

CASE LAW

A. Court of Justice

Family rights for circular migrants and frontier workers: *O and B*, and *S and G*.

Case C-456/12, *O v. Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v. B*, EU:C:2014:135; and Case C-457/12, *S v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. G*, EU:C:2014:136, Judgments of the Court (Grand Chamber) of 12 March 2014.

1. Introduction

The cases annotated here seek to clarify the law in relation to the family rights of own citizens when returning to the Member State of origin (circular migration);¹ or when exercising the rights to free movement in another Member State whilst residing in the Member State of nationality (frontier migration). This is a complex area of the law in a political minefield: the Court has, broadly speaking, been generous with the rights of family members; it is sufficient here to recall the case law on the derived right of residence of parents of migrant children in education.² Yet, the cases annotated here are difficult because they are at the very boundary between national and European law: indeed it is this boundary that the Court was asked to clarify. In this respect, it is clear that Member States wish to retain regulatory prerogatives in relation to the rights of family reunification of own citizens: it is no coincidence that Article 3(1) Directive 2004/38 provides that the Directive

1. I am grateful to the reviewers for suggesting the notion of “circular” migration.

2. See e.g. Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, EU:C:2002:493; Case C-310/08, *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80; Case C-480/08, *Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*, EU:C:2010:83; Case C-529/11, *Alarape and Tijani*, EU:C:2013:290.

can only be invoked against a State different from that of nationality.³ However, if the political will is clear, the legal situation is more complex since, pre-Directive 2004/38, the Court had already declared that Union citizens could invoke the Treaty against their State of nationality when they establish a cross-border element;⁴ and that the refusal to grant family reunification rights could be construed as a barrier to movement.⁵ Here, therefore, the Grand Chamber had to elaborate on the extent to which the primary Treaty provisions grant rights to returning nationals and to frontier workers, that is to say it had to elaborate on the conditions necessary to invoke the *Singh* and the *Carpenter* doctrines respectively.

Both the *Singh* and the *Carpenter* doctrines have proven to be very contentious with the Member States; in particular, some governments do not welcome further incursions in their migration policies. Furthermore, following the introduction of Union citizenship it has become easier to satisfy some cross-border requirement: what then if Union citizens tried to rely on those doctrines too easily, without having established proper economic/cross-border credentials? The national family reunification regimes would be directly undermined, and indirectly harmonized, through the “clever” exploitation of EU law. This is the problem that the Court seemingly attempted to solve in the rulings in questions. And yet, the carefully tailored solutions seem to fit no one – far from clarifying the scope of application of the *Carpenter* and *Singh* doctrines, and the reasons underlying them, it creates a system which is both confused and legally irrational.

2. Facts of the case and questions referred

The cases concerned four different claimants, all third country national family members of Dutch citizens residing in the Netherlands.

The first case (C-456/12) concerned Mr O and Mr B. Mr O was the husband of Sponsor O; they married in France and then took up residence in Spain. Since Sponsor O could not find work in Spain, she went back to the

3. 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, O.J. 2004, L 158/77.

4. E.g. when providing, or intending to provide, services abroad e.g. Case C-405/98, *Konsumtombudsmannen (KO) v. Gourmet International Products AB (GIP)*, EU:C:2001:135; upon returning after having exercised free movement rights e.g. Case C-19/92, *Kraus*, EU:C:1993:125.

5. E.g. Case C-370/90, *Surinder Singh*, EU:C:1992:296; Case C-291/05, *Eind*, EU:C:2007:771; Case C-60/00, *Carpenter*, EU:C:2002:434; Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, EU:C:2003:491.

Netherlands and visited O regularly in Spain. Eventually, after 3 years of living apart, O went back to live with sponsor O in the Netherlands and applied for a residence permit which was denied.

Mr B was a Moroccan national now married to Sponsor B; they lived for several years as an unmarried couple in the Netherlands but had to leave after Mr B was declared an undesirable alien for using a fake passport. The couple then moved to Belgium; Sponsor B, having failed to find a job in Belgium, returned to the Netherlands from where she travelled to Belgium every weekend to visit her partner. Mr B's residence in Belgium was terminated as a result of the Dutch declaration of undesirability, and he therefore moved back to Morocco, where the couple got married. The declaration of undesirability was then lifted at B's request and B returned to the Netherlands to reside with his wife. His residence request (and work permit) was then refused.

The second case (C-457/12) concerned the third country national family members of Dutch citizens living in the Netherlands but working wholly or partially in Belgium. Ms S was the Ukrainian mother-in-law of sponsor S; she took care of Sponsor S's son (her grandson). Sponsor S spent about 30 percent of his working life preparing or making trips to Belgium.

Mrs G was a Peruvian national married to Sponsor G with whom she had one child; the family unit also comprised G's child from another relationship. Sponsor G worked in Belgium, country to which he commuted daily. Mrs G's residence permit was also refused.

The national courts enquired as to the extent to which EU law conferred derived rights of residence to TCN family members of own citizens residing in the national territory.

In particular, in the case of *O and B* (C-465/12), the national court sought clarification of the scope of the *Singh* doctrine.⁶ It should be recalled that in *Singh* the Court held that own citizens who have exercised their free movement rights (in that case the free movement of workers' rights) have the same rights to be accompanied by their spouses upon returning home as those conferred to migrants by secondary legislation.⁷ This was elaborated upon in *Eind* where the Court clarified that the analogous application of secondary legislation did not mean that the returning migrant had to satisfy the same requirements as those necessary to establish residence in a host State.⁸ Therefore, the returning migrant did not need to be economically active (i.e.

6. Case C-370/90, *Surinder Singh*.

7. Then Regulation 1612/68 (O.J. 1968, L 257/2), Directive 68/360 (O.J. 1968, L 257/13); Directive 73/148 (O.J. 1973, L 172/14); Case C-370/90, *Surinder Singh*, para 21.

8. Case C-291/05, *Eind*.

employed or self-employed) in the home country for the *Singh* doctrine to apply. In the case here noted, the national court therefore asked whether Directive 2004/38 applied by analogy to own citizens returning after having resided in another Member State as Union citizens and service recipients; if so whether there was a requirement of a minimum length of stay in the host country for such rights to materialize; and whether “frequency of residence”, i.e. weekly visits, rather than continuous residence could be taken into account for these purposes.

In the case of *S and G* (C-457/12) the national court sought clarification of the scope of the *Carpenter* doctrine. In *Carpenter*,⁹ the Court had found a link between family life and the conditions under which a Union citizen exercised his (economic) free movement rights; as a result the refusal to grant the residence permit to the spouse of an own citizen providing services in another Member State was construed as an obstacle to the freedom to provide services, which therefore had to be justified and comply with fundamental rights. The Court then found that the application of the British rules on migration in the case at issue infringed the right to family life of the claimants and therefore could not be justified on public interest grounds. The national court enquired whether the wife and mother-in-law of Union citizens working, or paying regular visits for the purpose of work, respectively, in another Member State, could claim a derived right of residence pursuant to the Treaty free movement of workers provisions.¹⁰

3. Advocate General Sharpston’s Opinion

Advocate General Sharpston delivered a joint Opinion for *O and B* and *S and G*, urging the Court to clarify the extent to which own citizens can rely on EU law to gain residence rights for TCN family members. Ms Sharpston started her analysis by recalling the rationale behind the derived rights of residence. In particular, she argued that derived rights of residence “only exist where these are necessary to ensure that EU citizens can exercise their free movement and residence rights effectively”.¹¹ For this reason, in her view, two questions need answering: first whether the Union citizen had exercised or is exercising such

9. Case C-60/00, *Carpenter*.

10. It should be noted that the Dutch rules seem to be particularly restrictive and their application to a Suriname national whose husband and children had Dutch nationality was recently found to infringe Art. 8 ECHR by the Grand Chamber of the European Court of Human Rights in *Jeunesse v. the Netherlands* (Appl. No 12738/10, ruling delivered 3 Oct. 2014).

11. Opinion, EU:C:2013:837; para 49; on this point see section 5.5. *infra*.

rights; and secondly, whether denying residency rights to family members would have the effect of restricting the exercise of the free movement rights by the Union citizen. After having excluded that Directive 2004/38 could apply to the situations under consideration,¹² the Advocate General turned to analyse whether the claimants could derive residency rights by virtue of the Treaty provisions on Union citizenship, interpreted also having regard to the right to family life guaranteed by Article 7 of the EU Charter of Fundamental Rights. The Advocate General then proceeded to recall the relevant case law: *Singh* and *Eind*, where the Court held that a returning worker would have the same right to be joined by family members as she enjoyed in the host Member State; and *Carpenter*, where the Court held that an own-citizen who had established cross-border credentials by virtue of having clients and/or travelling abroad, might be able to derive from Article 56 TFEU a right to reside for his third country national spouse.

The Advocate General then turned to analyse the criterion of residence: in particular, what form should the residence abroad take in order for the returning migrant to enjoy family reunification rights under the Treaty? And, would mere freedom of movement (*à la Carpenter*) be enough? Finally, would movement with a view to receive services abroad be sufficient to trigger family reunification rights upon returning to the home State? The answers to these questions vary: thus, in Sharpston's analysis a minimum period of residence is not required in order to trigger Treaty rights upon returning; however, the Union citizen has only exercised her right to reside in another Member State when the habitual centre of her interests has been transferred there.

On the other hand in *Carpenter*-type situations, there must be an obstacle so that denial of residency rights to the family member would result in the EU citizen *having to move*, cease to move, or to abandon the "real" prospect of moving.¹³ In the case in which the citizen has moved to receive services abroad, it is only in exceptional circumstances that derived rights of residence for TCN family members would be relevant: for instance, in the case in which the citizen were to move to receive medical services abroad. Finally, in the case in which a Union citizen has moved only with a view to exercising her family rights upon returning, the test would be the same: whether the measure affects the choice whether to move or not to move.

12. Directive 2004/38 applies only to Union citizens "who move to or reside in a Member State other than that of which they are a national", see Art. 3(1) Directive 2004/38; and e.g. Case C-434/09, *McCarthy*, EU:C:2011:277.

13. Opinion, para 123.

3.1. *Application of the proposed framework to the facts of the cases under consideration*

Sponsor O had moved to Spain with her husband; she then moved back to the Netherlands. According to the Advocate General then, her husband O would be able to rely on the Treaty if the couple had resided in Spain under Directive 2004/38; however his right to reside in the Netherlands would be subject to the same limitations and conditions set out in Directive 2004/38.¹⁴ On the other hand, the situation of B was less straightforward, since Sponsor B and B only married *after* having resided together in the EU; their only residence as a married couple was in Morocco and therefore irrelevant for the purposes of EU law.

In relation to the second case, *S and G* (C-457/12), Advocate General Sharpston suggested that the solution would depend on whether there was a causal link between the family member's presence in the home territory, and the exercise of the right to free movement by the Union citizen. In the case of *S* (the mother-in-law caring for the child of a Union citizen regularly travelling to another Member State for work), the referring court would "need to examine whether denying residence to S would cause sponsor S to seek alternative employment that would not involve the exercise of rights of free movement or cause him to move with his family, including S, to another Member State".¹⁵ In the case of *G* (the spouse of a Union citizen and mother of his child) the connection would presumably be stronger since as "spouses, G and sponsor G must be presumed to be dependent on each other in material, legal and emotional terms".¹⁶ Therefore, denying Mrs G a residence permit in the Netherlands "*might plausibly*"¹⁷ cause her husband to take up residence in

14. A.G. Sharpston gave a narrow interpretation of Case C-291/05, *Eind* (and one not supported by the case itself) requiring the returning migrant to satisfy the conditions contained in secondary legislation (para 95). Fortunately, the Court did not follow the A.G. as this would have imposed conditions on the right to reside in the own Member State, the very core of nationality.

15. Opinion, para 154.

16. Ibid., para 155; Nic Shuibhne "The developing legal dimensions of Union citizenship", in Arnall and Chalmers, *Handbook of EU Law* (OUP, 2015 (forthcoming)) has noted how the language unhelpfully differs, if ever so slightly but rather significantly, from the language used by the Court in Joined Cases C-356 & 357/11, *O and S*, EU:C:2012:776. In the latter case, the Court referred to persons "on whom those citizens are legally, financially *or* emotionally dependent" (para 56, emphasis added), hence suggesting that the criteria can be disjunctively satisfied and are not cumulative. Whether A.G. Sharpston intended her test to be more restrictive than the existing one is open to debate, since the A.G. seems to be making a statement of fact (as spouses the claimants were in fact dependent upon one another in legal, financial and emotional terms).

17. Opinion, para 156 (emphasis added).

Belgium so as to be able to rely on EU rights, which would be a restriction of his freedom to be a frontier worker.

3.2. *Preliminary remarks on the Opinion of Advocate General Sharpston*

As we shall see below, the Court cherry-picked from the Opinion of its Advocate General: whilst the end result in both Opinion and judgments is similar, the paths taken are not always the same. For instance, the ruling does not receive Ms Sharpston's suggestion to broaden the scope of application of the Treaty free movement provisions so as to include a right *not* to move.¹⁸ This would be the corollary of the right to move, and also, although this was not expressly discussed by the Advocate General, would bridge the gap between have and have-nots (or move and move-nots) in EU law, recognizing the legitimacy of the Union citizen's decision not to leave family and friends behind. But this interpretation would also potentially open up the Treaty to those in a purely internal situation since the fact of benefiting of fewer rights than those granted by EU law, especially in family reunification cases, might "affect the EU citizen's free choice to exercise that right".¹⁹ The refusal of the Court to follow this interpretative path is therefore not surprising in light of the reticence towards tackling the problems of reverse discrimination through a European, rather than national, solution.²⁰ Still, it is a missed opportunity as the solution proposed by the Advocate General was both simple and elegant, and might have helped in addressing reverse discrimination, one of the most problematic side-effects of Union free movement law, at a moment in which the majority of Union citizens, those who do not exercise the right to move, might struggle to see the benefits of European integration.

The Opinion also differs from the judgment because Advocate General Sharpston addresses, at least formally, the relevance of the Charter to the cases at issue. In particular she suggests that fundamental rights (and Charter) considerations "permeate the substance of EU citizenship rights" so that the latter must be interpreted always so as to be Charter compliant. This incorporation of the Charter rights into the interpretation of Treaty rights is

18. A.G. Sharpston is not new to advocating a broader interpretation of the free movement provisions to address the problem of reverse discrimination; see e.g. Opinion in Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon v. Gouvernement flamand*, EU:C:2007:398; Opinion in Case C-34/09, *Ruiz Zambrano*, EU:C:2010:560.

19. Opinion, para 89.

20. For the Court's resistance to tackling reverse discrimination (at least openly) see e.g. Case C-256/11, *Dereci*; Case C-87/12, *Ymeraga and Ymeraga-Tafarshiku*, EU:C:2013:291. There is a wide body of literature on reverse discrimination; for a very insightful review see e.g. Kochenov, "The essence of Union citizenship emerging from the last ten years of academic debate: Beyond the cherry blossoms and the moon", 62 ICLQ (2013), 97.

commendable – and indeed would be consistent with both the Charter and the previous interpretation given by the Court to fundamental rights.²¹ And yet, even the Advocate General does not deliver on her promise: if fundamental rights issues must be incorporated in the analysis of Treaty rights, then such incorporation must be made explicit or else both citizens and national courts will be left in the dark as to the relevance of, and the protection afforded by, the Charter. In the Opinion, however, fundamental rights considerations are not openly addressed.

4. The Court's rulings

4.1. *Judgment of the Court in Case C-456/12, O and B*

The Grand Chamber confirmed that Directive 2004/38 is not applicable to own citizens, i.e. to situations like the ones at issue in both proceedings, where the claimant is challenging the rules of the State of her nationality. The Court then proceeded to examine the extent to which the primary Treaty provisions would help the claimants' plight: in particular, it clarified the conditions for the applicability of the *Singh* doctrine, following (broadly speaking) the advice of its Advocate General. Thus, the Court repeated that the reason to confer derived rights of residence on family members in the first place, is based on the fact that otherwise the right of Union citizens to move and reside in other Member States would be affected. The same rationale can then be applied to returning citizens: family members should be conferred a derived right to reside insofar as not doing so might discourage the Union citizen from moving in the first place. This would be the case where the Union citizen resided with his family members in the territory of the host State "*pursuant to, and in conformity with, Union law*".²²

The Court then found that the provisions of Directive 2004/38 should be applied by analogy to the family of the returning migrant. However, obstacles to movement "will arise only where the residence of the Union citizen in the host Member State has been *sufficiently genuine* so as to enable that citizen to create and strengthen family life in that Member State".²³ The Court then decided that Union citizens who exercise their right to short term residence

21. E.g. Case 36/75, *Rutili*, EU:C:1975:137, para 35; Case 222/84, *Johnston v. Chief Constable of Royal Ulster*, EU:C:1986:206, para 18; Case C-13/94, *P v. S Cornwall County Council*, EU:C:1996:170.

22. Para 47 of the judgment in *O and B* (emphasis added).

23. *Ibid.*, para 51 (emphasis added).

conferred by Article 6(1) (i.e. the unconditional residence of three months and under), do not intend “to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State”.²⁴ Therefore a refusal to grant family rights to a citizen returning upon having exercised short term residence “will *not* deter such a citizen from exercising his right under Article 6”.²⁵ On the other hand, when the citizen exercises her rights granted by Article 7(1) (i.e. rights of residence conditional upon economic activity or economic independence), the effectiveness of the rights conferred by Article 21(1) TFEU demands that the citizen’s family life in the host “Member State may continue on returning to the Member State of which [she] is a national”,²⁶ or else the citizen might be discouraged from leaving because of the uncertainty about whether she will be able to continue in her Member State of origin a family life with her “immediate family members”.²⁷ This is especially the case if the Union citizen *and* the family member had been granted a right of permanent residence in the host State pursuant to Article 16(1) and (2) Directive 2004/38. Whilst leaving the final determination to the national court, the Court of Justice re-iterated that weekend visits and holidays would fall within the scope of Article 6(1) Directive 2004/38 (short term residence) and would therefore not qualify as “genuine” residence for the purposes of gaining rights to reside upon returning to the home State. In the second case (the Moroccan case), the Court clarified that if a claimant became a protected family member *after* the residence in the host State occurred (such as it was the case in *B*), then there would be no derived right of residence upon returning.

4.2. *Judgment of the Court in Case C-457/12, S and G*

It might be recalled that the second case concerned frontier workers, i.e. claimants that were on firmer internal market grounds. *S* concerned the derived rights of the mother-in-law of a national who travelled regularly for work to another Member State; whilst *G* concerned the spouse of an EU national living in his own Member State but working in a bordering one. These two cases then concerned the scope of the *Carpenter* ruling where the Court found that the failure of a Member State to grant a residence permit to a service provider who “occasionally” travelled abroad constituted a hindrance to the free movement provisions which therefore had to be justified; such

24. *Ibid.*, para 52.

25. *Ibid.*

26. *Ibid.*, para 54; the correction to the original is mine. Since the Union citizens in this case were women and not men it seems fairer to refer to them as such.

27. *Ibid.* (emphasis added).

justification also needed to comply with the right to family life as a fundamental right protected by Union law.

The Court found that Union citizens who regularly travel for work fall within the scope of Article 45 TFEU, and that the interpretation given to Article 56 TFEU in *Carpenter* could, quite naturally, be transposed to the free movement of workers. The Court then, much as it did in the other case here annotated, held that the justification for the derived rights of residence is to be found in the fact that a refusal would be “such as to interfere with the exercise of fundamental freedoms” guaranteed by the Treaty.²⁸ Therefore, the Court continued, it is for the national court to examine whether the conferral of a derived right of residence in the cases at issue is necessary to “guarantee the citizen’s effective exercise of the fundamental freedom guaranteed by Article 45 TFEU”.²⁹ A TCN family member therefore acquires a right to residence if the refusal to grant such a right discourages the worker from effectively exercising his rights, which is for the national court to assess.

The Court could have left it at that; however, in going on to give further guidance (particularly in relation to the situation of S) it did what it had not done in *Carpenter*: it linked the child-minding role of the family member to the potential obstacle to movement. The Court held “the fact . . . that the third-country national takes care of the Union citizens’ child may, *as is apparent from the judgment in Carpenter*, be a *relevant* factor to be taken into account”³⁰ in determining whether the refusal of family reunification rights would affect the citizen’s free movement rights. The Court continued “... although in the judgment in *Carpenter* the fact that the child in question was being taken care of by the third-country national who is a family member of the Union citizen was considered to be *decisive*, the child was, in that case, taken care of by the Union citizen’s spouse. The mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the Union citizen’s spouse is not therefore sufficient in itself to constitute such a dissuasive effect”.³¹

5. Comments

As mentioned above, the rulings under examination are both complex and unclear. We will start by some comments on each of the cases individually

28. Para 41 of the judgment in *S and G*.

29. *Ibid.*, para 42.

30. *Ibid.*, para 43 (emphasis added).

31. *Ibid.*

(sections 5.1 and 5.2), and then turn to analyse some more general issues, focusing in particular on the Court's view of the family as an instrument of integration (section 5.3); the link required to trigger family rights in circular and frontier migration (section 5.4); the Court's narrow definition of protected family members (section 5.5); and the fundamental rights problem (section 5.6). In section 5.7 we will propose a different framework of analysis.

5.1. Preliminary remarks about Case C-456/12, *O and B*

It is clear that in *O and B* the Court was attempting to balance a number of conflicting yet closely interrelated interests: first of all, to ensure that economically inactive citizens would gain equivalent rights to those afforded by the *Singh* doctrine to economically active people; secondly, to circumscribe that doctrine to ensure that a real "link" with Union law had been established before reunification rights could be invoked in the home State. In particular, the Court seems to want to avoid tourists (i.e. those whose stay in the host-country is regulated by Art. 6(1) Directive 2004/38) being able to claim reunification rights. Thirdly, and perhaps unfortunately, the Court seems to be attempting to lay down some general guidelines which, however, sit at odds with the facts of the case, as well as being of limited use for future decisions.

For instance, both *O* and *B* had originally left their own Member State in order to look for work:³² hence, it could be argued that they were, upon returning, protected by Article 45 TFEU rather than by Article 21 TFEU.³³ However, the Court does not analyse this issue: as a result we do not know whether Article 45 TFEU is not mentioned because some time had elapsed between when the sponsors had looked for a job and when the family reunification issue arose; or whether a returning work-seeker does not enjoy Article 45 TFEU protection; or whether, finally, there is no difference in the

32. It is very regrettable that the facts of the case are summarized in a different way in the A.G.'s Opinion and in the ruling: in the former, it appears that *B* resided in Belgium and returned to the Netherlands after failing to find a job (para 26); in the Court's ruling any reference to this fact disappears, so that it only states that Mrs *B* resided in Belgium "every weekend". Unfortunately, this selective recollection of facts by the Court is becoming alarmingly common (e.g. Case C-86/12, *Alokpa*, EU:C:2013:645, where the Court fails to recall the fact that Mrs *Alokpa* had been offered a permanent job, even though both the Advocate General and some of the intervening parties considered this a very relevant factor for the decision) and very problematic since the facts might well determine the applicable rules. Furthermore, the lack of a report for the hearing renders the issues concerning the selective recollection of facts all the more cogent. The same applies to the inexact recollection of case law, see the discussion on *Carpenter* below.

33. As per Case C-138/02, *Collins*, EU:C:2004:172 and Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze*, EU:C:2009:344.

protection afforded to returning work-seekers by Article 45 TFEU and that afforded to non-economically active citizens by Article 21 TFEU.³⁴

Secondly, it is not clear which members of the family are protected: in paragraph 54 the Court referred to “immediate family members” hence potentially hinting at the fact that derived residence rights are limited to spouse and children (with the exclusion of ascendants); but then in the operative part of the ruling the Court simply refers to “family members” more generally. What we do know is that this interpretation only applies to “protected” family members (those listed in Art. 2(2) Directive 2004/38),³⁵ with the exclusion of other family members, such as those mentioned in Article 3(2) Directive 2004/38, including the partner in a stable relationship with the Union citizen (such as was presumably the situation in B’s case). We will return to this point also in the general analysis below, but for the time being it is sufficient to mention the discrepancy between the ruling (non-married partners have no rights; and marriage only counts insofar as the couple has enjoyed some marital relationship within the EU) and Directive 2004/38, also as interpreted by the Court. Thus, Article 3(2) requires that a Member State must facilitate the entry of a partner, duly attested; and pursuant to the *Metock* ruling the family member needs not to have resided in a Member State before joining the Union citizen.³⁶

Thirdly, the Court repeatedly refers to the fact that family life must be created or strengthened “in” the host Member State: in the Court’s opinion this is not so when a person is taking advantage of the unconditional right to reside detailed in Article 6(1) Directive 2004/38 (even though real, and fictional, life abounds with cases where people genuinely fall in love and create a family life in three months or less). We are not given any guidance as to when family life will be strengthened “in” the host Member State: it seems that when two people cannot cohabit, regular visits are not to be considered as a way to strengthen family life “in” the host State. Once again, it seems that the Court’s perception of reality is rather simplistic, leaving very little space for the complexities inherent in any family arrangement, where for instance couples might have jobs/links/families in different Member States.

34. It appears immaterial to this end that the national court had enquired about the applicability of Arts. 21 and 56 TFEU (the latter not mentioned in the Court’s ruling) since it is open to the ECJ to identify the correct provision to be applied in the cases referred to it.

35. See *O and B*, para 62. Furthermore, since the family member must be a family member pursuant to Art. 2(2) Directive 2004/38, technically a same sex registered partner who lived with the Union citizen in a country which does not recognize such partnerships, would not have the right to return with their partner to the Member State of origin even if the State of origin recognized same sex partnerships.

36. Case C-127/08, *Metock and Others v. Minister for Justice, Equality and Law Reform*, EU:C:2008:449, esp. para 70; see also Case C-459/99, *MRAX v. Belgium*, EU:C:2002:461; Case C-1/05, *Yunying Jia v. Migrationsverket*, EU:C:2007:1.

Finally, and very unfortunately, there is a discrepancy between the grounds of the ruling and its operative part - so that almost all of the above-mentioned qualifications disappear in the operative part. The Court simply instructs the national court to ensure that the conditions applicable to the returning Union citizen and her family members should not be in principle more strict than those applicable to a non-national EU citizen and her family. This then would simply extend the *Singh* doctrine to Union citizens who have resided in another State pursuant to Article 7(1) and (2) or 16(1) and (2) Directive 2004/38.

5.2. Preliminary reflections on Case C-457/12, *S and G*

The ruling in *S and G* is notable for a number of reasons. First of all, the Court's recollection of the *Carpenter* case is rather misguided: it is true that Mr Carpenter had argued that the deportation of his wife would have detrimental effects on his business because of her role in caring for the couple's children;³⁷ but, far from that being a decisive factor in the judgment, both the Court and its Advocate General resisted the temptation to link the derived rights of residence of a spouse to her role as child-carer.³⁸ Advocate General Stix-Hackl explicitly declared the legal irrelevance of the child-minding role of the spouse; and pointed out how all the relevant secondary legislation (then as now) does not attach any importance to the care of children in determining the derived rights of residence of family members.³⁹ The Court did not openly discuss the point; it stated "It is clear that the separation of Mr and Mrs Carpenter would be detrimental to *their family life* and, *therefore*, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse".⁴⁰

The Court in *Carpenter*, therefore, focused exclusively on the connection between the right to movement and the right to family life; at no point did the Court demand that such family included children, or even worse that the rights

37. Opinion in Case C-60/00, *Carpenter*, EU:C:2001:447, para 11.

38. Ibid., paras. 102 et seq. On This point see also McDonnell, "Mr and Mrs Carpenter and their progeny: The conditions under which the fundamental freedoms are exercised and the scope of EU law", in Ackermann und Köndgen (Eds.), *Privat- und Wirtschaftsrecht in Europa: Festschrift für Wulf-Henning Roth zum 70. Geburtstag* (Beck, 2015 (forthcoming)).

39. With the very limited exception of Art. 13(2)(b) Directive 2004/38 which provides for the retention of the right to reside for the divorced/separated spouse partner when he/she has custody of the Union citizen's children.

40. Case C-60/00, *Carpenter*, para 39 (emphasis added).

of the spouse might be dependent upon their caring role within the family.⁴¹ This point is crucial both from an equality perspective and from a purely practical one. Starting from the latter, the connection between child-caring and derived residence rights might determine a rather random application (or an even more random application) of Union law: is the Court really saying that matters would have been different if Mrs and Mr G had no children? Furthermore, if the family member's role in caring for the dependant is "decisive", why is it that the child-caring role of the grandmother is merely desirable, and therefore seemingly legally irrelevant? In other words, there are two possibilities: either the barrier to movement arises because of the impact on the EU citizen's right to family life, in which case it is irrelevant whether the spouse is or is not caring for the children (as it was in *Carpenter*). Or the barrier to movement arises because help with rearing children allows one or both parents to devote more time to working and therefore fosters their right to economic free movement, in which case the refusal of a residence permit to any family member caring for children (including a grandmother) would be equally detrimental to the right to free movement. The Court's reasoning is therefore rather lacking in logic and consistency. More fundamentally, the ruling also undermines basic principles of equality that demand that the legal position of women be severed from their role as a mother and/or carer (unless relevant to protect women that is).

Secondly, and again this is unfortunately not an isolated phenomenon, this ruling points at a subjective application of the law, based on the Court's preconceptions about family structures and dynamics. The same is true for the ruling in *Dereci*,⁴² where the Court implied that the presence of the father of a minor Union citizen in the territory of the State of residence was merely "desirable" and therefore not such as to force the child to leave the territory of the EU. And for the ruling in *Alokpa*,⁴³ where the Court decided that denying a residence permit to the single TCN mother of migrant Union citizens would not interfere with their rights under the Treaty, since the Union citizen

41. Whilst of course in the justification stage, when assessing the proportionality of an interference with family life, the presence of children might well be relevant in determining whether the interference is compatible with EU fundamental rights or not.

42. See also Case C-256/11, *Dereci*, "Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted" (para 68, emphasis added). On these issues see Spaventa, "Earned citizenship: Understanding Union citizenship through its scope", in Kochenov, *Citizenship and Federalism in the European Union: The Role of Rights* (CUP, forthcoming 2015), available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2497941>.

43. Case C-86/12, *Alokpa*.

children in question could return to their (EU) country of nationality and would therefore not be “forced” to leave the territory of the EU. Little did it matter to the Court that the children would be denied their right to move freely across the EU; and that the mother in question had no link, friends or support in the country of nationality of the children;⁴⁴ or that such an interpretation seemed hardly consistent with the children’s best interest.

Thirdly, and this is a point that will be analysed in the next section as it concerns both rulings, there is not even a passing mention to fundamental rights, even though both cases clearly raised issue about the applicants’ right to family life as protected by Article 7 Charter and 8 ECHR.

5.3. *Barriers to movement: The family as an instrument of integration*

As mentioned above, the starting point of both rulings is that the denial of derived residency rights in the home State might, in certain cases, give rise to a barrier to movement. Despite this common approach, the cases differ in their consequences. In *O and B* the Court substantially confirms the previous case law (*Singh* and *Eind*) so that the rights of the circular migrant are identical to some of the rights conferred by secondary legislation on migrants,⁴⁵ and no barrier needs to be proven. In this way, the material scope of the right is that defined by the legislature, whilst the personal scope of the right is broadened through the operation of the primary Treaty provisions.

In *S and G*, on the other hand, the Court departs from its previous interpretation and this change is not without consequences. Previously, in *Carpenter*-type cases, the Court did not apply secondary legislation by analogy: rather it construed an interference with the right to family life as a barrier to movement, which then had to be justified also in the light of fundamental rights (including the right to family life). This approach had two consequences: from a practical viewpoint it opened up the Treaties to claims by own citizens, since it became easy to establish a cross-border connection. From a theoretical viewpoint it established the centrality of the right to family life: in this way, the protection of the citizen’s family was a value in itself (and

44. It is interesting to note that the UK Upper Tribunal (Asylum and Immigration Chamber) in a case decided before *Alokpa*, with very similar factual circumstances (i.e. no link between TCN mother of Union citizen and Union citizen State of nationality), found that returning the applicants to the home State of the children was not a “realistic” prospect so that the substance of rights doctrine might apply; see *Ahmed v. Secretary of State for Home Department*, [2013] UKUT 89 (IAC).

45. Some but not all; e.g. there seems no duty of the Member State of the returning citizen to “facilitate” entry of a partner; or to grant family reunification rights to those citizens who have exercised only their right to unconditional residence provided for in Art. 6(1) Directive 2004/38.

the lack thereof could be construed as a barrier to movement) and no longer merely instrumental to the achievement of internal market objectives. Furthermore, the barrier/justification/fundamental rights approach left some space to the Member States to justify their rules, hence recognizing the regulatory primacy of the national legislature in this field and, more crucially for the citizen, space for the proportionality assessment (also from a fundamental rights perspective) of the decision of the national authorities.

The same is no longer true after the *S and G* ruling: the refusal to grant a residence permit to a family member constitutes a barrier only *insofar* as granting a derived residence permit to the family member is “*necessary to guarantee the citizen’s effective exercise of the fundamental freedom guaranteed by Article 45 TFEU*”.⁴⁶ This is not an insignificant change: following the *S and G* ruling, the Union citizen has to demonstrate a more precise link of causation between the denial of a residence permit and her exercise of the right to move, so that an interference with family life is no longer sufficient to establish a barrier to movement. It is for this reason that child-caring becomes (regrettably) relevant, leaving open the question about the rights of childless couples, and couples where both parents work. It is only where the spouse “enables” the Union citizen that the denial of residency rights might be construed as a barrier. In this way, the derived rights of the family members (and consequently the primary rights of the Union citizen to be accompanied by her family) become purely instrumental to the achievement of the internal market – in a way they are demoted from rights of the person (family life) to instruments of integration.

The justification for such an approach is that family reunification rights are granted, in EU law, solely to facilitate movement: and yet, this view is debatable. Thus, there is evidence to suggest that the EU grants family rights not (merely) to facilitate integration but because of the fact that integration should not come at the expense of the family life (and rights) of its beneficiaries. For instance, the Preamble to Regulation 1612/68 made no mention of an instrumental approach to the family rights of migrants, simply referring to the fact that “freedom of movement constitutes a fundamental right of workers *and their families*”.⁴⁷ The Preamble to Directive 2004/38 links the derived family rights to the Union citizen’s freedom and dignity,⁴⁸ thus suggesting a fundamental rights view of family rights rather than a purely instrumental view such as that suggested by the Court in the rulings under consideration. The same is true also in relation to the rights of other family members (i.e. those not included in Art. 2 Directive 2004/38), who are

46. *S and G*, para 42 (emphasis added).

47. Preamble Regulation 1612/68, recital 3 (emphasis added).

48. Preamble Directive 2004/38, recital 5.

mentioned in the Directive in order to maintain the “unity of the family in a broader sense”.⁴⁹ In a different, and yet very relevant context, that of family reunification for third country nationals residing in the EU, the Preamble to Directive 2003/86 states that measures concerning family reunification should conform to the “obligation to protect the family and respect family life” enshrined in many instruments of international law;⁵⁰ and that “Family reunification is a necessary way of making family life possible”.⁵¹ It seems therefore that the Union legislature is far from seeing family life in purely instrumental terms. Furthermore, this instrumental approach to the family rights of Union migrants represents also a departure from established case law pursuant to which migrants in EU law are protected as “persons” and not merely as agents of integration.⁵²

Overall then this approach restates the centrality of the market citizen whose non-market rights are protected only insofar as they facilitate her economic activity: fundamental rights play no role in the reasoning of the Court – a deafening silence, already heard in other recent citizenship cases.⁵³

5.4. *Not all obstacles to movement are equal: Article 7(1) Directive, residence and obstacles*

As mentioned above, the Court limited the derived rights of residence of the returning migrant’s family members to those Union citizens who had established “genuine residence” in the host country pursuant to Article 7(1) and (2) (or 16(1) and (2)) of Directive 2004/38. It is clear that the Court is here attempting to limit the benefits of circular migration, and exclude tourists or those who do not have a sufficient connection with a cross-border situation. Whilst this might be indeed a reasonable ambition, there are problems with the way the Court achieves this.

In particular, the Court insists that, in order to benefit from circular migration family rights, it is not sufficient to have resided legally in the host State, maybe even for a significant amount of time. Rather, the Union citizen must have satisfied throughout her stay the conditions set out in Directive 2004/38, even when the host State had granted more generous conditions to the migrant citizen. It further calls into question the rights of work-seekers

49. Ibid., recital 6.

50. Preamble Directive 2003/86 on the right to family reunification, O.J. 2003, L 251/12, recital 2.

51. Ibid., recital 4 which continues “It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty”.

52. E.g. Case C-127/08, *Metock*.

53. E.g. Case C-86/12, *Alokpa*.

(and let's not forget that the claimants in the case had originally moved in order to seek employment) who have a hybrid status in Union law: even though they can stay beyond the first three months if they show a genuine chance of finding employment, they are not resident pursuant to Article 7(1) but rather "present" pursuant to Article 14(4)(b).

The insistence on the satisfaction of Article 7(1) conditions in order to gain family rights also raises some questions as to whether circular migration rights are available to Union citizens who gained residency rights in the host State through marriage rather than through Union law. The Court, in fact, explicitly declared the irrelevance of residence permits awarded by another Member State,⁵⁴ hence suggesting that the home State is allowed to check on whether, when residing abroad, its citizen fulfilled the criteria listed in Article 7(1) (economic activity or sufficient resources and comprehensive health insurance). Given that Directive 2004/38 is a minimum instrument, allowing the Member States to provide more favourable conditions if they so wish, this is particularly disappointing if not altogether inconsistent with the bottom-net approach espoused in the legislation.⁵⁵

5.5. *The spousal contribution to the citizen's right*

If the existence of a barrier to movement is presumed in the case of the migrant who returns after having exercised a residence right pursuant to Article 7(1) Directive 2004/38, in the case of frontier workers a causal link between denial of residency rights and barrier to movement must be established. As pointed out above, there seems to be a presumption that only the derived right of residence of "some" family members is capable of facilitating movement for the purposes of Union law.

In relation to circular migrants, the national court in *B* had enquired as to the relevance (if any) for the derived right of residence of the fact that some time had elapsed between the return of the Union citizen national of the Member State and the arrival of the spouse. Advocate General Sharpston replied in the negative to this question; however, she also found that since the couple were not actually married when they were living in Belgium, Mr B could not be defined as a family member pursuant to Article 2(2) of the Directive. Mr B had cohabited in another Member State with the Union citizen; but, Mr B could not derive residency rights upon returning to the Netherlands, since the

54. *O and B*, para 60.

55. Similarly see the cases on permanent residence where the Court has declared the irrelevance of periods of lawful residence occurred through the operation of national law (or in any event without satisfying the conditions provided for in Art. 7(1) Directive 2004/38); e.g. Joined Cases C-424 & 425/10, *Ziolkowski and Szeja*, EU:C:2011:866.

couple had not moved to another Member State after having married. The Court followed this same path as to the absolute relevance of the spousal relationship and therefore found it unnecessary to answer the question.⁵⁶ It thus appears that family members listed in Article 3(2) of Directive 2004/38, and especially the unmarried partner of the Union citizen, do not derive any right of residence in the home State of their partner, not even to see their entrance “facilitated”.

This is particularly disappointing for three reasons: first of all, both Belgium and the Netherlands grant more favourable rights to unmarried partners than those required by Directive 2004/38. Thus, both countries accept that a duly attested partnership is to be treated in a comparable way to a spousal relationship. The question then should have been not whether Mr B was a family member pursuant to Article 2(2) Directive 2004/38, but rather whether he was treated like a family member pursuant to the legislation of Belgium and the Netherlands.⁵⁷ In other words, if both countries had decided to grant more favourable rights to Union citizens protected by Directive 2004/38, something that they can do pursuant to Article 37 Directive 2004/38, it seems inconsistent for the Court to focus only on the bare minimum of the rights conferred by Union secondary legislation. Secondly, and in relation to this first point, it might have been better for the Court just to answer the question as it was phrased by the national court: after all, it might be just about possible that the national court took for granted that also partners would be protected since that is the situation in the Netherlands.

Thirdly, and more fundamentally, this interpretation is a real blow to the rights of those in same-sex relationships. As it is well known, Directive 2004/38 was the result of a compromise, and a contested compromise as such. The Commission had originally proposed that unmarried partners should fall within the definition of protected family members insofar as the host country treated unmarried partners as equivalent to married partners.⁵⁸ This would

56. See *O and B*, paras. 62 and 63. The operative part of the ruling refers only to family members, and contains no mention of the fact that the family member should be one of the protected ones pursuant to Art. 2(2). The discrepancies between ruling and operative part is a problem in both judgments annotated here.

57. For Belgium it is sufficient to consult the embassy websites in any non-EU country; e.g. <www.diplomatie.be/manila/default.asp?ACT=5&content=43&id=28&mnu=28>. For the Netherlands see Langer and Schrauwen, “National report on the Netherlands”, in Neergaard, Jacqueson and Holst-Christensen (Eds.), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing, 2014), p. 696.

58. 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, O.J. 2001, 270/ E150) Art. 2(2)(b). In this way the Commission sought to codify the ruling in Case 59/85, *Reed*, EU:C:1986:157, where the Court applied the principle of non-discrimination to rules concerning family reunification, so that Dutch rules

have ensured that same-sex couples could enjoy rights to free movement to countries where partnerships are recognized also in those cases in which the home State did not allow civil partnerships or same-sex marriages. However, there was strong opposition from some Member States⁵⁹ to the recognition of any rights for same-sex couples; the final compromise was therefore to provide rights only to registered partners if and when the host State treats registered partnerships as equivalent to marriage.⁶⁰ This basically amounts to a double legality requirement so that Union citizens living in a country which does not provide recognition for same-sex couples find it more difficult,⁶¹ if not impossible, to be protected as a family unit. In order to mitigate this problem, Article 3(2)(b) Directive 2004/38 provides for a duty upon Member States to “facilitate” the entry of the “partner with whom the Union citizen has a durable relationship, duly attested”. What this duty entails is not defined; however, relying on cases such as *Reed*, *Carpenter* and *Akrich*,⁶² it could have been argued that the right to free movement would assist the unmarried couple since the denial of residency rights to the partner could be construed as a barrier to movement. Not any longer – by ignoring the relevance of the fact that Mr and Mrs B had been in a long term partnership whilst within the territory of the European Union, the Court is implying that whilst the Union citizen might be deterred from moving if the spouse /registered partner does not obtain a right to reside in the host country or in the home country upon

pursuant to which only Dutch citizens enjoyed rights of family reunification with unmarried partners were incompatible with EEC law. The European Parliament then sought to clarify that the “unmarried partner” was “irrespective of sex” (Report Committee on citizens’ freedoms and rights, justice and home affairs, (A5-0009/2003 final) amendment 16. However, the Council then modified the proposal to include only registered partners, as it is in its final version (12339/03 (presse 259)).

59. Italy was represented in Council also by Mr Buttiglione, whose views on homosexuality as a sin led the European Parliament to refuse his nomination as Commissioner for Justice and Home Affairs in the Barroso I Commission; this might have not helped the cause of equality advocates.

60. Art. 2(2)(b) Directive 2004/38.

61. In order to gain rights they would have to go to another Member State and register their partnership there; however, this is more easily said than done since the possibility to enter in marriage/partnership might be limited to those who reside in the country (e.g. <www.gov.uk/marriages-civil-partnerships/what-you-need-to-do>); and an unmarried TCN would not get residency rights unless the host country provided a more generous regime than that provided for in Directive 2004/38. Furthermore, the Court’s approach to Directive 2004/38, which is to confer EU law rights only if and when the conditions in the Directive are satisfied, so that more generous national regimes are not “Europeanized”, means that even in those cases in which national rules do confer a right to same sex partners to join the EU citizen, but do not recognize same sex partnerships (e.g. Italy, see Circolare 8996/2012 available at <immigrazione.aduc.it/generale/files/file/allegati/2013/circogay8nov2012.pdf>), then the partner would not be considered a family member pursuant to Art. 2(2) Directive 2004/38.

62. Case 59/85, *Reed*; Case C-60/00, *Carpenter*; Case C-109/01, *Akrich*.

returning, that is not the case in relation to unmarried/non-registered partners. This in turn leaves same-sex couples in a particularly vulnerable position, not least since the Court's interpretation of the "duty to facilitate" entry has not been particularly generous.⁶³

In relation to Union citizens who reside in their own Member State and travel to another State for work or business, the ruling in *S and G* seems to suggest a presumption (badly reasoned but defensible) in favour of the spousal relationship so that ascendants are unlikely to gain derived residency rights.⁶⁴

5.6. *Where there is a family There is a right?*

It is no mystery, even to the most distracted reader, that these cases were really about the right to family life of own citizens in their own Member State: it is because they failed to gain the protection they wanted in national law that they turned to EU law. For this reason it is particularly striking that the Court fails even to mention, let aside to apply, the right to family life as enshrined in Article 7 of the Charter (and in Art. 8 ECHR). After all, the Charter applies whenever the Member State is implementing EU law,⁶⁵ and pursuant to the Court's own interpretation in *Dereci*,⁶⁶ as well as pre-Charter case law (including *Carpenter*), this includes those situations in which the Member State is limiting a right conferred directly by the Treaty.⁶⁷ So, two questions arise: first of all, why is the Court so reluctant to perform a fundamental rights scrutiny in these cases? Secondly, is this reluctance indicative of a change of interpretation in the scope of application of fundamental rights in the EU?

In relation to the first question, it is clear that in "almost" purely internal situation cases, the Court feels on more uncertain grounds than it did before (whether this is because of the broader debate on migration and the limits of EU law, or because of the change in the composition of the Court and of the preferences of its members it is impossible to say). And, it is even possible that

63. Case C-83/11, *Rahman*, EU:C:2012:519.

64. It should be noted that the operative part of the ruling does leave open the possibility for any family member to gain residency rights provided an obstacle is established. However, and as noted above, the Court also declared the irrelevance of the "mere desirability" of the support from a grandmother. It is unclear whether Mrs S was a dependent relative or not; if she had been dependent then there would be a discrepancy between family members who gain residency rights pursuant to Art. 2(2) Directive 2004/38 (also upon returning); and family members who gain residence because they facilitate movement. It would be interesting to see how the "obstacle" reasoning would apply to third country national children, since it is difficult to see how children may "enable" the migration rights of the parent.

65. Art. 51(1) Charter.

66. Case C-256/11, *Dereci*, para 72.

67. E.g. Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, EU:C:1997:325; Case C-60/00, *Carpenter*.

the Court has internalized the warning contained in Article 51(2) that the Charter should not be used to expand the competences of the European Union: an extensive use of Article 7 Charter might well impact on an area which is both sensitive and, until competence is exercised at Union level, reserved to the Member States. In this respect, it is interesting to note that when the Court is on firmer jurisdictional grounds, then it appears less timid in assessing the compatibility of national rules with the right to family life. Take for instance the case of *O and S*: whilst the Court made no mention of family life when considering a potential *Ruiz Zambrano* issue in relation to minor Union citizens whose TCN mothers were requesting a permit for their TCN partners,⁶⁸ it had no such reservation in the second part of the ruling, once it found that the Family reunification Directive applied. It thus held that the national authorities were bound by both Article 7 (family life) and Article 24 (best interest of the child) of the Charter.

Furthermore, it seems that the “constitutionalization” of the Charter has had a chilling effect in several (but by no means all)⁶⁹ areas of EU law (e.g. *McB, Alokpa, N.S.*).⁷⁰ So, in relation to the second issue, it is possible that we are witnessing a shift so that national rules are subjected first and foremost to the national and ECHR standards, the Charter being relevant only in those cases where there is a more direct connection between EU law and the national implementing measure.⁷¹ Be that as it may, it would be good for some clarity to be brought in this matter.

5.7. *A modest proposal*

It is impossible to know whether the inconsistencies in the Court’s approach are intentional or not; however, it seems to me that most of the problems highlighted above arise from the fact that the Court is bending the analogous application of Directive 2004/38 to situations which do not fit it, simply because the right of residence of a national returning home is fundamentally different from that of a non-national: the right to reside in one’s own Member

68. Joined Cases C-356 & 357/11, *O and S*, the Court first indicated that family ties might transcend blood relations as well as have a domino effect (EU child wants to be with TCN mother; TCN mother wants to be with new TCN husband because of other child, mother might leave the EU therefore child leaves the EU), to then indicate also that in the case at issue that seemed not to be a problem (albeit it left the final assessment to the national court).

69. E.g. the ruling in Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105.

70. Case C-400/10 PPU, *McB*, EU:C:2010:582; Case C-86/12, *Alokpa*, Joined Cases C-411 & 493/10, *N.S. and others*, EU:C:2011:865.

71. Although that might not always be true, at least in internal market cases, see Case C-617/10, *Åkerberg Fransson*, where a rather remote connection with EU law was sufficient to trigger EU fundamental rights.

State is the corollary of nationality, and it is unconditional. This means that the sufficient resources/economic activity criteria that are applied to Union citizens and their families wanting to stay in another Member State for a period longer than three months cannot be applied to own citizens returning home with their families. For this reason, whilst there are limits to the migratory rights conferred upon Union nationals in other Member States, those same limits cannot be applied to own citizens.⁷² Given that, as said before, Member States clearly wish to retain regulatory control over the third country national family members of own citizens, there is a “risk” of an excessive interference with Member States’ migration policies. To put it bluntly, making it easy to claim circular migration family rights would render pointless any stricter national regime. *O and B*, then, is an attempt to circumscribe the rights of residence of third country national family members – but, for the reasons highlighted above, it is not a particularly successful attempt.

A different way of looking at the same issue might provide a hermeneutically more consistent approach: the Court should simply recognize that the free movement rights must also entail a right to go back to one’s own country. After all, the Treaty free movement provisions guarantee the freedom to move “within the territory of Member States”.⁷³ This would mean that the refusal of a residence right for a family member could be construed as an obstacle (à la *Carpenter*). This would have several advantages. First, it would avoid some interpretative somersaults: instead of relying on the questionable presumption that the Union citizen might be deterred from moving from her Member State if, upon returning, she did not enjoy the same right to family reunification as she did in the host State, the focus would be on the fact that the citizen might be prevented from exercising her right to move back to her own Member State if she did not enjoy family reunification rights.

Secondly, this interpretation would shift the focus back to the right to family life; and it would allow Member States to justify such a denial, provided that in doing so they respected that bare minimum of rights conferred by the Charter and the ECHR.⁷⁴ This approach could also be re-instated in relation to the derived rights of residence of family members of frontier migrants: if it has been decided that EU family reunification law covers those citizens, then the *Carpenter* approach with the stress on the right to family life,

72. See also ruling in Case C-291/05, *Eind*.

73. See Art. 21(b) TFEU; Art. 45(3)(b) TFEU; Art. 56(1) TFEU simply provides the cross border nature of the service provision; only Art. 43(1) TFEU is specific to non-nationals. However, in Case C-19/92, *Kraus*, the Court accepted that Art. 43 could be relied upon by a returning migrant.

74. Family reunification Directive.

rather than on the child-caring role of the spouse, would be better suited to the job.⁷⁵

Of course one could always argue that Union citizenship is merely additional and does not replace national citizenship, so that the former should leave full reign to the latter in relation to the (mis-)treatment of own citizens. But Union citizenship already imposes limits on the regulatory prerogatives that Member States enjoy towards their own citizens: the cases here annotated are the demonstration of this fact. So it would simply be a matter of providing a more coherent framework to the existing situation.

6. Conclusions

The cases at issue were not easy to solve since they related to how far EU law can penetrate in areas that the Member States wish to reserve to their own jurisdiction. It is clear that the Court wanted to limit the scope of the *Carpenter* ruling and curtail the extent to which returning migrants can attempt to circumvent national migration law by moving between countries. It did so by requiring the more “precise” identification of the way the denial of a residence permit to a family member might be affecting the right to move of frontier workers (and presumably of service providers). It is a pity that the Court felt the need to link the barrier to the child-caring role of the partner. Similarly, it attempted to limit the possibility of “tourists” benefiting from EU-derived family reunification rights: it did so by limiting those rights to citizens who gained a right of residence in the host-State by virtue of Article 7(1), i.e. economic activity or economic independence, hence excluding work-seekers as well as citizens who might have been lawfully resident in the host Member State by virtue of national rather than European law.

The solutions suggested by the Court are however wanting: they do not seem wholly consistent; and are far from introducing more defined limits to the scope of application of EU law. For an external observer it is of course impossible to second-guess what the Court did or did not want to say; it is also impossible to know how the cases developed, since the submissions of the parties are not summarized, and there is no longer a report for the hearing (not even upon request to the Court). It is further clear that the Court is under considerable pressure; that it is performing a particularly difficult job at present; and that it has to deliver rulings in a comparatively short amount of time. And yet, it is possibly time to initiate a broader conversation on whether some serious shortcomings might not end up weakening the strength of the

75. Of course, it could also be argued that there are some limits to the scope of EU law, so that some situations might fall altogether outside the scope of the Treaties.

preliminary ruling proceeding, which is to say one of the key engines of European integration. The successful dialogue between national and European courts rested on the authority that the latter's rulings could command: the outcome might have not always been to everyone's taste, and of course there has always been the odd misguided ruling or even the wrong turn taken (e.g. *Sunday Trading*). But overall the Court has done an impressive job in providing us with a visionary interpretation of the Treaties: an interpretation that was not swayed in times of crisis; and that was not hostage to the political moods of the Member States. But recently, this sense of direction seems lost; and as a result the quality of the rulings (and therefore their authority) suffers. This is not a case of not liking the end result of the recent case law: a liberal at heart, I would find backtracking from *Carpenter* and possibly even from *Singh*, hermeneutically defensible. Rather it is about delivering rulings that lay down the law in a way that can be understood, at least by those who work in the area; it means recalling all the facts of a case and not only those that tally with the end-solution favoured in the Court's ruling; it means ensuring that cases are recalled correctly and that the arguments of the parties are summarized properly (or at all). It might mean reinstating the report for the hearing and, dare I say, it might also mean accepting that the fast delivery of cases cannot be the main priority of the Court. It might mean accepting that, since different interpretations can be given to the same provisions, some explanation as to why the Court pursued one route rather than the other would be beneficial.⁷⁶ It means not having discrepancies between operative part and judgments. So regardless of the outcome of this or other cases, I believe it is time to start this conversation; or else we might end up with a weakened Court, one with diminished authority, which will command no respect from any of the constituencies whose job it is to work with its rulings, be it the national courts, the national administrators, the practitioners or the academic community. And once this authority is lost, it will be very difficult to regain it: neither the EU nor its citizens would benefit from such a result.

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76. On this issue see De Witte, "Democratic adjudication in Europe – How can the European Court of Justice be responsive to the citizens", in Dougan, Nic Shuibhne and Spaventa (Eds.), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing, 2012).

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