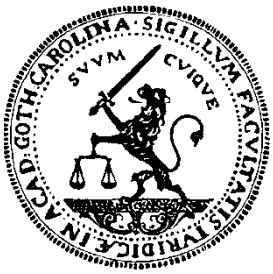

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Third Country Nationals and Backdoor Immigration: *Reverse Discrimination, Fundamental Rights and the Distinction between Use and Abuse.*

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Contents

Abstract

The thesis examines the situation of Third Country Nationals who have familial links to a 'returning' Community citizen. The thesis analyses Danish Immigration law, Community free movement provisions, and the case law of the Court suggesting that the application of National law is 'dying' due to the Court's interpretation of 'abuse' and gradual elimination of the 'wholly internal situations'.

The thesis argues that a Third Country National who is able to establish a connection to Community will fall under 'liberal' movement rules. Alternatively, a Third Country National and their Community family member that are in a 'wholly internal situations' will fall under stringent National laws. The problems inherent in this paradox is conceptualised in the application of the 'apparent universal' fundamental rights.

The thesis ends with a normative assertion: the problems caused by reverse discrimination must be eliminated. It is suggested that the problem associated with reverse discrimination could be eliminated at the Community level by an increase in competences over Third Country Nationals, or at the National level through Constitutional Courts or National legislators.

Preface

I would like to thank Xavier Groussot for his help in the preparation of this thesis. I appreciate the fact that he accepted me as a student late in the semester and took the time to help me via email and phone which enabled me to complete my thesis from the other side of the world.

The inspiration for this thesis came from my experience as an Australian (Third Country National), living in Sweden on a derivative right of residency. At the most basic level, I want to use this thesis as an opportunity to give a 'voice' to other Third Country Nationals and their European family members, who are forced to deal with the inconsistent and arguably ludicrous 'rules' contained in Community law and National legislation.

On an academic level, I hope that my attempt to illustrate the shortcomings of the current rules on third country migrants, will force a new 'era' of discussion and apparatus for change.

At all material times, I hope that the readers of this thesis will keep in mind that the rules governing third country immigrants affect real people in real situations. It is often routine and a habit for Law students to read textbooks and 'pull out' the law (e.g. does article X apply to this situation?). In a majority of situations, subsequent cases are 'read' as either adding to the law or subtracting from previous case law. As future lawyers and academics we should keep in mind that behind the 'rules' is a real situation involving real people; fathers and daughters, husband and wife, and brothers and sisters. We ought to learn to appreciate and understand not only the legal elements, but also the human situation that underlies each case.

Abbreviations

Charter	Charter of Fundamental Rights of the European Union
Community	European Community
Court	The Court of Justice of the European Communities
ECHR	European Convention on Human Rights and Fundamental Freedoms
EU	European Union
TCN	Third Country Nationals
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Over the past few decades there has been a substantial increase in the number of Third Country Nationals applying for entry and residency in the European Union. In an attempt to gain greater control of their external borders, many Member States of the European Union[1] have gradually increased the legislative requirements for Resident Permits for third country immigrants. The 'immigration issue' has been excavated the last few months with increasing political tension in the Middle East.

The political tension has resulted in an influx of residency applications emanating from the Middle East to Community Member States. The result of the influx is an increase in media attention and proliferation of discourse on the contentious topic of third country immigration. Human rights groups have been vocal in their support for the 'struggle' of the populations of the Middle East, and critical to the immigration policies of many European Countries.[2] Alternatively, many Member States have expressed their disapproval and inability to cope with the recent influx of immigrants. In the heart of Europe, for example, Mr. Sarkozy has pushed for a stricter policy on illegal immigration to be adopted across Europe.[3]

As a preliminary point it is this author's observation that reports and other discourse based on 'Third Country Nationals and the Community implicitly accept and/or reinforce that the National level have and *ought to have* the fundamental competences regarding the immigration of Third Country Nationals. This paper differs from dominant discourse by not only

[1] Hereinafter 'Member State[s]'
[2] For example: Amnesty International (2011) *'Asylum and International Protection: EU undermines international Standards'* <available at 'http://www.amnesty.eu/en/press-releases/all/asylum-and-refugee-protection--eu-undermines-international-standards-0002/>
[3] See for example: BBC News (2011) *'France Urges EU Immigration Curb'* <available at http://news.bbc.co.uk/2/hi/5391920.stm>

questioning that very assumption, but illustrating that the way forward is through enlarged European competences.

The overarching purpose of this thesis is to consider the immigration of Third Country Nationals to, and within, the European Union. The purpose of this thesis will be primarily achieved by focusing on the division of competences between Community law and National law, with respect to third country citizens with familial links to Community Nationals.

First, it will be argued that the National legislative requirement of Member States such as Denmark, are essentially 'closed' imposing onerous conditions of entry and residency on both the Third Country National and their Union family member. Alternatively, the Community free movement rules when applicable to third country migrants, are essentially 'open' and 'liberal'.

Second, this paper will present the case of the 'returnee migrant' who, after exercising their right of free movement, *'returns'* to their home Member State with their third country family member. The thesis will turn to an analysis of the case law where the Court asks the question, 'who is competent to deal with the 'returnee' and their third country family member? It will be contended that the Court has gradually become more 'liberal' in their approach in finding that a connection to Community law exists and consequently, Community free movement provisions are likely to apply to the detriment of National law.

Third, the thesis will contend that contemporary times are witnessing the 'death' of National law. First, National law is dying due to the legal and rightful 'use' of Community law that essentially provides an avenue for Nationals with a connection to Community law. It will be illustrated that where a connection is formed, Community law can be 'used' to 'get around', 'avoid', 'evade', 'side step' National law. The 'getting around',

avoidance' evasion', 'side stepping' of National law is reinforced by the fact that the Court is unwilling to define or find abuse. Second, National law is dying due to the gradual erosion of the 'wholly internal rule' which has meant that Community law is applied in situations that would traditionally be conceptualised as a matter of National law.

Fourth, it is argued that despite the (slow) 'death' of National law a system based on a division of competences has resulted in 'reverse discrimination'. Moreover, the current division of competences creates an ironic paradox: some Nationals may essentially fall under and use the more liberal Community law, essentially 'getting around' the laws of their home member State. At the same time, 'reverse discrimination' and (what is left of) the 'wholly internal rule', dictates that other Nationals are denied the same 'liberal' Community rules and, instead face what is often more stringent National migration rules. The irony in 'the paradox' is reinforced by the fact that fundamental rights are only guaranteed at the Community level where a link to Community law is established.

Overall, it is argued that the paradoxical application of fundamental rights created by the division of competences and reverses discrimination justify change. Given it was the expansion of Community Law to Third Country Nationals that ultimately created 'reverse discrimination', it will be asserted that the Community is ultimately responsible for addressing the problem caused by reverse discrimination.. The Community could fix the problems associated with reverse discrimination by subsuming a great degree of competences with respect to Third Country Nationals and immigration.

Nonetheless, it is recognised that the Court has a tendency to 'wipe its hands clean' of situations involving reverse discrimination, thus further

suggestions on ‘combating’ reverse discrimination will be directed towards the Member States.

2 Immigration under National Law

Member States have fundamentally retained the competence in the field of immigration.[4] For the most part, a Third Country National in applying for entry and residency in the Community will fall within the ambit of the National law of that Member State.[5]

In controlling the external borders of the Community, Member States restrict entry and residency of Third Country National based on number of National legislative criteria.[6] The legislative conditions of Member State's generally impose conditions *prior* to providing a right of residency including; conditions on the nature and (with spouses) duration of the relationship, the risk the applicant poses under public policy and security, character requirements, and other measures necessary to prevent 'abuse of National legislation' and 'fraud'. In almost all situations, the Member State retains the power to deny entry, remove and/or detain Third Country Nationals that fail to meet National legislative requirements.[7]

As an illustration of National legislative requirements, the following section will consider spousal reunification under Danish law. It should be noted however, that the following should be construed only as an example. It is recognised that immigration rules not only differ *between* the different Member States but also *within a single* Member State depending on the 'type' of familial link.

[4] Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.38.
[5] Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.38&47.
[6] Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.43.
[7] Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at pp.44-46.

2.1 Spousal Reunification under Danish Law

Family reunification under National Danish laws could be conceptualized as one of the most stringent in the Community. First, there are conditions on the 'relationship' itself because the marriage or registered partnership must be recognized by Danish law. If the relationship between the applicant and the Dane is a marriage or registered partnership then it must not be a 'forced marriage'[8] or 'marriage of convenience'[9]. Alternatively, if the relationship is between the Dane and Third Country National is one of cohabitation, then it must be proved that the relationship is permanent with proof of cohabitation for at least eighteen (18) months.[10]

Second, there are conditions on the Danish spouse. In order for a Danish citizen to move their Third Country National spouse to Denmark, the Danish National must:

- Be a Danish or Nordic Citizen[11];
- Living permanently in Denmark;
- Have adequate housing, defined as either owning, co-operatively owning, or have a Rental Agreement for a period of at least three years from the date the Third Country National applies for a place. The place must be at least fourty (40) square meters and the total number of people living in the residence may not be more than double the number of rooms;
- Be able to support themselves;
- Offer collateral to the value of sixty-three thousand, four hundred and thirteen dollars, and thirty-nine ora (63,413,39DKK) (April 2011)

[8] The marriage or registered partnership must be, for example, voluntary.
[9] The marriage or registered partnership must **not** have been entered into for the purpose of obtaining a Resident Permit.
[10] Danish Government (2011) 'New in Denmark: Official Portal for Foreigners and Integration' <available at http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/spouses.htm>.
[11] Exceptions may apply to those that have lived in Denmark for a substantive period of time, or individuals holding Resident Permit on the grounds of asylum.

covering any public assistance granted to the spouse for a period of four (4) years; and

- Not have been convicted of violent acts of domestic abuse. [12]

Third, there are a number of stringent conditions on the Third Country National. There is a requirement that the third country applicant pass an immigration test in Denmark *prior* to the issue of any Visa. The test costs three thousand (3,000) DKK and, requires the Third Country National to illustrate **a level of proficiency** in: the Danish language, Danish values, Danish norms, and (the Danish conceptualization of?) fundamental rights. Presumably the Third Country National would have to bear the costs associated with flying to Denmark to take the test.[13]

Last, there are a number of conditions on both parties. First if the visa is granted, both parties must agree to living at the same address in Denmark. Second, both individuals must have a greater combined attachment to Denmark than any other country in the world.[14] Last, both parties must be over the age of twenty-four (24) years.[15]

2.2 Illustrative Example

In order to illustrate the 'actual application' of the rules and human element, a hypothetical situation involving Lars and Sarah will be used throughout the thesis. Lars Petersen is a Danish National, who is in a long-term relationship with a Sarah Hall a Canadian National.

[12] Danish Government (2011) 'New in Denmark: Official Portal for Foreigners and Integration' <available at http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/spouses.htm>.
[13] Danish Government (2011) 'New in Denmark: Official Portal for Foreigners and Integration' <available at http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/spouses.htm>.
[14] Consideration is given to, for example, the strength of connection to the Danish labour market and location of family and friends. The requirement can be waived in situations where the Danish national has been a citizen for over twenty-eight (28) years.
[15] Danish Government (2011) 'New in Denmark: Official Portal for Foreigners and Integration' <available at http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/spouses.htm>.

By all accounts, Lars is an 'average' 24 year old Dane, earning an average Danish salary and living in average Copenhagen apartment. Sarah is an 18 year old Canadian student that is studying a four (4) year dentistry program at Copenhagen University. The two get along great and eventually form a relationship and move in together.

After three (3) years of living together, Sarah is about to finish University. Sarah realizes that her Student Visa will expire upon completion of her program. Lars and Sarah approach the Danish authorities for a 'Spousal Visa'. Unfortunately, the couple's application is rejected on the grounds that:-

- Sarah is not twenty-four (24) years old;
- The couples apartment does not meet the accommodation requirement;
- Lars does not have 63,413,39DKK to post as 'bond'; and
- Sarah's level of proficiency in Danish is not sufficient to pass the 'Danish test'.

Lars and Sarah are extremely upset that the application of Sarah for a Resident Permit has been rejected.[16] The couple is, however, deeply in love and determined to find a way to remain together.

[16] For the purposes of the illustration it must also be assumed that Sarah is unable to gain a Visa in her own right (such as a work Visa).

3 Free Movement under Community Law

The Community is competent to govern the free movement of persons within the Community boundaries.[17] In contemporary times, the right to 'move' between Member States has significantly liberalised by the introduction of Citizenship.

3.1 Free Movement

The traditional right of free movement was essentially linked to economical freedoms. For example, under Article 45 *TFEU* a Community National has the right to move, reside and remain in another member State as a worker. For movement of workers, the Court has emphasised the requirement of an economic activity that is not purely marginal and ancillary.[18] Similarly under Article 49 *TFEU* a Community citizen has the right to establish themselves in another member as, for example, self-employed persons. Earlier judgements[19] of the Court grappled with the distinction between a 'worker' and 'establishment' however, such a distinction would appear to be a 'moot question' since the introduction of Citizenship.[20]

The introduction of 'Community Citizenship' represented a significant liberalization of the free movement rules. Departing from the traditional free movement's rules (linked to economically active Nationals[21]),

[17] Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.49.
[18] Case c-196/87 *Steymann* [1988] ECR 6159 at p. 13, and Case c-53/81 *Levin v Staatssecretair van Justitie* (1982) ECR 1035.
[19] Employed refers to payment (pay) for work under direction of another (boss) whereas self-employed is supplying goods and services to another person: Case c-456/02 *Trojani v Centre Public D'aide Sociale* (2004) ECR 1-7573.
[20] Chalmers, D, Davies,G & Monti,G, 'European Union Law: Cases and Materials (2010), 831.
[21] Including free movement of worker that is now Article 45 TFEU.

Citizenship widened the scope of free movement to include non-economically active Nationals. Free movement was also embedded as one of the most fundamental rights inherent in Citizenship.[22] According to Article 21(3) and (3) *TFEU*, the freedom of movement is subject to secondary legislation including the Citizens Right Directive which has arguably strengthened Citizenship and its inherent right.[23]

According to the CRD family members, irrespective of Nationality, may accompany or join Community citizens exercising the freedom of movement.[24] Under Article 3(1) *CRD* a family member of a Community citizen must be admitted if they are a 'married spouse'[25], a registered partner[26] and in some situations the direct descendants under the age of 21[27] or direct relatives in the ascending line that is in a position of dependence.[28] According to Article 3(2) *CDR* a family member may be admitted if they are in a situation of dependence[29] or in a duly relationship that is duly attested. If the family member meets the requirements of Article 3 *CRD* and presents a valid passport, the host Member State is under an obligation to issue a resident card within three months.[30]

A Community citizen and accompanying family member may remain in a 'host' State for over three months.[31] The conditions are essentially satisfied where the Community citizen is a worker, self-supporting person, or a student.[32]

[22] Articles 20(2) &21 *TFEU* and Cristina, Popa, 'The Connection Between the European Citizenship and the Free Movement of Persons' (2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313013, 1-3.
[23] Cristina, Popa, 'The Connection Between the European Citizenship and the Free Movement of Persons' (2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313013,, 2.
[24] Barnard, Catherine, The Substantive Law of the EU: The Four Freedoms (2010), 425.
[25] See Case C-59/85 *Reed* [1986] ECR 1283.
[26] Provided it is recognized under national law.
[27] Case C-316/85 *Lebbon* [1987] ERC 2811.
[28] Article 2(2) *CRD*.
[29] Outside of Article 2(2) *CRD.*
[30] Articles9&10 *CRD.*
[31] Article 7 Directive 2004/38/EC.
[32] Article 7(1)(a)-(c) Directive 2004/38/EC.

3.2 Illustrative Example

Rather than applying for a Danish Resident Permit, Lars and Sarah decide that they want to live in Sweden. Lars decides to exercise his right of free movement and Sarah subsequently applies for a Resident Permit under Community law. There are a number of reasons for the move - Lars has always wanted to live in Sweden in order to save money from the high Danish kroner and lower cost of living. Alternatively, Sarah decides that she wants to complete a Masters Degree without having adding the large University debt accumulated from Copenhagen University.

Luckily for Lars, the Öresund bridge and train system make it possible for him to live in Malmö and continue working in Copenhagen. Both Lars and Sarah are also happy that the Öresund train make it possible for them to maintain their social life in Copenhagen. In the opinion of Lars, commuting for thirty (30) minutes from Malmö to Copenhagen would be no different to living in the Danish suburbs.

Sarah is issued a Community Visa from the Swedish authorities without any major hiccups.

4 The Case of the Returning Migrant – *Who is Competent?*

An interesting question that has arisen in large bodies of literature in the situation of Third Country Nationals and immigration rules is; 'do National laws of the Member State or Community law apply? At the start of this essay it was Stated that National law applies where Community citizens are joined by a Third Country National family member, to which the Community citizen holds Nationality.[33] Alternatively, it was Stated that Community law applies where a National and their third country family member moves from their home State to a host State[34]. The 'dividing line' of between Community and National competences and applicable Laws is not, however, so clear cut.

The 'battle' of Community and National competences is evident in the situation of the 'returning migration'. The fundamental question that has arisen with the 'returning migration' could be conceptualized as follows; Does a Third Country National who has moved with a Community National exercising their right of free movement, fall under National or Community law upon the return of that National to their home Member State? In answering the question of applicable law, the Court essentially focus on whether a connection to Community law exists. Tryfonido has successfully argued that there is a general trend for the Court to adopt a liberal approach to find that a connection to Community law exists.[35] The liberal approach has moved the focus from finding a connection between 'free movement', and the aims of the internal market focusing instead on (a) the actual exercise of a right by a Community citizen and, (b) a familial link

[33] See 'Immigration under National Law' above.
[34] See 'Free Movement under Community Law' above.
[35] Tryfonidou, Alina, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15(5) *European Law Journal 634*, 634.

between the Third Country National and that citizen.[36] Consequently, the 'link' to Community law has meant that the Court has resolved the question of competences and applicable law, in favor of the free movement rules to the detriment of National immigration rules.[37]

4.1 Surrender Singh

In the context of Third Country Nationals and the returning migration, the case of Surrender Singh arguably represents the first case in which the Court adopted a liberal approach. This case also presents a 'mile stone' in that Community rules were applied to Third Country Nationals.

4.1.1 Factual Situation and Procedural Posture

Ms Singh aCommunity National (British National), and her husband Mr. Singh a Third Country Nations (Indian National) returned to the United Kingdom after a period of living in another member State. Upon their return to the United Kingdom, Mr. Singh was issued with a deportation order for failure to meet National legislative requirements.[38] The National judiciary stayed proceedings and referred a question on applicable law.

4.1.2 Returnee Rule

The Court grappled with the question of whether a Community citizen that undertakes employment in another Member States is able to return to the Community citizens home State with her third country spouse under Community rules.[39] Based on the argument of 'effective application of Community law' the Court held that Community law precludes National measures that are capable of deterring a Community citizens for invoking

[36] Tryfonido suggests that the 'liberal approach' is undermined by the notion of Citizenship. Citizenship is, however, beyond the scope of this essay, it is sufficient to note that the Court has adopted a more liberal approach to Citizenship: Tryfonidou, Alina, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15(5) *European Law Journal 634*, 635-637.
[37] Peers, Steve, 'Free Movement, 'Immigration Control and Constitutional Conflict' (2009) *5 EmCpmst*, 173-174.
[38] Case C-370/90 *Singh (1992)* ECR I-4265 at pp. 1-6
[39] Case C-370/90 *Singh (1992)* ECR I-4265 at p. 11.

their right of free movement.[40] In response to the question referred by the National Court it was held that disadvantage includes less favorable conditions of entry and residence under National law. In other words, a Community citizen may be deterred from exercising their right of free movement if they are subject to National rules that are less favorable than the Community rules (the 'returnee rule'). [41]

4.2 Hacene Akrich

Arguably the case of Hacene Akrich provided a departure from the 'liberal approach'. In addition to the requirement of a connection to Community law, the Court held that Community law also requires 'prior lawful residence'. Despite the general departure from the liberal approach adopted by the Court, the case appears to have made an attempt to uphold the rationale of the 'returnee rule' from *Singh.*[42]

4.2.1 Factual Situation and Procedural Posture

In *Akrich*[43] a Moroccan National entered the United Kingdom on a temporary 'Tourist Visa'. Mr. Akrich subsequently applied, and was rejected, for a Student Visa.[44] Almost two (2) years after the initial entry, Mr. Akrich was deported from the United Kingdom for using a stolen identity card and attempted theft. Under British law, the deportation order not only required Mr. Akrich to leave the United Kingdom but, prohibited Mr. Akrich from reentering the United Kingdom. The revocation order applied for an indefinite basis unless withdrawn by the Security of State.[45]

Despite the deportation order, Mr. Akrich returned to the United Kingdom one (1) year later on false identity papers and was deported again.

[40] Case C-370/90 *Singh (1992)* ECR I-4265 at p. 15&25.
[41] Case C-370/90 *Singh (1992)* ECR I-4265 at p. 19.
[42] Case C-370/90 *Singh* (1992) ECR I-4265.
[43] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665.
[44] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at pp. 29-30.
[45] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at pp. 16-19.

Approximately a month after Mr. Akrich illegally returned to the United Kingdom he married a British citizen, Ms. Jazdzewska. Five (5) years after returning to the United Kingdom, Mr. Akrich was detained and deported to Ireland where he was joined by his wife.[46]

Mr. Akrich subsequently applied for the revocation of the deportation order and sought leave from the Court to reenter the United Kingdom. It subsequently emerged that (the now) Ms. Akrich was employed in Ireland for a period of six (6) months. Expressly relying on the judgment in *Singh*[47], Mr Akrich sought to return to the United Kingdom with his (British) wife under Community law. On appeal to the Immigration Appeal Tribunal the proceedings were stayed and an order for a preliminary reference was made.[48]

4.2.2 'Returnee Rule'

At the most simple level, the questions referred essentially sought to determine the scope of the 'returnee rule' from *Singh*[49]. The first part of the question sought to ascertain whether Community rules of free movement could apply where the Community National (Ms. Akrich) has exercised the right of freedom with the intention of falling under Community law. In this situation, the intentions to 'fall under' Community law occurred while the Third Country National (Mr. Akrich') would not otherwise qualify for a residence permit in the home State ('United Kingdom').[50]

Prima facie the Court cited, and presumably attempted to uphold *Singh*[51] by recognizing that ordinarily a Third Country National who is the spouse of a Community citizen, has the right to enter and enjoy rights that are at

[46] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at pp. 30-33.
[47] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265.
[48] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at pp. 33-36 & 39-40.
[49] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265.
[50] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 45.
[51] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265.

least equal to those afforded by Community law.[52] Applied to the facts, the Court recognized that Ms. Akrich had exercised her right of free movement by residing and working in Ireland. Under ordinary circumstances Ms. Akrich would be able to return home with Mr. Akrick under Community law.

Despite the recognition of the 'returnee rule', the Court departed from the liberal approaching in adding the requirement of 'lawful residence'. The Court Stated that in order fall under Community law and claim benefits afforded by Community law, the Third Country National would have to have been a 'lawful' resident in a Member State prior to migrating with his Community spouse, to another Member State.[53] The 'lawful resident rule' was used by the Court to distinguish the situation of Mr. Akrich from *Singh.*[54] That is, Mr. Akrich had not *lawfully* entered the United Kingdom and thus could not benefit from the rights afforded by Community law.

As Peers noted, the judgment remained ambiguous on the scope or application of the 'prior lawful residence' rule. On the one hand, the 'lawful residence' rule could be construed to mean that the 'returnee rule' does not apply in situations where the Third Country National had ***un****lawfully resided* in a Member State. On the other hand, the 'lawful residence' rule could mean that there must be prior *lawful residence* in a Member State within the scope of free movement rules before the 'returnee rule' could apply.[55]

According to the Court, the 'lawful residency rule' was entirely consistent with the rationale of *Singh.*[56] The Court further reasoned that 'lawful residence: *"cannot constitute less favorable treatment than that which they enjoyed before the citizen made use of the Treaty as regards to the*

[52] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 47, 52, 53,58 & 61.
[53] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 50, 54.
[54] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265.
[55] Peers, Steve, 'Free Movement, 'Immigration Control and Constitutional Conflict' (2009) *5 EmCpmst*, 179.
[56] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265 and Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 51.

movement of persons".[57] It was Stated further that the 'lawful resident rule' does not dissuade Community citizens from exercising their right of free movement because: *"the absence of any right of the spouse under [the treaty] aforesaid to install himself or herself with the citizen of the Union does not have a dissuasive effect in that regard".*[58]

The reasoning of the Court is questionable in arguing that the 'lawful resident rule' does not deter Community citizens from exercising their freedom of movement. The objective facts accepted by the Court were that Mr. and Ms. Akrich's fundamental intention was to move to Ireland to evade the immigration laws of the United Kingdom, and subsequently rely on the judgment of the Court in *Singh.*[59] It does not appear, in that context, appear logical for the Court to argue that the judgment does not have a 'dissuasive effect', given that they moved to evade National laws. In other words, it would have been extremely unlikely that the couple would have moved to Ireland, and thus the 'prior lawful residence rule' would have dissuaded Ms. and Mr. Akrich.[60]

4.3 R.G.N Eind

In R.G.N Eind the pendulum appears to have swung back to the 'liberal approach'. The Court reaffirmed the requirement of a connection to Community law and rationale underlying the 'returnee rule'. Moreover, the judgment cast considerable doubt on the restrictive approach taken in *Akrich*[61]

[57] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 53.
[58] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 54.
[59] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265.
[60] Peers, Steve, 'Free Movement, 'Immigration Control and Constitutional Conflict' (2009) *5 EmCpmst*, 181.
[61] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665.

4.3.1 Factual Situation and Procedural Posture

In *Eind*[62] a National of the Netherlands resided and gained employment in the United Kingdom. Mr. Eind was joined in the United Kingdom by his daughter Rachel. Rachel a Third Country National was granted a residence permit by her status as a family member of a Community worker.[63] Both Mr. Eind and Rachel returned to the Netherlands.[64] Upon returning to the Netherlands Mr. Eind was receiving social security benefits from the Dutch government. Rachel applied, and was rejected, for a residence permit. On appeal, the proceedings were stayed and a question was sent to the Court.[65]

4.3.2 'Returnee Rule'

The Court sought to ascertain the scope of the 'returnee rule' as established in *Singh.*[66] The Court reasoned that while Community citizens have conditional rights to reside in another Member State, the right of the citizen to reside in their own Member State was unconditional. Moreover, the unconditional right of a Community citizen to return to the Member State in which they hold Nationality is guaranteed by Community law as ensuring freedom of movement.[67]

The Court then proceeded to uphold the 'returnee rule' by reasoning that barriers to family reunification are liable to undermine free movement. It was Stated that a Community citizen could be deterred from existing the right to take up employment in another Member State if, upon returning to their home State they were unable, to continue living with their close relative.[68]

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[62] Case C-291/05 *R.G.N Eind* [2007] I 10761 at p.9.
[63] This was disputed by the United Kingdom: Case C-291/05 *R.G.N Eind* [2007] I 10761 at p.16.
[64] Case C-291/05 *R.G.N Eind* [2007] I 10761 at p.11.
[65] Case C-291/05 *R.G.N Eind* [2007] I 10761 at pp.12-15.
[66] Case C-370/90 *Surrinder Singh* [1992] ECR I-4265.
[67] Case C-291/05 *R.G.N Eind* [2007] I 10761 at pp.28-32.
[68] Case C-291/05 *R.G.N Eind* [2007] I 10761 at pp. 36-38.

Within the 'returnee rationale', the Governments of the Netherlands and the United Kingdom contended that Mr. Eind would not be deterred from exercising his right of free movement. The Governments reasoned that since Rachel did not have *prior* lawful residence in the Netherlands (home State), the mere fact that the same conditions would apply upon his return cannot be construed as a deterrent. In response the Court Stated that a family member may come to 'get used' a way of life in the host State with their family members.[69]

In this regard *Eind*[70] raised serious questions to the non-liberal rationale underlying *Akrich*[71]. On the facts, both cases involve a Community citizen returning to their 'home State' after a period working in another Member State. Both cases also involved the 'installation' of their family member in the' host State' rather than home State. Following the Court's rationale, it remained unclear how Mr. Eind would be 'deterred' from moving to the United Kingdom if he could not return to the Netherlands with his daughter, while Ms. Akrich would **not** be deterred from moving to Ireland if she could not return with her husband.

Nonetheless, the decision in *Eind*[72]was liberal in the way it defined 'joined' and subsequent connection to Community law. *Eind*[73] stands for the authority that it is irrelevant where the relationship was 'created' or 'formed'. As a general proposition, Third Country Nationals and a Community citizen can create a relationship outside the home Member State, for example by marriage or installing themselves together. Subsequently, the National and their spouse can use the 'returnee rule' to go back to the home State of the Community citizen. For *Eind*[74], this meant

[69] Case C-291/05 *R.G.N Eind* [2007] 10761 at pp.32-36.
[70] Case C-291/05 *R.G.N Eind* [2007] 10761 at p.9.
[71] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665.
[72] Case C-291/05 *R.G.N Eind* [2007] 10761.
[73] Case C-291/05 *R.G.N Eind* [2007] 10761.
[74] Case C-291/05 *R.G.N Eind* [2007] 10761.

that Rachel could return to the Netherlands with her father, despite the fact that they had 'formed a relationship' in the United Kingdom.

4.4 Blaise Metock

The case of *Metock*[75] does not directly deal with the 'returning' migrant and their third country family member, rather it expressly overturns the requirement of prior lawful residence as established in *Akrich*[76]. Moreover, the decision affirmed the liberal approach of Court in holding that a connection to Community rules can be formed by a *prior* exercise of free movement.

4.4.1 Factual Situation and Procedureal Posture

In *Metock*[77] a number of Third Country Nationals had applied for and been reject for asylum. All individuals subsequently married Community Nationals in Ireland. It was not suggested by the Member States that any of the marriages constituted an 'abuse' of Community rights.[78]

In all the cases, the Third Country Nationals applied for and were rejected for residency. Under judicial review in the High Court, a preliminary reference was made to the Court that essentially sought to ascertain whether National law could require 'prior lawful residence'. In addition, whether Community law precluded situations where the relationship was formed in the host Member State.[79]

4.4.2 'Returnee Rule'

In returning to the 'liberal approach', the Court expressly rejected the 'prior lawful' residence rule. It was held that neither treaty provisions, nor

[75] Case C-127/08 *Metock* [2008] ECRI-6241 at pp.53-54.
[76] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665.
[77] Case C-127/08 *Metock* [2008] ECRI-6241 at pp.18-21.
[78] Case C-127/08 *Metock* [2008] ECRI-6241 at p. 46.
[79] Case C-127/08 *Metock* [2008] ECRI-6241 at p. 48&81.

directives contained the requirement of prior lawful residence.[80] The Court continued to expressly reject the authority of *Akrich*[81] by stating that, *"the benefit of such a right cannot depend on the prior lawful residence of a spouse in another Member State".*[82]

In rejecting the 'prior lawful residence rule', the Court reasoned that it did not matter that a Third Country National would not be able to obtain a right of residency in the Member State to which their family member was a National. Moreover, the Community competences must extend to entry and residence of Third Country Nationals in certain situations to prevent differing rules of Member States that would be contrary to the effectiveness and 'sprit of the freedom of movement. A finding to the contrary (allowing the National refusal to grant a Visa) would dissuade Nationals from moving to another Member State'.[83]

On the question of where the relationship is formed, the Court reinforced the rationale undermining *Eind*[84]and found that the marital relationship can take place in the 'host' Member State.[85] The conclusions in that said context is more liberal than *Eind*[86]*,* in that the Community Nationals were still living in the 'host' Member State and as such, the connection to Community rules appears to have been formed by the *prior* exercise of the freedom to move.

4.5 Gerardo Ruiz Zambrano

The case of *Zambrano*[87] represents a 'leap' forward in the liberal approach of the Court. This case is interesting in the sense that it does not directly

[80] Case C-127/08 *Metock* [2008] ECRI-6241 at pp.43-48.
[81] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665.
[82] Case C-127/08 *Metock* [2008] ECRI-6241 at p.58.
[83] Case C-127/08 *Metock* [2008] ECRI-6241 at pp.64-68.
[84] Case C-291/05 *R.G.N Eind* [2007] 10761.
[85] Case C-127/08 *Metock* [2008] ECRI-6241 at p.99.
[86] Case C0291/05 *R.G.N Eind* [2007] 10761.
[87] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.

deal with the 'returning National' rather, a *potential* returning National and the derivative rights of Third Country Nationals.

4.5.1 Factual Situationand Procedureal Posture

Mr. *Zambrano*[88] a Colombian National entered and applied for asylum in Belgium. The application for asylum was rejected on the proviso that Mr. Zambrano could not be returned to Colombia.[89] The decision was followed by an unsuccessful 'appeal'.[90] Given the *non-refoulement* clause, however, Mr Zambrano, his wife and child were able to remain[91] in a Belgium.[92]

While in Belgium, Mr Zambrano and his wife had two children. After the birth of a second child named Diego an 'appeal'[93] of the decision was made on the grounds of Article 3 of the ECHR. Alternatively, after the birth of the third child Jessica, Mr Zambrano made a new application for residency. The application relies on Belgian law whereby a child that is born in Belgian and would otherwise be Stateless must be grant Belgian Nationality. The application was rejected on the grounds that the children *could have* obtained Columbian Nationality had they been registered with the embassy[94]

Mr Zambrano was employed on a full-time basis making the required contributions to the social security system. Mr. Zambrano was temporary suspended from work and made an application for social security benefits. Despite fulfilling the substantive requirements for social security, the application was rejected on the grounds that Mr. Zambrano did not hold a valid work permit. The application also resulted in an investigation by the authorities resulting in the cancellation of Mr. Zambrano employment

[88] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp.14-18.
[89] A *non-refou*lement clause.
[90] Under Belgium law 'an application for regularisation'.
[91] And were registered.
[92] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp.15-18.
[93] Under Belgium law 'an application for regularisation'.
[94] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000at p.4 and pp.19-23.

contract due to him not holding a valid work permit.[95] Mr. Zambrano subsequently challenged the rejection under National law.[96] The question of Mr. Zambrano's eligibility for social security 'hinged' on the question of whether Mr. Zambrano (a Third Country National) derived a right to residency through his familial link to his children (Community Nationals). The matter was referred by the Belgian court.[97]

The Advocate General Sharpston points out that the questions referred by the National court did not constitute a direct administrative review of the decision to reject the Resident Permit since it does not form the 'subject matter' of those proceedings. Moreover, the Belgian authorities had already granted Mr Zambrano a provisional work permit.[98] Rather, the question of residency was thus a necessary *incremental question* in order to answer the overall question of access to social security[99]

4.5.2 'Returnee Rule'

The Court conceptualized the lengthy questions posed by the Belgian authorities as a question of whether Citizenship under article 20 *TFEU*:

> *"confer[s] on a relative in the ascending line who is a Third Country National, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are Nationals and in which they reside"*[100]

The Court found that a 'future exercise' of a substantive right was sufficient to prove a connection to Community law. In their reasoning, the Court interpreted Article 20 *TFEU* as precluding measures that deprive citizens of

[95] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp.25-28 and Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 pp.38-40.
[96] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000at p.34.
[97] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp. 29-31.
[98] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.32.
[99] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.40.
[100] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.36.

substantive rights afforded to Nationals by the Community.[101] Within that context, it was held that denying the parent of Community Nationals a work permit may result in Mr. Zambrano having to leave the Member State to which their children are Nationals. Consequently, the children would be required to leave the boundaries of the Community and as such would be denied the ability to exercise the substantive of Citizenship.[102] *Prima facie,* the 'future exercise' of a substantive right means that a connection to Community law is established by the mere fact that, a citizen *could* become a returning citizen *in the future.*

The 'future' connection to Community law marks a substantive departure from the traditional 'returning migrant' cases where the Court has only found a connection to Community law exists where there has been an *actual* exercise of Community rights. For example, in *Singh*[103] and *Eind*[104], the Court based the judgments on the fact that a Community National had exercised the right of free movement through genuine employment in another Member State. That is, a*fter* excising a Community right*,* the Court would ensure the *"useful effect of the right of free movement of workers"* upon the return to the Member State to which they are Nationals.[105]

Similarly, the decision in *Zambrano*[106] is liberal in the sense that the connection was made by Belgium Nationals who are living in Belgium.[107] In that respect, Advocate General Sharpston argued that Citizenship is a free standing right that does not require physical movement across borders in order to be invoked. The requirement of physical movement according to the Advocate General would provide an outcome based on *"lottery rather than logic".*[108] In an effective use of satire it was pointed out that if a 'cross

Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.42.
[102] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp. 43-45.
[103] Case C-370/90 *Singh* (1992) ECR I-4265 at p.11.
[104] Case C-291/05 *R.G.N Eind* [2007] 10761.
[105] Case C-291/05 *R.G.N Eind* [2007] 10761 at p.32.
[106] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.
[107] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.37.
[108] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.87.

border' movement was required, Diego and Jessica would be able to invoke consular assistance but, not a right to reside in their home State of residency. The opinion and subsequent judgment raised serious questions to the application and scope of the 'wholly internal' rule.

4.6 Illustrative Example

For the purpose of continuality, let's assume that after living in Malmö for six (6) months, Lars and Sarah decide it is time to move back to Denmark. Lars is 'fed up' with the constant delays of the Öresund train and has received a number of warnings for coming to work late. Lars does some research online and realizes that he has exercised the Community right of freedom movement not only as a Community Citizen, but as a 'self-supporting' person.[109] Sarah applies and is issued a Visa for Denmark under the exact same conditions as the Community provisions.

[109] A 'self-supporting person' is the status that is most often given to frountier workers.

5 A European Competence - *the Death of National Law*

As discussed, the Court has gradually become more liberal in finding a connection to Community law whichhas largely resulted in the erosion of the principle of 'wholly internal situations'. The consequence has been that Community law is increasingly applied to situations that have traditionally been within the ambit of National law. Similarly, the reluctance of the Court to adequately define or find 'abuse' on a given factual matrix has meant that, those individuals who are able prove a connection to Community law may 'use' Community law to 'bypass', 'step around', or 'evade'[110] their National laws.

5.1 Abuse and Evasion – Backdoor Immigration

Contemporary case law has illustrated[111] that where a connection to Community law exists, it may be 'used' as the applicable law to the detriment of National law. Conceptually, this means that a third country family member of a Community National, with a connection to Community law, *could '*get around', 'avoid', or 'evade'[112] or 'side step'[113] the more stringent requirements under National Immigration law.

5.1.1 Public Policy and Security

It is theoretically possible for a Member State to apply the public policy derogations in situations where a Third Country National attempts to use

[110] Provided for example, it is not provable as the sole purpose.
[111] See generally section 4 of this thesis.
[112] See 110
[113] Hereinafter 'get around'.

Community free movement provisions to 'get around' National laws.[114] Article 27 of the CDR provides that:

> *"Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of Nationality, on grounds of public policy, public security or public health".*

However, it must be noted that the application of the derogations in situations where a Third Country National attempts to 'get around' National law is highly unlikely. In *Kempf*[115] it was held that freedom of movement constituted a fundamental right in providing the foundation of the Community and, as such any derogation must be interpreted strictly. In the context of personal conduct there must be an 'actual risk' to a fundamental interest of a Member State. [116]

Moreover, even if the Member State is able to illustrate that there is an 'actual risk', the strict application of the principle of proportionality is likely to preclude any denial of entry or residency.[117] Conceptually the characteristic of the threat[118] must be weighed against the impact on the right to family life and difficulties facing family in country of origin. The measure imposed by the Member State must not *"go beyond what is strictly necessary to achieve the objective pursued, and whether there are less stringent measures to achieve that objective".* [119] As pointed out by Barnard, proportionality in most cases of mere avoidance would only justify minor penalties such as the implementation of a fine.[120]

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[114] COMM(2009) 313 at p.10 and Barnard, Catherine, The Substantive Law of the EU: The Four Freedoms (2010),429-431.
[115] Case C-139/85 *Kempf v Staatssecretaris van Justitie* [1987] ECR at p.13.
[116] See for example COMM(2009) 313 see also Case C-48/75 *Procureur du Roi Royer* [1976] ECR 497 at 51.
[117] COMM(2009) 313 at p.13.
[118] Including danger, reoffending activities and time lapsed.
[119] COMM(2009) 313 at p.13.
[120] Barnard, Catherine, The Substantive Law of the EU: The Four Freedoms (2010),431.

5.1.2 Fraud and Abuse

Member States may be able to invoke Article 27 CDR to take the necessary measures to preclude 'abusive' use of Community law.[121] The concept of 'abuse' as established by the Court is expressly recognized in the Article 35 *CDR*[122] that States:

> *"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31"*

In the context of 'family reunification' and free movement of persons, the notion of 'fraud' could apply in a number of situations. This includes where parties deliberately deceive the authorities to obtain a right under free movement[123], artificial conduct done for the purpose of obtaining a right under free movement[124], and/or where the sole purpose is to evade the provisions of National law. [125] For the purpose of this thesis, however, the focus will be on situations where the 'sole purpose' is to evade National law.

[121] See for example: Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 56; Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.97; Case C0291/05 *R.G.N Eind* [2007] I 10761 at p.33 , and Case *C-370/90 Singh (1992)* ECR I-4265 at p. 19.

[122] Article 35, Directive 2004/34

[123] This includes to *"manipulate the factual pre-conditions of a right".* Argued in the context of workers Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323,7-8 see also COMM(2009) 313, 15.

[124] E.g. a marriage of convenience. According to the Commission a 'marriage of convenience' occurs where the sole purpose of the marriage is to ensure the right of free movement. See Case C-370/90 *Singh (1992)* ECR I-4265 at p. 24 and COMM(2009) 313 at pp.14-15. According to the commission factors indicating a 'marriage of convenience' include the couple have never met prior to marriage, inconsistency about personal details, previous 'fake' marriages, evidence of gifts for the marriage, development of family in response to a deportation order.

[125] Case C-39/86 *Sylvie Lair v Universitat Hannover* [1988] ECR 3161 at pp.43-44.

The 'sole purpose' rhetoric emerged in the case of *Lair.*[126] Lair was essentially a case regarding status of a worker as a precondition for access to social security. The Court noted in *obiter dicta* that 'abuse' may occur where the *sole purpose* of moving to another Member State was to work for a short while and subsequently enjoy the benefits of that country's social security system. Despite the reference to abuse, the Court distinguished the 'sole purpose rule' from the facts as there was a genuine and effect 'use' of the right to move.

The approach in *Lair*[127] was affirmed in the context of family reunification and the returning migrant in *Akrich*[128]*,* and subsequently by the Commission.[129] According to the Commission, 'abuse' in the context of family reunification requires:

1. The Community citizen is unable to be joined by their family member in their home State under National Immigration laws;
2. The 'family' move to another Member State;
3. The 'family' return to the home State under Community law; and
4. The sole purpose of that move was to return to the home State and evade National law.[130]

There are also a number of indicative criteria eluding to the fact that 'abuse' has occurred including: unsuccessful attempts to move to the home State, efforts made to establish themselves in the host State, and the circumstances of return.[131] Despite the criteria, 'genuine and effective' use of a Community right will preclude any enquiry into the motive or intention of the 'family' making it impossible to find abuse.[132]

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[126] Case C-39/86 *Sylvie Lair v Universitat Hannover* [1988] ECR 3161 at pp.43-44.
[127] Case 39/86 *Sylvie Lair v Universitat Hannover* [1988] ECR 3161 at pp.43-44.
[128] Advocate General Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.103.
[129] COMM(2009) 313.
[130] COMM(2009) 313 at pp.17-18.
[131] COMM(2009) 313 at p.18.
[132] COMM(2009) 313 at p.18; Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323,15; and Advocate General in Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.102.

5.1.3 Abuse and Evasion – Mere Rhetoric?

As it is evident from the case law, individuals may 'get around' National law as the concept of abuse in the Community level constitutes nothing more than mere rhetoric.[133] In *Levin*[134] for example the Court focus was to determine if there was effective 'use of the right of movement' rather than 'abuse of the right' whether working as a part-time chamber maid was *"effective and genuine……[and] not purely marginal"*[135]. The Court in focusing on the 'use' of the right to move, did not even consider the possibility that 'abuse' had occurred. It must be kept in mind that the factual matrix of the case involved 'work' as a precondition for the right of residence of a Third Country National. [136] Moreover, the Court appeared to *preclude* the possibility of finding 'abuse' by stating that in determining a genuine economic activity, that 'motive' was not relevant.[137]

Similarly in *Eind*[138] the Court focused on the effective use of right and appeared to preclude the possibility of finding abuse. In that case the conclusion was based on the fact that a Community citizen that had 'used' the freedom of movement provisions and should be granted not less favorable rights upon their return.

Alternatively, In *Singh*[139]*,* the United Kingdom attempted to use the fact that the couple had commenced divorce proceedings to implicitly suggest that the marriage was a 'fraud' therefore implying that the marriage was a sham. In a 'sweeping Statement' the Court Stated that *"the facilities created by the Treaty cannot have the effect of allowing the persons who*

[133] Although the thesis is confined to the third country nationals connected to the 'returnee migrant' a more comprehensive understanding of abuse will inevitably entail 'borrowing' cases of abuse from areas outside the 'returnees'.
[134] Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035.
[135] Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035 at p.17.
[136] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323, 8.
[137] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323,7-8.
[138] Case C-291/05 *R.G.N Eind* [2007] 10761.
[139] Case C-370/90 *Singh (1992)* ECR I-4265 at p.14.

benefit from them to evade the application of National legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse".[140] Presumably since the aforesaid paragraph was not applied to the facts, it can be interred that the factual matrix of *Singh*[141] illustrates a 'use' of a Community right.

In *Akrich*[142]*,* the Court was faced with an applicant that expressly 'admitted' the evasion of National law. Nonetheless, the Court missed an opportunity to develop and firmly embed the concept of abuse in Community law. For the most part, the Court focused on the 'use' of the right focusing on 'effective employment' and the 'use' of Community law without prior lawful residence.[143] Moreover, the Court in *Akrich*[144] Stated that, the motives prompting another member to exercise freedom of movement were not relevant if there was a 'use' of a Community right.[145]

Arguably, the Court missed the ultimate opportunity to explain the 'mysterious concept' of abuse and, how it *could* prevent evasion of National law. It was not a disputed fact that the Mr. Akrich had entered the United Kingdom illegally, had committed criminal offences, had a deportation order and had no real prospects of gaining residency in the United Kingdom. Moreover, it was accepted that couple had moved from the United Kingdom to Ireland for the purpose of 'getting around' National law and falling under the more favorable conditions of Community law.[146]

The general approach of the Court was both affirmed and summarized by the Advocate General in *Zambrano:*

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[140] Case C-370/90 *Singh (1992)* ECR I-4265 at p. 24.
[141] Case C-370/90 *Singh* (1992) ECR I-4265.
[142] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 45
[143]See above under 'Reverse Discrimination' for the discussion of prior lawful residence: Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.50 and Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323,15.
[144] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 45.
[145] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p.55&56.
[146] Case C-109/01 *Hacene Akrich* [2003] ECR I-9665 at p. 56.

> *"there is nothing reprehensible about taking advantage of a possibility conferred by law and that this is clearly distinguishable from an abuse of rights"* [147]

In that regard, an individual that is able to form a connection to Community can, *within their rights,* 'get around' National law.

5.1.4 "Use" is not "Abuse"

Prima facie the reluctance of the Court to establish a concrete principle of 'abuse' at the Community level may provide an avenue for Community citizens and their Third Country National family members to 'get around' the more stringent National laws. This is supported by the aforesaid authority that suggest the reluctance of the Court in defining or finding abuse eludes to the fact that 'abuse' under Community law is nothing more than a verbally expressed 'principle' or mere rhetoric.[148]

Nonetheless, it would appear as though the Court has legitimate reasons for focusing on the 'use' of a right. The focus on the 'use' of a right illustrate that the notion of 'abuse' does not modify the content of the right afforded by Community law, nor can it rule out the existence of the right.[149] In this context, Ziegler provides three justifications for the approach adopted by the Court. First, the effectiveness of free movement requires a Community approach that promotes mobility.[150] Second, Citizenship requires social integration where an individual should have the possibility to move and promote their own social advancement[151] Third, a

[147] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.104.
[148] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323, 1-3.
[149] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323, 2.
[150] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323, 17.
[151] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323, 18.

finding of 'abuse' may itself constitute a violation of fundamental/human rights including the right of the family.[152]

The Commission appears to have affirmed the 'justifications' provided by Ziegler. The Commission has explained that there is a strict burden on the Member States to prove that abuse has occurred. As such the decisions that are *"not to be such as to deter EU citizens and their family members from making use of their right to free movement"*[153], nor can a decision of a Member State disregard fundamental rights to family and marriage.[154]

5.2 Illustrative Example

Returning to the illustrate example of Lars and Sarah. Given the fact that Lars is effectively 'using' a right of free movement (e.g. to place himself in a better financial situation), it is clear from the case law that the motive of Lars exercising the right of free movement is irrelevant. In that context, the Court would be reluctant to consider the motive.[155]

In any case, Lars and Sarah are not moving to Sweden for the 'sole purpose' of evading National law. Therefore, this would constitute a 'use' of the right and would still fall under the ambit of Community law.

5.3 Wholly Internal- *Or Wholly European?*

In cases dealing with the classic 'free movement' provisions, the Court has become more liberal in finding that a Community element exists.

[152] Ziegler, Katja, 'Abuse of Law in the Context of the Free Movement of Workers' (2009) R. de la Feria and S. Vogenauer, eds., Hart Publishing, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1653323, 20.
[153] COMM(2009) 313 at pp.15-16.
[154] Articles 8-12 of the Charter.
[155] See the cases above.

Consequently, there has been a limitation to the principle of wholly internal situations and application of National law.[156]

The traditional expression of 'wholly internal' situation can be conceptualized through the case of *Saunders.*[157] In criminal proceedings Saunders sought to invoke a type of 'euro-defense' by arguing that she had lived in Northern Ireland and not visited England for a number of years. The Court held, however, that the factual matrix constituted a 'wholly internal situation'. The claims of Saunders were confined to a single Member State (the United Kingdom') absent any inter-State element or connection to Community law.[158]

The cases that deal with the 'returning migration' illustrate the limited application of 'wholly internal' situations' and subsequently National law. *Prima Facie* the United Kingdom in *Singh*[159] argued along the lines of a 'wholly internal' situation by arguing that the third country partner of a United Kingdom National applying for residency in the United Kingdom, fall clearly within the ambit of National law. According to the United Kingdom, the 'returnee migrant' enters and remains in the State to which they hold Nationality by virtue of National law. Moreover, the United Kingdom argued that situation of the 'returnee' migrant should be distinguished from the situation where Nationals of other Member States enter and reside in the United Kingdom, which is where Community law applies. [160] Despite the arguments the Court found that the free movement not only applied as there was movement between Member States but constituted a fundamental freedom.[161]

[156] Xavier, Groussot, 'UK Immigration Law under Attack and the Direct Application of Article 8 ECHR by the ECJ' (2003) *3 Non-State Actors and International Law 178*, 189-200.
[157] Case C-175/78 *R v Saunders* [1979] ECR 1129 at p.11.
[158] See also Barnard, Catherine, The Substantive Law of the EU: The Four Freedoms (2010), 228.
[159] C-370/90 *Singh* (1992) ECR I-4265.
[160] C-370/90 *Singh* (1992) ECR I-4265 at p.14.
[161] See 'Singh' above.

The case of *Eind*[162] reinforced the erosion of the wholly internal principle and the 'death' of National law. In that case, the Court rejected the argument that a claim of residency, by a third country family member of a Community citizen against their home State, presented a wholly internal situation. In a 'sweeping' Statement the Court Stated that *"the right of a Community worker to return to the Member State of which he is a National cannot be considered to be a purely internal matter"*[163]

The erosion of the principle of 'wholly internal situation', continued in *Metock*[164]where the Court rejected that the factual matrix represented a situation devote of any connection to Community law. In a claim against a Community Nationals 'home' State, it was held that a *past exercise* of the freedom to move was sufficient to prove a connection to Community law.[165]

The recent decision of *Zambrano*[166] proved to be another 'slap in the face' for the principle of wholly internal situations. As mentioned above, the Court used Citizenship to find that the *future* exercise of a right was sufficient to illustrate a connection to Community law existed. Moreover, it was stated by the Advocate General that Citizenship is a free standing right and that any finding to the contrary should not be accepted. In a powerful example, the Advocate General pointed out the irony that a connection 'might' be made if a nice neighbor would have taken the Diego and Jessica to Disneyland and the fact that if the family were forced to move. [167]

The erosion of the principle of a 'wholly internal situation' does not mean that the principle has been completely eliminated. Interesting, the

[162] Case C-291/05 *R.G.N Eind* [2007] I 10761 .
[163] Case C-291/05 *R.G.N Eind* [2007] I 10761 at p.37.
[164] Case C-127/08 *Metock* [2008] ECRI-6241 at pp.63-66.
[165] Case C-127/08 *Metock* [2008] ECRI-6241 at p. 99; and Advocate General Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.74.
[166] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.
[167] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp.87-89.

Advocate General noted that the situation was 'wholly internal', falling within the ambit of National law, at the point in time before the children had acquired Belgium Nationality. In that situation it could be inferred that no connection to Community existed. Nonetheless, upon obtaining Belgium Nationality the facts did not *"constitute a purely internal situation, devoid of any link to EU law"*[168].

On that level, it should be pointed out that a Community National with a third country spouse is likely to fall within the principle of 'wholly internal situations', absent a physical movement[169]. The situations of a Community citizen in a relationship, is clearly distinguishable from 'Community child', as there is the capacity to exercise the right of movement.

[168] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.97.
[169] With the exception of 'providing Services' etc.

6 Problems with the Current Approach – *What Happened to Equality and a Fair Go?*

Imigration is based on a division of Community and National competences, and there are still situations in which the 'wholly internal rule' applies. In situations that are 'wholly internal', Member States remain free to apply more stringent National law based on the fact that no connection to Community law applies. This situation is called reverse discrimination as the discrimination occurs from a Member State against their citizens.[170]

It should be pointed out that most of the discussion about reverse discrimination is conceptualized around other 'fundamental freedoms' such as the free movement of goods. Tryfonidou has illustrated that reverse discrimination failed to reflect economic reality in the context of free movement of goods.[171] In the context of 'reverse discrimination' and free movement of persons however, there is much more at stake than mere 'reflecting' economic reality. Freedom of movement is dealing with real humans that must be afforded, at the bare minimum, fundamental rights and equal treatment.

[170] Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007,* 7.
[171] Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007,*11.

6.1 Reverse Discrimination – *An 'Equal' Europe?*

Reverse discrimination is an inevitable consequence in a system of divided competences. At a general level, the notion of reverse discrimination presents an ironic paradox; Nationals of a Member State are disadvantaged because they are subject to a National measure, while Nationals of other Member States and Nationals of the same Member State who show a connection to Community law are subject to Community law and 'shielded' from the more stringent National measure.[172]

The Advocate General in Zambrano gave a solid illustration of the actual affect of 'reverse discrimination'.[173] The parents of Diego and Jessica would be able to claim a derivative right of residence under Community rules, if the family lived in a Member State other than Belgium. As the law stands, Mr. Zambrano could not claim the same right against Belgium. The irony of the situation, lead the Advocate General to suggest that the parents *should* be able to claim the same derivative right of residency in the children's 'home' Member State.

Reverse discrimination occurs where there is no connection to Community law. In acknowledging the human element with free movement of persons, it is likely that reverse discrimination may occur in three wholly internal situations. First, there may be Community citizens who are *unable* to move to another Member State, including those with a disability or those that are not in a financial situation to do so. Second, reverse discrimination may occur where an individual is unwilling to move for reasoning including familial links and/or current employment. Third, it is likely that there are a number of Community Nationals that are unaware of their rights under the Community rules.

[172] Ritter, Cyril, 'Purely Internal Situations, Reverse Discrimination, *Guimont, Dzodzi and Article 234'* (2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=954242, 1-3.
[173] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.97.

6.2 Illustrative Example

Lars and Sarah were able to 'use' the Community rules to remain together. In other situations however, Community citizens may be unable or unwilling to fall under the ambit of Community rules. Lets assume that Peter is in the same factual situation as Lars, except for the fact that he lives with Tracey in Aalborg.

In the situation of Peter and Tracey there are a number of reasons that may prevent them from forming a connection to Community law. The situation could be distinguished from Lars and Sarah due to the:-

- Geographical location of Aalborg that means that Peter and Tracey are unable to live in a bordering country and maintain their life in Aalborg;
- The fact that Peter may be unwilling to gain a connection to Community law. Peter could be for example, an extremely proud and patriotic Dane and have no desire to live in another country. Alternatively, Peter could be the primary caregiver for one of his family members.

For identical reasons as Sarah[174], Tracey is rejected for a Visa under Danish law. Peter believes that it is a 'slap in the face' for equality and fairness given that Lars and Sarah are a couple in a comparable situation, and they managed to fall under Community provisions. Unfortunately, Tracey cannot remain in Denmark and the two are forced to separate.

[174] See Section 2.2.

6.3 Fundamental Rights

Fundamental rights are quickly becoming a central feature of the Community. Originally playing a 'gap filling' role, fundamental rights have since taken a powerful role in the Community. The powerful force of fundamental rights was evident in Carpenter[175], where the Court referred and arguably relied on the right to family life even though the Charter had no formal legal status. The Charter has subsequently gained legal force for most Community States[176] and the full-impact of human rights has begun to emerge in Europe. It is likely that the role of fundamental rights will continue to be strengthened by the Community's accession to the ECHR.

In the context of Third Country Nationals and their Community partners, fundamental rights are likely to afford protection by protecting the right to marriage and found a family[177], and right to respect for the family[178]

6.3.1 Fundamental Rights and the Required Connection

In *Carpenter*[179] the Court recognized that the 'right to family life' constitutes a fundamental right and accepted it as a General Principle of Law. The Court found that a National may invoke the fundamental right of family against his own State based on the fact that he provided services to other Member States.[180] Despite the judgment in *Carpenter*[181], it well known that fundamental rights do not apply to situations that fall outside the scope of Community law.[182] That is, those that are unable to *"promote a fictitious or hypothetical link to Community law*" may find themselves in a situation of reverse discrimination and it is likely that they will not be

[175] Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2000] ECI-6279.
[176] Excluding Poland and the United Kingdom.
[177] Article 9, 'Charter'.
[178] Article 7 'Charter'.
[179] Cited in Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.54.
[180] Cited in Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000at p.157.
[181] Cited in Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000at p.54.
[182] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.158.

"afforded [the same rights as] their fellow EU citizens and fellow Nationals who had exercised rights of free movement".[183]

6.3.2 Fundamental Rights and National Law

It is necessary to point out that Member States do not always 'uphold' fundamental rights, and as such protection at the Community level is of the upmost importance. In *Eind*[184] for example, the Netherland wanted to deny entry to the child of a Dutch National. The 'deportation' was supported by the Danish and Germany Governments on the grounds that there was no prior lawful residence [illustrated above]. Ultimately, the Netherlands and their 'cheerleaders' failed to acknowledge the role of fundamental rights.

Luckily in *Eind*[185], there was a connection to Community law and the Court was able to ensure compliance with fundamental rights:-

> *"…such a requirement [' prior lawful residence'] would run counter to the objections of the Community legislation, which has recognized the importance of ensuring protection for the family life of Nationals of the Member State in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the treaty"*

Implicitly, the Advocate General appeared to recognize that Member States, particularly in sensitive areas, do not always uphold fundamental rights. In support of 'free standing rights' the Advocate General Stated:

> *"if fundamental rights under EU law were known to be guaranteed in all areas of shared or exclusive Union competences, Member States might be encouraged to move forward with detailed EU secondary legislation in certain areas of particular sensitivity (such as immigration…), which*

[183]: Cited in Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.164.
[184] Case C-291/05 *R.G.N Eind* [2007] 10761 at p.44 and 46.
[185] Case C-291/05 *R.G.N Eind* [2007] 10761 at p.44 and 46.

would include appropriate definition of the exact extent of EU fundamental rights"[186]

[186] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.97.

7 Time for Change – A new European Future

It should be obvious that the application of fundamental rights to a 'select' group of individuals presents an unspeakable paradox, given that fundamental rights by their very nature **apply to all people**. In this context, it is recognised that the Community is not ready for a 'federal style' system with freestanding rights.[187] In the context of 'immigration' however, the Community and Member States are able and should ensure equal application of fundamental rights without having to resort to a 'federal' system.

Much of the blame for the unspeakable paradox must be directed at the Community level. Arguably the Community level is responsible for causing reverse discrimination by subsuming a competence with Third Country Nationals in the context of the returning migrant.

Nonetheless, the Member States should not escape all blame for the 'unspeakable paradox'. As it will be discussed, the Member States *should* provide their own Nationals and/or residents with basic fundamental rights if for no other reason than the principle of equality.

In this context, it is almost deplorable to point out that while most Member States have made little effort to 'combat' reverse discrimination with free movement of people; many Member States have done a lot to combat reverse discrimination that occurs with the movement of goods. As Tryfonidou successful pointed out, many Member States have addressed reverse discrimination in the context of 'goods' given the *"negative*

[187] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp.166-177.

repercussions that this difference in treatment may have on the competitive of [National] products"[188] **Surely Member States of the European Community do value the competitiveness of National goods over fundamental rights?**

7.1 Increased Community Competences

At the most simple level the problem of reverse discrimination would not have occurred but for the Community expansion of competences into the area of Third Country Nationals (for example *with* the returnee rule). Although the Member States still have a responsibility to uphold fundamental rights, they did not make the initial decision to discriminate against their own Nationals (and their third country family member), that exercise free movement and the remaining citizens that do not.[189]

Given that 'reverse discrimination' emerges where there is a 'division' of competences, the Community through its institutions are under an obligation to harmonise and 'fix' the very problem that it has caused. The Advocate General in Zambrano suggested a possible solution to 'reverse discrimination'.[190] It was suggested that free movement under Article 21 TFEU should be construed in light of non-discrimination under Article 18 TFEU as prohibiting reverse discrimination.[191]

The Advocate General suggests three stages for the Courts to apply when faced with reverse discrimination. First, there would have to be 'reverse discrimination' against a Community National that has not exercised their right of free movement. Second, there must be a violation by National law of a right protected under Community law. Last, there must not be

[188] Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007,* 28.
[189] In the context of goods see Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007.*
[190] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.
[191] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at p.144 & 150.

equivalent protection under National law.[192] The Court did not accept the 'progressive' suggestions of the Advocate General.

This paper departs from the opinion of the Advocate General by contending that the elimination of 'reverse discrimination' is unlikely to be 'propelled' by the Court. Unfortunately, the previous approaches of the Court have illustrated that it often uses 'reverse discrimination' as a tool to encourage Member States to make changes at the National level.[193] Moreover, the Court does not consider itself to be in a situation to address the problems caused by reverse discrimination. In the words of Tryfonidou:

> *"[t]he Court's formal response to [the problems of reverse discrimination]…has been to wash its hands of instances of reverse discrimination, pointing out that it is up to the Member States, if they so wish , to provide a remedy to persons…that are reversely discriminated against"*[194]

Consequently, change would have to be 'propelled' by the other Community institutions.

7.2 Member States – *Pick up the Pieces*

If the Community level do not address the problems caused by the 'unspeakable paradox', the Member States should attempt to address the problems caused by 'reverse discrimination' at the National level.

7.2.1 Make it a Matter of National Law

Member States could use National legislation to give effect to more favorable Community provisions. Belgium for example, should be appalled for making 'reverse discrimination' a matter of National law. Belgium has

[192] Advocate General in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000 at pp.146-148.
[193] D'Alessio, Ignacio, 'The Free Movement of Goods and Services had Resulted in Reverse Discrimination, which is Surely Contrary to Community Law in Spirt, if not in Letter' (2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268968,11-13.
[194] Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007,*19 citing Case C-132/93 Steen *v Deutsche Bundespast (No. 2)* [1994] ECR 1-2715 at pp.8-10.

set the tone for the remaining Member States by enacting legislation that gives Belgium Nationals, as a matter of Belgium law, the same rights of 'family reunification' as granted under Community law. In order to guarantee fundamental rights and equal treatment, other Member States should follow suit.[195]

7.2.2 Uphold the Principle of Equality

The duty of equal treatment is recognised in most Member States as either a constitutional or a general right, and Member States *should want* to take all necessary and appropriate measure to ensure equal treatment of their citizens. Member States could uphold the principle of equal treatment through their Constitutional Courts by amending rules to match those afforded by the Community level. [196]

7.2.3 Recognition that National Level is not itself a Total Solution

It is recognized that the 'solutions' listed above are not without problems. Particularly in the 'area' of harmonization problems may arise. There will be a number of progressive Member States that will take all necessary measures to ensure equal treatment of their Nationals, while there will be other Member States that will 'drag their feet' and refuse to accept the 'liberal' approach taken by the Community. This will inevitably lead to a new division where fundamental rights will be provided to Nationals and third country family member of those Member States that 'self harmonise', whereas Nationals of other Member States who do not self-harmonise, and their third country family member (who do not exercise freedom of movement) will not be protected by fundamental rights.[197]

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[195] Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007*, 19.

[196] Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007*, 19-20.

[197] Similar reasoning in the context of free movement of goods: Tryfonidou, Alina, 'The Outer Limits of Article 23 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' (2007) *Delivered at the Faculty of Law, University of Cambridge 22 September 2007*, 19.

8 Conclusion

In conclusion, this thesis has argued that the application of Community laws to Third Country Nationals, with a familial link to a Community citizen, has contributed to the gradual 'death' of national law. The 'death' of National law has been reinforced by the ability of Third Country Nationals to 'use' Community rules over National laws, and the general reluctance of the Court to find that 'abuse' has occurred.

It was also argued that a system of divided competences will inevitably lead to 'reverse discrimination'. In the context of Third Country Nationals, reverse discrimination has essentially meant that individuals who are able to show a connection to Community law are able to 'use' the more liberal Community provisions and 'get around' the laws of their home State. Alternatively, individuals who cannot illustrate a connection to Community law are denied the same liberal rules and often face more stringent National laws. The actual effect of 'reverse discrimination' was illustrated through the application of fundamental rights, which will only be upheld at the Community level where a link to Community rules are established.

It has been suggested that the problems caused by reverse discrimination must be fixed by the Community subsuming a greater competence. If the Community level continues to 'wipe its hands clean', it was suggested that the Member States could (imperfectly) make an effort to minimize the inequality that occurs as a consequence of reverse discrimination.

As a concluding note it should be pointed out that if the Community does 'step up to the plate' by subsuming a greater degree of competences, the Court should turn the rhetorical concept of 'abuse' into a concrete principle. While this is an area that needs greater research, Member States will be unlikely to cede power to the Community level without more effective measures in place to ensure compliance with both the letter and sprit of Community law.

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