

THE RIGHTS OF CHILDREN AS FAMILY MEMBERS WITHIN THE FREE MOVEMENT OF PERSONS IN EU LAW

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Summary. The article deals with the legal status of children as the family members of EU nationals and their rights they derive from EU nationals in the area of free movement of persons. The article points out to the existing EU legislation that guarantees the EU nationals the right to move freely and to reside on the territory of another EU member states. The article explains who are considered to be family members, the position of children as family member, and also explains the relevant case law that explains the opinions of the Court of Justice of the EU relating to the right of family members to move and to reside on the territory of the host member states. The article presents a recent case in which the Court of Justice had to deal with a reverse situation, i.e. where the dependent child is EU national and the parent derives the right to residence from his/her child.

Key words: free movement of persons, Art. 21 TFEU, Directive 2004/38, right to move, right to reside

FOREWORD

Free movement of persons, i.e. the right of EU citizens to move from one member state to another, belongs to basic rights of the internal market. Free movement of persons was much more sensitive in the integration process as the free movement of goods due to the fact that the free movement of persons is connected also with safety issues and social issues. This was also the reason why the original legal regulation was strictly connected with economic freedoms of the internal market. Economically active citizens brought also many advantages as these persons were very often skilful and educated and were thus able to promote the economic progress. It is important to note that the free movement of persons belongs only to EU citizens and does not cover third country nationals. However, the third countries nationals who are the family members of EU nationals have a special position. They derive their rights from EU nationals who realizes his/her freedom to free movement and who has the position of the primary beneficiary.

It is necessary to realize that the primary law does not enable the free movement of persons without any restrictions. Some conditions must be fulfilled in order the EU nationals may realize their right of free movement of persons. Firstly, the natural persons must be EU nationals or the legal person must have their registered seat within the territory of EU member state and secondly, these persons must perform certain economic activity assumed by EU law, whether as a worker (Art. 45–48 TFEU), self-employed person, company, organizational unit, or a subsidiary (Art. 49–55 TFEU) or as a service provider or their recipient (Art. 56–62 TFEU). Persons who perform one from these activities may realize a right of free movement of persons. However, always in connection with certain economic activity that forms the legal basis for free movement. Free movement of persons is in fact a requirement for realization of freedoms of internal market. This freedom however underlies to specific restrictions consisting in public policy, public security, protection of public health or restrictions for employment public service or state service.

Prohibition of discrimination based on nationality is a common characteristic feature for the freedoms of internal market. This means that a person from one member state has a right to equal treatment in a comparable situation as a person from the home member state.¹

The initial reason of member states why the Articles were included into primary law was to ensure the free movement of economically active persons (i.e. persons who contribute to economic development) without any barriers. The intention was also to balance the price of work within the EU and to achieve the prosperity for EU citizens. This intention was realized gradually as in the early years the free movement of persons was used only by a small number of EU nationals. There were several reasons, especially there was a need to ensure the free movement also for family members and to ensure social security guarantees when the EU nationals decided to realize their freedom to move. There are however also other social, cultural or language restrictions that became significant after the EU was expanded to 28 member states (from 1 July 2013).

The EU adopted measures aimed to fight against different restrictions for free movement of persons. This was especially made by adoption of secondary legislation in 60s and 70s years of the 20th century. The content of secondary legislation was significantly influenced by the case-law of European Court of Justice. In the secondary legislation can be seen the shift from understanding the freedom of free movement of persons from strictly economic concept to political concept, especially after the Maastricht Treaty introduced the concept of EU citizenship. The Maastricht Treaty introduced the political concept of EU citizenship and introduced new political rights for EU citizens.²

¹ Art. 18 TFEU provides a general principle of non-discrimination based on nationality.

² See Art. 9 TEU and Art. 20 TEU that guarantee the right to move and reside freely within the

1. LEGISLATION ON FREE MOVEMENT OF PERSONS

EU citizenship confers every citizen of any EU member state the right to move and reside freely within the territory of the Member States. The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers. It is therefore necessary to codify in EU law the instruments for exercising these rights. Except of the treaties, the most important instrument regulating the free movement of persons is the 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 (hereinafter as “Directive 2004/38”). This directive was adopted with the intention to review and amend the fragmented legislation dealing separately with workers, self-employed persons, as well as students and other inactive persons. Another intention was to simplify and strengthen the right of free movement and residence of all EU nationals, together with their family members. Directive 2004/38 is based on the principle that the longer EU citizens lives in another member state, the more rights he/she has. In connection with the residence in another member state, the EU citizen does not need to prove any economic relationship, if his/her residence is shorter than three months or longer than five years. This is a clear evidence of how the EU has moved away from the original roots of integration, specifically related to the internal market towards civil rights.

1.1. Personal scope of free movement of persons

Personal scope means that person who intends to apply the rules on free movement, must be a national of EU member state³ who moves to or resides in a member state other than that of which he/she is a national, together with his/her family members.⁴ Free movement of persons within the EU would not be possible if the free movement was not enabled also to family members of the primary beneficiary who intends to realize the rights connected with internal market functioning. The rights of family members are derived from the rights

territory of the Member States.

³ The member states set their own criteria for acquirement of state citizenship. In order a person may use the rights arising from EU law it is important the fact that he/she is a national of the EU member state. The member states are not competent to investigate the intention, way or other circumstances how the person acquired the citizenship of another EU member state.

⁴ Art. 3(1) of the Directive 2004/38.

of that EU national who realizes one of the internal market freedoms. The Directive 2004/38 legally defines the term „family member.”⁵

“Family member” means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member 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;
- (c) *the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)*;
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)

1.2. Rights acknowledged to family members

The Directive 2004/38 confers the rights on free movement both to EU national and his/her family member (this article deals with the rights in the extent of the Directive 2004/38).

As stated above, the Directive 2004/38 applies to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them.⁶ The member states are obliged to enable the entry and residence for EU citizens and their family members, irrespective of their nationality, not falling under the definition in point 2 of Art. 2 who, in the country from which they have come, are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen.⁷ This right only belongs to the partner with whom the EU citizen has a durable relationship that is duly attested.⁸

Article 3 of the Directive 2004/38

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:

⁵ Art. 2(2) of the Directive 2004/38.

⁶ Ibid.

⁷ Art. 3(2)(a) of the Directive 2004/38.

⁸ Art. 3(2)(b) of the Directive 2004/38.

- 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.

In relation to residence, EU citizens have the right to stay longer than three months⁹ if they (i) are workers or self-employed persons in the host Member State, (ii) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, (iii) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence or (iv) are family members accompanying or joining a EU citizen who satisfies the conditions referred previous points.

The right of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the EU citizen in the host Member State, provided that such EU citizen satisfies the conditions for residence in the host Member State.¹⁰

Under certain circumstances, an EU citizen who resides in a host Member State is no longer a worker or self-employed. He/she shall retain the status of worker or self-employed person in the following circumstances¹¹: (i) he/she is temporarily unable to work as the result of an illness or accident, (ii) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office, (iii) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months or (iv) he/she embarks on vocational training.

⁹ For details on staying for more than three months, see Art. 7 of the Directive 2004/38.

¹⁰ Art. 7(2) of the Directive 2004/38.

¹¹ Art. 7(3) of the Directive 2004/38.

There were several cases in which the Court of Justice of the EU interpreted the rights of a family member, including the rights of the descendants. These judgments provide us the interpretation of laws and help also the authorities of the member states not to breach laws that guarantee the right of free movement of persons.

2. JUDGMENT OF THE COURT C-200/02, KUNQIAN CATHERINE ZHU AND MAN LAVETTE CHEN V SECRETARY OF STATE FOR THE HOME DEPARTMENT¹²

In this case the Court of Justice („Court”) issued a judgment on 19 October 2004. The case concerned a situation where the parents were Chinese nationals. The couple’s first child was born in the People’s Republic of China in 1998. Mrs Chen, who wished to give birth to a second child, entered the United Kingdom in May 2000 when she was about six months pregnant. She went to Belfast in July of the same year and Catherine was born there on 16 September 2000. The mother and her child lived after in Cardiff, Wales (United Kingdom).

2.1. Facts of the case

According to Irish legislation, Ireland allows any person born on the island of Ireland to acquire Irish nationality. A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country. Under these rules, Catherine was issued with an Irish passport in September 2000. She was however not entitled to acquire United Kingdom nationality as the UK departed from the *ius soli* principle. The UK authorities declared that it was clear that Mrs Chen took up residence in the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to enable her to acquire the right to reside with her child in the UK. In addition, Ireland forms part of the Common Travel Area, i.e. the Irish nationals do not as a general rule have to obtain a permit to enter and reside in the UK. Catherine, in contrast to Mrs Chen, may move freely within the UK and within Ireland (aside from her parents). The situation of Catherine is that she is dependent both emotionally and financially on her mother, that her mother is her primary carer, Catherine receives private medical services and child-care services in return for payment in the UK, she also lost the right to acquire Chinese nationality by virtue of having been born in Northern Ireland and her subsequent acquisition of Irish nationality and, as a result, that she only has the right to enter Chinese territory under a visa allowing residence for a maximum of 30 days per visit. The Catherine’s parents

¹² ECLI:EU:C:2004:639

are economically independent, they do not rely upon public funds in the UK and have health insurance.

The ground for refusal of residence for Catherine's parents is that Catherine is a child of eight months of age and does not exercise any rights arising from the EU law and is not entitled to reside in the UK under EU law. The decision was subject to an appeal and the Immigration Appellate Authority, which submitted preliminary questions to the Court of Justice of the EU. These questions, *inter alia*, deal with a situation whether a minor EU citizen is conferred a right to enter and reside in the host Member State. If so, does it consequently confer the right to enter and reside to a third country national who is the mother and primary carer, to reside with the child.

2.2. The findings of the Court of Justice

The Court of Justice summarized the questions of the national court. The essence of these questions is to ascertain whether the relevant EU law, read in conjunction with Art. 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), confer, upon a young minor who is a national of a Member State, and is in the care of a parent who is a national of a non-member country, the right to reside in another Member State where the minor receives child-care services. If such right be conferred, the national court wishes to ascertain whether those same provisions consequently confer a right of residence on the parent concerned.¹³

2.2.1. The right to move and reside freely

The Court of Justice refuses the contention that a person cannot claim the benefit of the provisions of EU law on free movement of persons and residence simply because that person has never moved from one Member State to another Member State.¹⁴ The Court of Justice argued that the situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of EU law on freedom of movement and of residence.¹⁵ In addition, a young child can take advantage of the rights of free movement and residence guaranteed by EU law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally. The Court of Justice concluded that neither the Treaties, nor the secondary

¹³ Judgment C-200/02, point 16.

¹⁴ *Ibid.*, point 18.

¹⁵ *Ibid.*, point 19.

laws require that the enjoyment of the rights on free movement should be made conditional upon the attainment of a minimum age.¹⁶

The Court of Justice was dealing with Art. 18 of the EC Treaty¹⁷ that provides the right to reside in the territory of the Member States to EU citizens.¹⁸ It stated that this right is granted directly to every citizen of the EU by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the EU, Catherine is entitled to rely on this right.¹⁹ The EU stipulates some limitations and conditions, i.e. the nationals of a Member State who wish to benefit from the right to reside in their territory and the members of their families cannot be a burden on the social assistance system of the host Member State during their period of residence. In this situation, Catherine has both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host Member State. The Irish and UK government argues, that the availability of sufficient resources means that the person concerned must possess those resources personally and may not use for that purpose those of an accompanying family member. The Court of Justice rejected this argument as unfounded and emphasized the necessity of broad interpretation of the free movement of persons as it constitutes a fundamental principle.²⁰ The limitations and conditions to move and reside freely are based on the idea that the exercise of the right of residence of citizens of the EU can be subordinated to the legitimate interests of the Member States and the beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State. The Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by EU law and in accordance with the principle of proportionality.²¹ The Court of Justice explained why the argumentation of the Irish and UK government concerning the sufficiency of resources cannot be accepted. It argues that it would establish a new condition as to the origin of the resources which would not be necessary for the attainment of the pursued objective pursued, i.e. the protection of the public finances of the Member States. This condition would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence.²²

¹⁶ *Ibid.*, point 20.

¹⁷ Now Art. 21 TFEU that guarantees every EU citizen the right to move and reside freely within the territory of the Member States. This right may be subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

¹⁸ According to the Art. 20 TFEU, 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.

¹⁹ Judgment C-200/02, point 26.

²⁰ *Ibid.*, point 30.

²¹ *Ibid.*, point 32.

²² *Ibid.*, point 33.

2.2.2. Acquiring of nationality

The UK government contends that Mrs Chen is not entitled to rely on the provisions of EU law in question because she moved to Northern Ireland with the aim of having her child acquire the nationality of another Member State. This should constitute an attempt to exploit the provisions of EU law improperly and, according to the UK government, the aims pursued by those EU law provisions are not served where a national of a non-member country wishing to reside in a Member State, without however moving or wishing to move from one Member State to another, arranges matters in such a way as to give birth to a child in a part of the host Member State to which another Member State applies its rules governing acquisition of nationality *iure soli*. UK also stipulates that it is entitled to take measures to prevent individuals from improperly taking advantage of provisions of EU law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation.²³ The Court of Justice rejected this argument despite the purpose of Mrs Chen's stay in the UK was to create a situation in which the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure for her child and for herself a long-term right to reside in the UK. The Court of Justice stated that under international law, it is for each Member State, to lay down the conditions for the acquisition and loss of nationality. And none of the parties that submitted observations to the Court has questioned either the legality, or the fact, of Catherine's acquisition of Irish nationality. The Court of Justice declared that it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.²⁴ The Court of Justice concluded that the right to move and reside freely as guaranteed by the Treaty is also conferred on a young minor who is a national of a Member State and who is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.²⁵

2.2.3. Residence of the mother of the minor – third country national

The secondary legislation postulates a situation in which the family members who are the dependent direct relatives in the ascending line have the rights derived from the EU national, including the right of residence, the right

²³ Ibid., point 34.

²⁴ Ibid., point 39.

²⁵ Ibid., point 41.

to install themselves with the holder of the right of residence, regardless of their nationality.

This right however does not enable a parent who is a national of a non-member country of the EU to acquire the right to reside by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the UK is dependent on her child's right of residence. The EU law only deals with a status of 'dependent' member of the family of a holder of a right of residence. This status is characterised by the fact that material support for the family member is provided by the holder of the right of residence, and not vice versa, like in this situation, i.e. where the position is exactly the opposite, i.e. the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. The Court of Justice declares that the parent cannot claim to be a 'dependent' relative in the ascending line with a view to having the benefit of a right of residence in the UK.²⁶

On the other hand, if the parent, who is the carer of the child who is granted the right of residence, would be refused the residence in the host Member State with the child, the child's right of residence would be deprived of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.²⁷ The Court of Justice thus required that a parent who is minor's primary carer, shall have the right to reside with the child in the host Member State.²⁸

CONCLUSION

The right to move freely and to reside within the territories of EU member states is guaranteed both as a political right (right that belongs to EU citizens) and economical right (the right of free movement of persons). The article describes that these rights would not be effectively applicable, if the family members of EU citizens would not have any rights that would enable them to accompany the EU citizens when moving from one EU member state to another. The Directive 2004/38 defines who is considered as a family member. The children of EU citizens who are direct descendants and who are under the age of 21 or are dependants on EU citizens, are family members and may benefit from the right to move and top reside, however, together with the EU

²⁶ *Ibid.*, point 44.

²⁷ *Ibid.*, point 45.

²⁸ *Ibid.*, point 46.

national. It is also important to realize that the EU legislation on free movement of persons is applicable to a situation of EU citizens who move to or reside in a Member State other than that of which they are nationals. I.e., the EU law is not applicable to purely domestic situations. The article also described a case in which the Court of Justice established a principle that a Member State cannot deny residency to the mother of a child with citizenship in that Member State as to do so would be contrary to that child's interests and contrary to Art. 8 of the European Convention on Human Rights.

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PRAWA DZIECI JAKO CZŁONKÓW RODZINY W RAMACH SWOBODNEGO PRZEPEŁYWU OSÓB W PRAWIE UE

Streszczenie. Artykuł dotyczy statusu prawnego dzieci jako członków rodziny obywateli UE oraz ich praw, które pozbawiają obywateli UE w dziedzinie swobodnego przepływu osób. W artykule wskazano na istniejące prawodawstwo UE, które gwarantuje obywatelom UE prawo do swobodnego przemieszczania się i pobytu na terytorium innych państw członkowskich UE. W artykule wyjaśniono, kto jest uważany za członka rodziny, pozycję dziecka jako członka rodziny, a także wyjaśniono odpowiednie orzecznictwo Trybunału Sprawiedliwości UE dotyczące prawa członków rodziny do przemieszczania się i pobytu na terytorium przyjmujących państw członkowskich.

Słowa kluczowe: swobodny przepływ osób, art. 21 TFUE, Dyrektywa 2004/38, prawo do przemieszczania się, prawo pobytu

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