 2008, Case C-244/06 *Dynamic Medien*, EU:C:2008:85, a case on labeling DVDs and videos. See also Stalford 2012, p. 35.

24 Case C-413/99 *Baumbast and R.*, EU:C:2002:493, para. 50.

25 *Idem*, para. 55.

26 Case C-529/11 *Alarape and Tijani*, EU:C:2013:290, para. 30. In this case the child had reached the age of majority and had been admitted to study for a doctorate.

27 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

### 3.3 Enrolment in the Educational System of a Host State under Directive 2004/38

The Citizens' Directive 2004/38 does not explicitly provide children belonging to the family of EU citizens residing in a host state with a right to education "under the best possible conditions" similar to Article 12 of Regulation 1612/68. It does however provide for a general right to equal treatment in its Article 24. The aim and context of the Directive – notably simplifying and strengthening the right to free movement and residence of all Union citizens under objective conditions of freedom and dignity<sup>28</sup> – resonate aim and context of Regulation 1612/68. However, the Directive also aims at preventing that beneficiaries become an unreasonable burden on the social assistance system of the host State. It has repercussions on the residence rights family members may derive from children enrolled in education.

Article 12 (3) of Directive 2004/38 specifically provides for the children's right to remain in the host State until completion of their education in case the Union citizen dies or departs from the host State. It gives an accompanying right of residence for the parent or partner, irrespective of nationality. Although the provision was designed to be consistent with the judgment in *Baumbast and R*,<sup>29</sup> the wording of this provision is stricter as compared to the rights under Regulation 1612/68, for it does not apply in case of divorce, and only applies to the parent who has "actual custody". Under Article 13 paragraph 1 Directive 2004/38 self-sufficient or economically active EU citizens retain the residence right after divorce. Article 13 paragraph 2 of the Directive concerns situations of divorce in case of mixed families. It provides a right to remain in the host State for the non-EU spouse or partner of the EU citizen having custody over the EU citizen's children or having a right of access to a minor child in the host State. However, divorced partners must be economically active or have sufficient financial means not to become a burden on the social assistance system of the host State (hereinafter: the self-sufficiency condition). That condition does not apply in case the EU citizen dies or departs from the host State and the non-EU parent has custody over the children who are in education under Article 12 (3) of Directive 2004/38. The Court has stated that the latter provision "illustrates the particular importance which Directive

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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* L158, pp. 77–123 of 30/04/2004.

28 *Idem*, preamble, recitals 3 and 5.

29 Case C-480/08 *Teixeira*, EU:C:2010:83, para. 58 and the amended proposal for Directive 2004/38 of 15/04/2003, COM(2003) 199 final, p. 7.

2004/38 attaches to the situation of children who are in education in the host Member State and the parents who care for them”.<sup>30</sup> It might seem odd and questionable in the light of Articles 3 CRC and 24 Charter that the particular importance of the situation of children in education has a different weight according to whether their EU parent has died or left the country on the one hand, or has divorced from the non-EU parent on the other. This is especially true when one considers the following words in the explanatory memorandum accompanying the proposal for the Directive:

One problem is that under Community law as it stands, the right of residence in the host Member State may be taken away from divorced spouses and from children who are no longer minors or dependent on the Union citizen, regardless of their nationality. This problem is particularly acute for members of a Union citizen's family who are third-country nationals; hence the need to introduce measures providing equitable solutions that respect family life and human dignity, coupled with certain conditions in order to avoid abuses of the system.<sup>31</sup>

The self-sufficiency condition for divorced non-EU parents whose children are in education in a host State was touched upon in *Ibrahim*, where the Court acknowledged that Directive 2004/38 does not make the right of residence of these children and the parent who is their primary carer dependent, *in certain circumstances*, on their being self-sufficient.<sup>32</sup> However, the Court could avoid pronouncing itself on the self-sufficiency condition for divorced parents, because in the case at hand the EU child and non-EU parent were family members of a (former) EU worker and hence Article 12 of Regulation 1612/68 applied – this article was not repealed by Directive 2004/38 and applies on condition that the child has lived with his parents or either one of them in the host State while at least one of the parents resided there as EU worker. As we have seen, Article 12 of Regulation 1612/68 does not have a self-sufficiency condition. However, residence without self-sufficiency or economic activity based on Article 12 of Regulation 1612/68 does not lead to a right of permanent residence under Directive 2004/38.<sup>33</sup>

To conclude, in mixed family situations residence rights in a host State for both children in education and the parent who takes care of them may

<sup>30</sup> *Idem*, para. 69.

<sup>31</sup> Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, OJ 270 E/150 of 25/09/2001, para 2.4.

<sup>32</sup> Case C-310/08 *Ibrahim*, EU:C:2010:80, para. 56.

<sup>33</sup> Case C-529/11 *Alarape and Tijani*, EU:C:2013:290, paras. 37–39.

differ according to the (former) economic status of the EU parent. Children of (former) self-employed parents do not have a similar sponsor position as children of (former) workers have.<sup>34</sup> In case the EU parent is not a (former) worker, the cause for breaking up the family matters: a divorce does not give children and the parent who has actual custody the unconditional right of residence in the host State as long as the children are in education, whereas death or departure of the EU parent does. In EU family situations, a similar difference according to economic status applies, as does the self-sufficiency condition in case of divorce from an economically inactive or self-employed EU citizen.<sup>35</sup> Finally, it must be noted that the best interests of the child under the CRC or under Article 24 of the Charter were nowhere mentioned with respect to (derived) residence based on enrolment in the educational system. The next section examines whether that is different when the connecting factor with the host State of children in a sponsor position is their Union citizenship.

### 3.4 EU Citizenship in a Host State

Two years after the Court in *Baumbast and R.* ruled that children of (former) workers enrolled in education could serve as sponsor for their parent, the Court ruled in the landmark *Zhu and Chen* case<sup>36</sup> that EU children as economically inactive persons have an independent right to move to and reside in a Member State other than that of their nationality, as long as they fulfill conditions of self-sufficiency and have comprehensive sickness insurance. Similar to the argument that the right of the child to continue his/her education in a host State presupposes that the family member taking care of the child may reside with her or him, the Court argues that a *young* EU child's right to move to and reside in a host Member State presupposes that the non-EU parent who takes care of the child may reside with her or him.<sup>37</sup> Crucially, conditions of self-sufficiency and comprehensive sickness insurance do not imply any requirements of

34 Joined Cases C-147/11 and C-148/11 *Czop and Punakova*, EU:C:2012:538. In this case residence for the former self-employed parent could be based on Article 16 of the Citizens' Directive providing permanent residence to the parent. Thus, the Court did not have to pronounce itself explicitly on the residence rights children of (former) self-employed parents could provide to a parent while being in education.

35 Illustrations of the differences in residence rights are provided by Joined Cases C-147/11 and C-148/11 *Czop and Punakova*, EU:C:2012:538 and Case C-115/15 *NA*, EU:C:2016:487.

36 Case C-200/02 *Zhu and Chen*, EU:C:2004:639.

37 *Idem*, para. 45, my italics, A.S.

origin.<sup>38</sup> In fact, resources may be provided by the parent of the child or even by a third party.<sup>39</sup>

In *Alokpa* the Court repeats that the condition of self-sufficiency is fulfilled whenever financial resources are available to the EU children and that a non-EU parent who is their carer must be in a position to reside with the EU children.<sup>40</sup> The child's right to move to and reside in the host State is his/her EU citizenship right under Article 21 TFEU and Directive 2004/38. The Court adds that "enjoyment by a *young* child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is primary carer", but in the later case *NA* the Court, while repeating the words "young child" in the ruling, does refer in the dictum to "minor" children.<sup>41</sup> As residence based on Article 21 TFEU and Directive 2004/38 while fulfilling the conditions of self-sufficiency and comprehensive sickness insurance may result in permanent residence under the Directive, the factual consequences of the explicit use of the words "young" or "minor" might be minimal.<sup>42</sup>

The cases mentioned in this section all concerned young EU children who were born and lived in a Member State other than that of their nationality, and where their non-EU parent applied for residence. It might explain why the judgments seem to restrict the residence rights derived from EU children in a Member State other than that of their nationality to only the primary caretaker parent, and to young children. Admittedly, it is highly unlikely that EU children will have two non-EU parents since conferral of nationality based on automatic and unconditional *ius soli* only does not exist anymore in the EU.<sup>43</sup> However the question whether the child could be sponsor for the residence of both parents in a host State is touched upon in the case *Iida*, where the Court had to pronounce itself on the question whether a Japanese father could derive a residence right in Germany from his German daughter who lived with her German mother in Austria.<sup>44</sup> In answering questions relating to a possible

38 *Idem*, para. 30.

39 Case C-408/03 *Commission v. Belgium*, EU:C:2008:192, paras. 47–48.

40 Case C-86/12 *Alokpa*, EU:C:2013:645, paras. 27 and 28.

41 *Idem*, para. 28, my italics, A.S.; Case C-115/15 *NA*, EU:C:2016:487, dictum para. 3.

42 It is not unthinkable that the Court will interpret the derived right of residence for family members as covering the position of adult children whenever an exceptional relationship of dependency between adult child and family member exists, in analogy to its interpretation in a case on derived residence rights in the Member State of nationality of the child, see Case C-82/16 *K.A. and others*, EU:C:2018:308, para. 65.

43 For an overview see European Parliament Research Service Blog on *ius soli*, see <epthink-tank.eu/2018/07/11/acquisition-and-loss-of-citizenship-in-eu-member-states-key-trends-and-issues/figure-1-rules-of-jus-soli-citizenship-in-eu-28/> (last visited 17 April 2019).

44 Case C-40/11 *Iida*, EU:C:2012:691.

derived residence right in the EU as family member of the EU child, the Court concluded that there was no such right. However, the facts in this case do not allow us to conclude that the Court would deny a child to be sponsor for both parents in a host State. The Court in this case did not examine the compatibility of the refusal of a derived residence right for the father with Article 24(3) of the Charter, as it did not fall within the implementation of EU law. I submit here that based on the CRC and Article 24 of the Charter children should indeed be able to act as sponsor for residence of both parents in a host State, provided the self-sufficiency conditions are fulfilled. I will return to this point in the conclusion.

### 3.5 EU Citizenship in the Member State of Nationality

In the early cases regarding EU citizenship, the Court underlined that the establishment of EU citizenship is not supposed to extend the material scope of the Treaties also to internal situations having no link with EU law.<sup>45</sup> Eight years after the *Chen* case a link with EU law was however discovered for EU citizens in internal situations, notably in the *Zambrano* case, where the Court quite controversially ruled that the status of EU citizenship precludes national measures depriving citizens of the Union of the genuine enjoyment of the substance of rights conferred by virtue of their status of EU citizens.<sup>46</sup> The Court interpreted Article 20 TFEU as precluding the refusal of a right of residence and a work permit to a non-EU parent upon whom minor EU children are dependent, in so far as the refusal would deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen. In subsequent case law the Court emphasized the exceptional nature of its ruling in the *Ruiz Zambrano* case, and that it would only apply in situations where the Union citizen will be *forced* to leave the Union territory.<sup>47</sup>

45 Cases C-64/96 and C-65/96 *Uecker and Jacquet*, EU:C:1997:285, para. 23.

46 Case C-34/09 *Zambrano*, EU:C:2011:124, para. 42. See also Solanke, I. (2010), "Using the citizen to bring the refugee in", 75 *MLR*, pp. 101–111; Hailbronner, K. & D. Thym (2011), "Comment on Case C-34/09 *Ruiz Zambrano*", 48 *CML Rev.*, pp. 1253; Kochenov, D. & R. Plender (2012), "EU citizenship: From an incipient form to an incipient substance? The discovery of the Treaty text", 37 *EL Rev.*, p. 369; Eijken, H. van & S.A. de Vries (2011), "A new route into the promised land? Being a European citizen after *Ruiz Zambrano*", 36 *EL Rev.*, p. 704.

47 Case C-434/09 *McCarthy*, EU:C:2011:277; Case C-256/11 *Dereci*, EU:C:2011:734; Case C-40/11 *Iida*, EU:C:2012:691; Case C-87/12 *Kreshnik Ymeraga*, EU:C:2013:291. In Case C-86/12 *Aloka*, EU:C:2013:645 the Court made clear that the responsibility for protecting the genuine enjoyment of the substance of the rights of Union citizens lies ultimately with the Member State of nationality.

In *O. and S. and L.*, the Court had to answer the question whether only biological parents could derive a residence right from their Union citizen children under Article 20 TFEU.<sup>48</sup> The Court made clear that the principles stated in the *Ruiz Zambrano* judgment are not “confined to situations in which there is a blood relationship between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived”.<sup>49</sup> Instead, the legal, financial, or emotional dependency of the minor citizen on the third country national for whom a right of residence is sought has to be taken into consideration.

In its *Ruiz Zambrano* judgment and subsequent case law on residence rights derived from Article 20 TFEU, the ECJ did not refer to the EU Charter of Fundamental Rights nor to fundamental rights such as those included in the CRC as general principles of Union law, even though national judges explicitly asked the Court how to interpret the citizenship provisions in conjunction with provisions of the EU Charter of Fundamental Rights.<sup>50</sup> Arguably, EU fundamental right protection does not apply in case a situation does not fall under the scope of EU law, and as a consequence EU fundamental right protection cannot be invoked as long as Union citizens are not forced to leave the territory of the Union as a consequence of not granting residence rights to their third country parent.<sup>51</sup> In *O. and S. and L.*,<sup>52</sup> legally residing non-EU parents with EU children after having divorced the EU parent married a non-EU partner with whom they wanted to live in the state of nationality of the EU children. The Court in this case refers to Articles 7 and 24 of the EU Charter of Fundamental Rights that Member States must take into account when deciding on the basis of Directive 2003/86/EC in the context of family reunification where the non-EU parent is the sponsor,<sup>53</sup> whereas no such reference to fundamental rights of children was made in the context of similar decisions where the EU child serves as a sponsor for residence of the non-EU partner based on Article 20 TFEU. The paradoxical result that fundamental rights apply to residence of

48 Joined Cases C-356/11 and C-357/11 *O. and S., and L.* EU:C:2012:776.

49 *Idem*, para. 55.

50 Case C-34/09 *Zambrano*, EU:C:2011:124. See also Case C-87/12 *Kreshnik Ymeraga*, EU:C:2013:291 and Case C-86/12 *Aloka*, EU:C:2013:645.

51 See Case C-165/14 *Rendón Marín*, EU:C:2016:675, para. 81; Case C-87/12 *Kreshnik Ymeraga*, paras. 42–43. In contrast, EU fundamental rights do apply when a third country parent with a derived right of residence is expelled, Case C-304/14 *CS*, EU:C:2016:674, para. 36; see also Art. 51 EU Charter of Fundamental Rights on its scope of application.

52 Joined Cases C-356/11 and C-357/11 *O. and S., and L.*, EU:C:2012:776.

53 Directive 2003/86 of 22 September 2003 on the right to family reunification, *OJ* L251, 03/10/2003, pp. 12–18.

family members of third country nationals but not to residence of family members of EU citizens in their State of nationality was said to sit ill with the idea that EU citizenship is destined to be the fundamental status of the nationals of the Member States.<sup>54</sup> I submit the result sits equally ill with the principle of the primacy of the best interests of the child.<sup>55</sup> After the *Zambrano* judgment, it took the Court six years to recognize the relevance of Articles 7 and 24 of the EU Charter of Fundamental Rights in the context of residence rights for non-EU parents based on EU citizenship of children. Interestingly, it did so in a case where the national judge did not refer to fundamental rights in the preliminary questions.<sup>56</sup>

The Court's emphasis of the "exceptional nature" of its ruling in *Zambrano* did raise a number of questions. Could only *young* children in the State of their nationality provide a basis for residence of their non-EU parents based on Article 20 TFEU? Does the exceptional nature of the ruling only apply in case both parents have to leave the territory of the Union or does it also apply in case only the parent who takes care of the child has to leave the territory of the Union and hence the family will be either separated or has to live together outside the EU? And which fundamental rights of the children are relevant?

The Court has never made explicit that parents can only derive residence from their EU child on the basis of Article 20 TFEU when the children are minors. In *Ymeraga* a child of a family from Kosovo lived with his uncle in Luxembourg since he was fifteen and acquired the nationality of Luxembourg when he was twenty-five.<sup>57</sup> His parents and brothers applied for residence in Luxembourg derived from his newly acquired EU citizenship based on Article 20 TFEU. On questions from the national judge, the Court does not refer to the age of majority of the EU child, neither to the child's dependence on his family. It explains that entry and stay of non-EU family members of EU

54 AG Sharpston in Case C-34/09 *Ruiz Zambrano*, EU:C:2010:560 at para. 170; Kochenov, D. (2014), "Equality across the legal orders; Or voiding EU citizenship of content", in: Guild, E., C.J. Gortázar & D. Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship*, Leiden: Brill Nijhoff, pp. 301–321.

55 Joined Cases C-356/11 and C-357/11 *O. and S., and L.*, EU:C:2012:776, paras. 76–79; see also Case C-403/09 *PPU Detiček*, EU:C:2009:810, where the Court in the context of judicial co-operation in civil matters in para 59 stated that "It follows that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right".

56 Case C-133/15 *Chavez-Vilchez a.o.*, EU:C:2017:354, para. 70.

57 Case C-87/12 *Kreshnik Ymeraga*, EU:C:2013:291.

citizens in the state of their nationality falls in principle under the competence of the Member States, but that there is an intrinsic connection with the free movement rights of the EU citizen if the EU citizen is forced to leave the territory of the EU whenever his family members are not granted a derived residence right. The mere fact that the EU citizen wants to be reunified with his family members in the state of his nationality in itself does not support the view that he will be forced to leave the EU. The Court explicitly adds that in such a case, where secondary legislation nor Article 20 TFEU do apply, the Member State's refusal of derived residence rights for family members is not implementing EU law and therefore the Court cannot examine its conformity with fundamental rights in the light of the Charter.<sup>58</sup> The Court adds that the refusal might be incompatible with the European Convention on Human Rights.<sup>59</sup> It does not mention the CRC, which can be explained by the fact that in the case at hand the EU citizen would not be considered a "child" under that Convention.

In *Chavez-Vilchez*, the Court explicitly stated that it is the dependency between the sponsor child "who is a minor" and the non-EU family member that would lead to the EU citizen (the sponsor child) being forced to leave in practice the territory of the EU.<sup>60</sup> In the more recent *K.A. and others* case, one of the situations involved a non-EU child in the age of majority applying for a derived right of residence with her EU father based on Article 20 TFEU. The Court acknowledges that it is conceivable that in exceptional cases a relationship of dependency between adults is such that "in light of *all* the relevant circumstances *any form of separation*" of the EU adult citizen and the non-EU family member is impossible.<sup>61</sup> The dictum of the case makes a clear distinction between these stricter criteria applying in the determination of dependency where the Union citizen is an adult and the conditions applying where the Union citizen is a minor.<sup>62</sup>

As to the determination of dependency where the Union citizen is a minor, the Court in *Chavez-Vilchez* first mentions the importance of determining which parent is the primary carer of the child. Factors of relevance in the examination of the dependency include the question which parent has custody of the child and whether the child is legally, financially or emotionally

58 *Idem*, para. 43.

59 *Idem*, para. 44.

60 Case C-133/15 *Chavez-Vilchez a.o.*, EU:C:2017:354, para. 69.

61 Case C-82/16 *K.A. and others*, EU:C:2018:308, para. 65.

62 *Idem*, dictum para. 2, 2nd and 3rd indent.

dependent on the non-EU family member. Furthermore, as part of the assessment of dependency the competent authorities must take into account the right to family life included in Article 7 of the Charter, to be read “in conjunction with the obligation to take into consideration the best interests of the child, recognized in Article 24(2) of the Charter”.<sup>63</sup> Six years after the landmark judgment in *Zambrano* the Court made clear that when determining whether a residence right for a non-EU family member of an EU child may be derived from Article 20 TFEU Member States are implementing EU law and the Charter applies.

In *Chavez-Vilchez* the Court seems to give substance to the best interests of the child by indicating which circumstances need to be taken into account when assessing whether the relation of dependency would compel the child to leave the EU, without being exhaustive. These circumstances include “the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium”.<sup>64</sup> In *K.A. and others* the Court adds that the existence of a family link with the non-EU person, whether natural or legal, is not sufficient, and co-habitation with that person is not necessary to establish that the dependency is such that the EU child would be compelled to leave the territory of the EU with the non-EU family member in case of refusal of a derived right of residence.<sup>65</sup>

It is quite remarkable that the Court indicates that the emotional ties the child has with *both* parents need to be taken into account as well as the risk the departure of the non-EU parent may have for the child’s equilibrium while not referring to Article 24(3) Charter. That provision sets out the right of the child to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to the interests of the child. In the context of recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, the Court stated that this right undeniably merged into the best interests of *any* child.<sup>66</sup> That brings us back to the question whether in all EU family and mixed family situations where children take the position of sponsor the principle of best interests of the child is taken duly into account and regardless of nationality of the child.

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63 Case C-133/15 *Chavez-Vilchez a.o.*, EU:C:2017:354, para. 70.

64 *Idem*, para. 71.

65 Case C-82/16 *K.A. and others*, EU:C:2018:308, dictum para 2, 3rd indent.

66 Case C-403/09 *PPU Detiček*, EU:C:2009:810, para. 54.

### 3.6 The Best Interests of (EU) Children and Derived Residence Rights for Family Members

The principle of the best interests of the child means that decisions concerning entrance, residence and stay of children in a country must show their best interests being the first priority.<sup>67</sup> It is undeniably true that the selection of cases in this chapter does not revolve around residence of the children, but around residence of their parents. It may explain why it took quite some time before the best interests of the child were “discovered” as an interpretation tool in these particular cases. The best interests of the child principle does not figure in Regulation 1612/68 nor in Directive 2004/38. The absence of the principle in the case law with respect to derived residence based on enrolment of children in the educational system, as well as in cases where family members derive a residence right in a host State on the basis of Article 21 TFEU and Directive 2004/38 is therefore less surprising. The best interests of the child principle is however included in EU secondary legislation focusing on asylum and immigration policy, including in the Family Reunification Directive.<sup>68</sup> It led to the paradoxical result in *O. and S.* and *L.*<sup>69</sup> that the best interests of the child should be taken into account where a non-EU parent was a sponsor but no reference to those interests was made where the EU child served as sponsor.

The result may be called paradoxical, because the introduction of EU citizenship has strengthened security of residence for children as an autonomous and independent right both in a host State and in the State of their nationality. Their capacity to be holders of EU citizenship rights is not conditional upon the attainment of the age prescribed for the acquisition of legal capacity to exercise those rights personally.<sup>70</sup> In both landmark cases *Zhu and Chen* and *Zambrano*, the Court starts its reasoning with the phrase that Union citizenship is destined to be the fundamental status of nationals of the Member States.<sup>71</sup> This status implies that children enjoy a conditional right of residence in a host State and a right of residence in the State of their nationality. The non-EU

67 Kalverboer, M., D. Beltman, C. van Os & E. Zijlstra (2017), The Best Interests of the Child in Cases of Migration. Assessing and Determining the Best Interests of the Child in Migration Procedures, 25 *International Journal of Children's Rights*, p. 115.

68 Directive 2003/86 of 22 September 2003 on the right to family reunification, *OJ L251*, 03/10/2003, pp. 12–18, article 5, see for reference to other instances of inclusion of the principle in secondary legislation also Kalverboer et al. 2017, p. 118.

69 Joined Cases C-356/11 and C-357/11, *O. and S.*, and *L.*, EU:C:2012:776.

70 Case C-200/02 *Zhu and Chen*, EU:C:2004:639, para. 20.

71 Case C-200/02 *Zhu and Chen*, EU:C:2004:639, para. 25; Case C-34/09 *Zambrano*, EU:C:2011:124, para. 41.

parent taking care of the children derives a right of residence from the EU citizenship status of the child whenever a relationship of dependency between the parent and the child is such that without the parent the child would be deprived of its (conditional) residence right. In *Zhu and Chen*, the Court draws on its reasoning in *Baumbast* with respect to Article 12 of the Regulation 1612/68 (at para 45), but does not refer to the best interests of the child principle.

The Court side-stepped the paradoxical result stemming from *O. and S.*, and *L.* with its ruling in *Chavez-Vilchez*.<sup>72</sup> Advocate General Szpunar had made an unequivocal argument to take the best interests of the child principle as the prism through which the provisions of EU law must be read.<sup>73</sup> The Court seemed to follow its Advocate General in its ruling, and gave substance to these interests. Thus, it indicated that risks for the child's equilibrium caused by refusing derived residence to a parent must be taken into account as part of the best interests of the child prism.

Now that the Court has established that the best interests of the child are relevant in assessing relationships of dependency between child and parents for the purpose of derived residence rights, we might expect the principle to play a role in assessing derived residence based on children's enrolment in education as well. As Kalverboer and others argue, since Article 24 of the Charter is based on Article 3 CRC the principle should be determined in accordance with General Comment no. 14, containing guidelines on the implementation of the best interests of the child, published by the United Nations Committee on the Rights of the Child.<sup>74</sup> This would mean that in the assessment of the child's best interests specific elements should be taken into account, amongst which preservation of the family environment and maintaining relations with the family and preservation of the ties of the child in a wider sense as well as the child's right to education.<sup>75</sup> With respect to the family environment, the Court embraces the CRC more fully in cases on judicial cooperation in civil matters.<sup>76</sup> We will have to wait and see whether a stronger embracement also follows in decisions on derived residence rights for family members. I for one think that taking the best interests of the child seriously should lead to an interpretation of the rights linked to enrolment in an educational institution for children of (former) self-employed EU citizens that is more in line with the

72 Case C-133/15 *Chavez-Vilchez a.o.*, EU:C:2017:354.

73 AG Szpunar 8 September 2016, Case C-133/15 *Chavez-Vilchez a.o.*, EU:C:2016:659, para. 45.

74 Committee on the Rights of the Children, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/c/GC/14, 29/05/2013. See also Kalverboer et al. 2017.

75 Kalverboer et al. 2017, p. 120.

76 Case C-403/09 PPU *Detiček*, EU:C:2009:810.

interpretation of Article 12 of Regulation 1612/68. Finally, taking both children's EU citizenship and the best interests of the child seriously implies that the Court's acknowledgement that respect for a child's right to maintain on a regular basis a personal relationship and contact with both parents merges into the best interests of any child should always be included in the balance of interests whenever the authorities have to decide on children providing a derived residence right for their parents based on EU law.

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