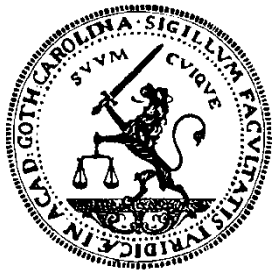

FACULTY OF LAW
Lund University

Linda Svensson

The Rights of Children in EU Law

- A case law study regarding children's rights within the paradigms of instrumentalism, individualism and protectionism

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws programme
30 higher education credits

Supervisor: Sanja Bogojevic

Semester: VT2014

Contents

Summary

Within the legal field free movement of workers the child has been given a right under Article 12 in Regulation 1612/68 to education in the host Member State. For the right to apply the child has to move and reside with the worker. The principle of equal treatment applies to the provision, which requires that, the Member State does not discriminate against children to workers. To give the right full effect the CJEU stipulated in *Baumbast* that the child has a right to be accompanied by a primary carer in order to be able to pursue the education successfully. The limits to the right has further been tried and tested in other cases, such as *Texiera* and *Ibrahim.*

When the EU-citizenship became part of EU law, also the child became encompassed by this status. CJEU interpreted in *Zhu and Chen* that anyone who is a national of a Member State is an EU-citizen and has then a right to move and reside within the European Union as long as the EU-citizen has sufficient resources and a comprehensive sickness insurance. To give full effect to the Article, if a child exercising the right to free movement then the child has received a right to be accompanied by a primary carer. That concept has also been tried and test within the field of EU-citizenship *inter alia* in *O and S*, and in *Iida*. Furthermore, the EU-citizenship was held to be a status which at a minimum prevents Member States that a child loses the status as an EU citizen. That was held in *Ruiz Zambrano* and later confirmed in *Alopka.*

In Brussel II-Regulation children shall be returned quickly if a child has been wrongfully abducted. Therefore, has a rather rigid system been created to facilitate the cooperation between national courts in issues concerning parental responsibility and claimed rights to custody of children in cross-border situations. The court where the child is considered to be habitual resident is considered to be the best suited court to try these disputes. This raises problems in regard to what is the best interest of the child, if one thinks outside CJEU strict interpretation of the objective of the Brussels II-Regulation.

The Charter of Fundamental rights also contains Article 24 ‘the rights of the child’ which addresses children and their rights, the child have the right to be heard, the best interest shall be considered and also to remain in contact with both parents on a regular basis. The Charter of Fundamental Rights does effect the application of EU law and in particular when the application of law concerns a child then Article 24 shall come into play.

Sammanfattning

Inom rättsområdet fri rörlighet av arbetare har barnet givits en rätt under Artikel 12 till utbildning i Förordning 1612/68 som barnet kan göra burk av i värd Medlems Staten. För att barnets rätt till utbildning ska bli tillämplig måste barnet flytta och bo tillsammans med föräldern som är arbetare. Likabehandlingsprincipen är tillämplig tillsammans med rätten till utbildning vilken kräver att Medlems Staten inte diskriminerar barn till arbetare. Rätten till utbildning har givits full effekt av EU-domstolen, som fastställde i *Baumbast* att barnet har rätt att bli åtföljt av sin förälder för att kunna göra bruk av sin rätt till utbildning i det fall föräldern skulle upphöra att arbeta och inte längre innehar statusen arbetstagare. Gränserna för när föräldern får åtfölja barnet utan att uppfylla några andra kriterier i EU-rätt har prövats i rättsfall som *Texiera* och *Ibrahim*.

När EU medborgarskapet blev en del utav EU-rätten, omfattades även barn av den statusen. EU-domstolen fastställde detta i *Zhu and Chen* som tolkade att även rätt till fri rörlighet gav barnet en rätt att bli åtföljt av sin förälder som inte vara EU-medborgare. Bara denne såg till att barnet och föräldern hade tillräckligt med resurser och innehade en omfattande sjukförsäkring för att inte bli till en ekonomisk börda för Medlems Staten. Barnets rätt att bli åtföljt av en förälder har i flera fall prövats utav EU-domstolen. Utmärkande för EU-rätten är att det måste finnas en länk till utövad fri rörlighet för att EU-rätten ska bli tillämplig. I Ruiz Zambrano fanns det dock ingen sådan länk, men barnen som vara EU-medborgare riskerade att få lämna sitt hemland till följd av att föräldrarna inte vara medborgare där. För att förhindra att barn utsätts för denna risk att förlora sitt EU-medborgarskap tolkade EU-domstolen att Artikel 20 i Fördraget om EU:s Funktionssätt skulle ges effekt på sätt att barnens föräldrar fick stanna med barnen.

Vidare syftar bland annat Bryssel II-Förordningen till att skydda barn ifrån att bli olovligt bortförda ifrån sitt hemland i fall då föräldrarna delar på vårdnaden. Om barnet har blivit bortfört ska samordningssystemet som Bryssel II-Förordningen föreskriver respekteras och domstolarna ska samarbeta för att barnet återlämnas snarast möjligt. Domstolen som har jurisdiktion att döma i frågor i dessa situationer är domstolen där barnet har domicil. Har barnet blivit olovligt bortfört så är det alltid den domstolen där barnet hade sin senast domicil som ska ha jurisdiktion, då den anses bäst lämpad att pröva saken utifrån barnet intresse. Så är även fallet när barnet har kommit att integreras i den andra Medlems Staten och det ger upphov till problematik kring i vilken utsträckning som barnets bästa verkligen beaktas.

Den Europeiska Unionens Stadga om de Grundläggande Rättigheterna innehåller också Artikel 24 ’barnets rättigheter’, Artikeln adresserar barn när EU-rätt är applicerbar och situationen berör ett barn. I synnerhet ska hänsyn tas till barnets rätt att bli hörd, barnets bästa och barnets rätt att på en

regelbunden basis förbli i kontakt med båda föräldrarna. Den Europeiska Unionens Stadga om de Grundläggande Rättigheterna påverkar tillämpningen av EU-rätt och i synnerhet när ett barn är med i bilden aktualiseras tillämpningen av Artikel 24.

Preface

I would like to thank my supervisor Sanja for her professional advices that helped me to accomplish what I hoped for to accomplish with this thesis. I also would like to give a special thanks to all Moot Court coaches, Xavier, Eduardo, Justin, Megi and Angelica, that I had the privilege to learn from when being part of one of Lund's Moot Court teams.

I would also like to express my gratitude towards my friends Ann, Cristopher and Emilie, as well who took the time to proofread my thesis. And of course I would like to give thanks to my supportive family whom always believes in me.

Linda Svensson

Lund, 27 May 2014

Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CJEU	European Court of Justice
COE	Council of Europe
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court on Human Rights
EC	European Communities
ECC	European Economic Community
EU	European Union
OJ	Official Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
UNTS	United Nations Treaty Series

1 INTRODUCTION

In the UNCRC the factor that constructs the concept child is age. Pursuant Article 1 therein 'child means every human being below the age of eighteen years unless, und the law applicable to the child, majority is attained earlier'.[1] EU has also embraced this age-based definition of who is to be considered to be a child.[2] The Commission and Parliament uses the concept when referring to children in their child related work, with UNCRC as their reference.[3] However, in general in EU law the concept child is not that easily defined. Due to the fact that no consistency has been used when the rights of the child has been legislated, and also because it has been in the hands of CJEU to interpret what the concept child means in EU law. To illustrate some differences occurring in EU law following legal instruments may be mentioned.

For instance in Directive 94/33/EC on the protection of young people at work regulates under what conditions the child is allowed to work and be employed in a host Member State. Pursuant Article 2(1) a child is someone who is under the age of eighteen, and pursuant Article 3(b) defined as a person who is under the age of fifteen or still subject to compulsory-school in accordance to the laws in the Member State. If the child is fifteen and not subject to compulsory school on the other hand, the person shall be seen as an adolescent.[4]

In the reading of this quite new secondary EU legislation the definition of the concept child is almost identical with the definition in CRC. Despite that a drastic difference occur when entering into a reading of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and Article 2(2)(c) where the concept child is written as both an age-based construction and a construction which depends on the child's dependency in relation to a parent.[5] Article 2(2)(c) states the following 'the direct descendants who are

---

[1] 1989 United Nations Convention on the Rights of the Child, UNTS, vol. 1577, p.3. See Article 1.

[2] See for example, European Commission, Communication from the Commission: Towards an EU Strategy on the Rights of the Child, COM(2006) 367, The Stockholm strategy – Building a Europe for and with children (2009-2011) and The Monaco strategy, Council of Europe Strategy for the Rights of the Child (2012-2015), CM(2011)171 final.

[3] De Schutter, O., with assistance of Van Goethem V., *Commentary of the Charter of Fundamental Rights of the European Union* (EU Network of independent experts on Fundamental Rights, 2006), p 210.

[4] Directive 24/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216, 20/08/1994.

[5] Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30/04/2004.

under the age of 21 or are dependants'. The concept dependency is not defined further in the Directive. CJEU has interpreted the concept dependent child in *Reyes* though, and held that a situation of real dependency for the Article to apply must exist. The EU citizen shall for a longer period of time on a regular basis paid support to the child.[6]

Furthermore, the concept child has not been defined in the Brussels II-Regulation. The definition will in the dispute when the Regulation applies depend on how the national laws define a child.[7] In Article 24 CRF the rights of the child consists of two concepts.[8] The first concept assumes that the child is someone whose well-being needs protection. The second concept considers the child to be an individual, which has a right to be part of decisions that concerns the child and to have the right to be in contact with both the parents.[9] However due to the fact that children are of varied age and maturity and not always best suited to take decisions that is in their best interest themselves. The concept provides that the child's interest is balanced against the child's age and maturity.[10]

1.1 Purpose

The aim of this thesis is to map out child cases in EU law of relevance for the purpose of detecting what meaning CJEU has given the rights of the child in EU law. Through an examination of the case law of CJEU in cases concerning children I will seek to capture the essence of what may be understood as the rights of the child in EU law. This is meant in a broad sense. Not only provisions addressed to children only will be examined. Provisions which in general terms are addressed to adults but also apply to children and CJEU has given a certain interpretation due to the fact that the addressed is a child, will also be examined.

Exploring a certain amount of cases, which extends over different legal fields in EU law, will make it possible to detect different patterns as well. With patterns I mean a group of cases that follow upon each other fitting into a certain legal frame inherent in the law or in principles developed by CJEU. Patterns that will reveal what the rights of the child mean in EU law, which may appear in one field but not in another, or patterns, which appears in two fields but not in a third or patterns, which partly overlaps from one field into another. Patterns that will uncover and reveal what meaning CJEU has given children's rights in EU law.

---

[6] Case C-423/12 *Flora May Reyes v Migrationsverket* [2014] I-0000, paras 20-25.
[7] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and of parental responsibility, OJ L 338, 23.12,2003.
[8] Charter of Fundamental Rights of the European Union, OJ 2010 C83/02.
[9] Stalford, H., *Children and the European Union: Rights, Welfare and Accountability* (Kluwer Law International, Netherlands, 2012) pp 22-25.
[10] Mak, C., *Children's Rights in EU Law* (Center for the Study of European Contract Law Working Paper Series, No. 2013-08) p 3.

Furthermore, the purpose is therefore also to detect the legal fields in which the child cases appear. To make it possible making comparisons between the different detected legal fields, and put the case law I am using into context. Furthermore the purpose is also to highlight case law in which CJEU has used Article 24 in the CFR, to interpret other EU law.

The problematic with children's rights in EU law is that the legal system does not provide a consist system of rights. They show up here and there and speaking of them as the children's rights, the expectations raises that all children will receive same rights which provide them equal benefits just because they are children. The issue though is that, due to the fact that not all individuals come under the influence of EU law, or they do but doesn't fulfil the requirement for a certain provision to apply the system is not coherent. To uncover the element determining when a right applies to a child it will be possible to elaborate on what more precisely the rights of the child in EU law are. In the light of this the main question in this thesis is: *What meaning has CJEU given children's rights in EU law?* While evaluating that also following two sub questions will be used: *Are the rights of the child differently interpreted by CJEU depending on the interest they are balanced against? Does the right of the child or the non-existence of the rights of the child raise any problematic issues in EU law?*

1.2 Delimitation

The focus for my research will extend over three fields of EU law namely free movement of workers and their family members, free movement of persons in this case children and their primary carers, family law regarding parental responsibility and unaccompanied minors seeking asylum. The last two I treat together as child protection measures in EU law. Dealing with these quite broad areas of law themselves in one thesis is an ambitious project. Therefor following delimitations are important to set out and highlight to keep the writing of the thesis within reasonable boundaries.

The first delimitation is made concerning social benefits such as childcare allowance, maternity allowance etc. The case law regarding social benefits of different forms awarded to workers are not relevant for the writing of this thesis. They may be argued to deal with children's rights indirectly and I will deal with the children's rights directly.

The second delimitation is made in regard to civil statuses. There are Cases dealing with the subject such as *Garcia Avello*[11] and *Grunkin-Paul* [12] that concerns children. I aim to look at rights of the child that someone have because the individual is a child. These Cases does not fit into my thesis because I made the distinction that civil status is fundamentally something

[11] Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] I-11613.
[12] Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] I-07639.

you have or do not have. According to the national laws of the Member State, you were born into or have been naturalised into or received through marriage or through an adoption the civil status. When the discrimination occurred in the mentioned Cases it was not because the individuals were children but rather because they held a certain civil status a certain surname which they had acquired under the national laws in the Member State they were also a national.

The third delimitation is made in regard to Decision no 1/80 of the association council of 19 September 1980 on the development of the association, the so-called Ankara agreement.[13] The agreement is concluded between EU and Turkey, and allows Turkish workers to reside and work within the Union under similar conditions as Union workers and their family members in Regulation 1612/68 on free movement for workers. I did not want to include Cases that had been interpreted pursuant Decision 1/80 since they do not encompass whole EU.

The fourth delimitation is made in regard to the young workers directive, Directive 94/33/EC young workers of 22 June 1994 on the protection of young people at work.[14] This is not a real delimitation since there does not exists any cases of relevance in that matter. However, it is of relevance to mention since such cases seem to have brought light to what is the child's right in EU law.

The fifth delimitation is made concerning child protection measures that have been introduced in EU law since the 1990's. These measures vary from policy decisions, legislative instruments, to different projects to make Europe a more child friendly place free from violence, abuse and exploitation of children.[15] This work within EU to protect children is excluded from the writing of this thesis. Focus will instead be kept on the legislative child protection instrument Brussels II-Regulation and protection of unaccompanied minors in Dublin I-Regulation.

---

[13] Decision no 1/80 of the association council of 19 September 1980 on the development of the association, not published in OJ.

[14] Directive 24/33 of 22 June 1994 on the protection of young people at work, OJ L 216, 20/08/1994.

[15] See for instance, Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, replace the previous Council Framework consisting of Decision 2004/68/JHA .This Directive shall further be complementary to Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (1), as some victims of human trafficking have also been child victims of sexual abuse or sexual exploitation.
The Daphne program decision 293/2000/EC taken by the Commission and European Parliament consists of measures to combat sexual exploitation and violence against children. The Daphne program has since 2000 been developed into three programs Daphne program I (2000), (2004-2008) II extended to EFTA/EEA and Candidate countries, and (2007-2013) III add a high level of health protection into the program.

The fifth delimitation is made in regard to the use of the case law in Brussels II-Regulation. These Cases deals with rather complicated jurisdictional issues, the presentation and argumentation regarding these Cases will therefore not be as thorough, as if this thesis had solely revolved around private international law and main focus is kept on the use of the best interest of the child within the Cases brought up as well as references made to Article 24 on the rights of the child in CFR.

Furthermore it may be highlighted that of relevance for children's rights in EU law is *inter alia* the generic rights contained in the CRF, such as Article 20 CFR which provides that everyone is equal before law, Article 3(2) CFR that every person has a right to integrity, Article 4 CFR that torture and other degrading treatment is prohibited, Article 5(1) and (3) CFR that slavery, forced labour and trafficking are prohibited, Article 7 CFR that everyone has the right to respect for their family life. Some provisions are even more child specific such as Article 14 CFR the right to education, Article 32 CFR prohibition of exploitation and safeguarding of health on the internal market and Article 21 CFR the prohibition of discrimination.[16] However as a sixth delimitation all provisions relevant for children contained in CFR will be excluded from the writing of this thesis with the exception of Article 24 CFR the rights of the child and to some extent also Article 7 the right to family life, which are put into focus.

1.3 Methology and Material

The used method is primarily an analysis of cases which concern children and therefor their rights as a child under EU law. Some provisions are addressed directly to children; others are addressed to anyone who is an EU citizen. Differences appearing when the latter type of provision applies to a child and CJEU interpret that provision on a child, then in this thesis that interpretation is considered to stipulate a right of the child. My thesis will show that there are patterns in EU law, in which the child cases appear. These patterns primarily extend over three fields of law namely free movement of workers, EU citizenship and child protection measures.

The first legal field within in this thesis refers to children's rights under worker's rights in EU law and scholars speak of as a paradigm called instrumentalism, the second legal field is EU citizenship introduced through the adoption of the Maastricht Treaty, which is spoken of as a paradigm referable to individualism. The third legal field is child protection, which appeared with the increased attention directed towards the negative side effects of more open boundaries between the Member States and is called protectionism. [17] Some scholars also suggest a fourth paradigm namely the

[16] Ruxton, S., *What about us? Children's Rights in the European Union, next step* (European Children's Network, Brussels, 2005) p 21.
[17] See McGlynn, C., *Families and the Euroapean Union Law, Politics and Pluralism* (Cambridge University Press, UK, 2006) Ch 2, 3 and 5, see also Stalford, H., *Children and*

CFR.[18] However, I consider the CFR to be essentially linked to the other paradigms due to the mere fact that it is a codification of already existing general principles in the form of fundamental rights that to some extent was used prior the adoption of CFR, and which only apply when EU law applies.

Nevertheless, since the CFR do have an influential part in EU law I will deal with it in what may be called a quasi-paradigm. Further, I have sorted in the cases under respectively legal field and strived after to find out how the child cases relates to each other within each field. To gain knowledge in how children's rights in EU law is constructed and designed by CJEU. I have also investigated how CJEU is connecting the rights of the child in EU law to any fundamental right, such as the rights of the child in the CFR or the right to family life in the CFR. In addition, the input from the AG in some cases has also been of relevance to bring up for the purpose of a more illuminated discussion.

Driven by the conviction that to understand the used children's rights cases the context in which they appear must also be understood. Therefore alongside the studies of these children's right cases, I have also researched the doctrine describing the development of EU law concerning the child, the development of EU as a whole and doctrine targeting specific problematic appearing in relation to the Cases brought up in this thesis. Substantially, I have worked in four legal frameworks, each one of them presented here below.

1.3.1 Legal framework of children's rights under workers rights

The relevant provisions in the child cases concerning worker´s children are contained in the free movement of workers in Article 45 TFEU[19], and Regulation 1612/68 on freedom of movement for workers within the Community.[20] Regulation 1612/68 is a development of the rights contained in Article 45 TFEU free movement of workers. The purpose with Regulation 1612/68 is to ensure that workers enjoy equal treatment in the

---

the European Union: Rights, Welfare and Accountability (Kluwer Law International, Netherlands, 2012) pp 47-50.

[18] See for instance McGlynn, C., *Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights*, (European Public Law, Kluwer Law International, 2002), It must be noted though, that this writing was made before CFR became legally binding and CJEU had settled the scope of application of CFR. However, within the CFR limits the child's right contained in the CFR may be considered a right which do provide a measure, which makes it possible to consider the interest of the child in a more appropriate manner. Due to the fact that the child is acknowledged as an individual of a specific age and maturity and whose well-being must be considered when establishing what the interest in need of protection is. See the discussion in Stalford, H., *Children and the European Union: Rights, Welfare and Accountability* (Kluwer Law International, Netherlands, 2012) pp 43-44.

[19] Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2010 C83/10.

[20] Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19/10/1968.

Member State they work in. Regarding the child as a family member of the worker, more specifically Article 12 in Regulation 1612/68 that provides the child has a right to education on equal terms as nationals is of great importance for the writing of this thesis and in answering what the right of the child in EU law mean. To some extent, Article 7(2) provides the child equal rights to certain social benefits as the worker, such as study finances.

1.3.2 Legal framework of children's rights as an EU citizenship right

In regard to the child cases appearing within the field of free movement of persons and relevant for this thesis to mention is Article 20 and 21 TFEU also referred to as EU citizenship. According to Article 20(1) TFEU the holder of an EU citizenship is 'every person holding the nationality of a Member State shall be a citizen of the Union'.[21] The status pursuant Article 21(1) TFEU entitles 'every citizen of the Union shall have the right to move and reside freely within the territory of the member states'. To the status are awards, rights and obligations as well as limitations set out in the Treaty and measures intended to give effect to the Treaty. Such a measure in secondary law is 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[22]. Of relevance is also Directive 2003/86 on the right to family reunification[23]. The Directive provides that third-country nationals may be reunified with their family members under certain conditions while the sponsor is residing in EU. This legal framework deals with children's rights as a right to free movement of EU citizens.

1.3.3 Legal framework of children's rights as a mean to protect

The child cases that has been used within the field of child protection is attributable to the interpretation of the Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility.[24] The Regulation is known under the name Brussels II-Regulation and determines the jurisdiction of national courts in family-law matters in cross-border situations. In particular are following Articles relevant to be familiar with. Article 8 'the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitual resident in that Member State'. Article 20 provide that courts may

[21] See also Article 9 TEU, which *inter alia* states 'Every national of a Member State shall be a citizen of the Union'.
[22] Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30/04/2004.
[23] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 03/10/2003.
[24] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12,2003.

take protective provisional measures in urgent cases, Article 21 states that judgements shall be recognised that falls within the scope of Brussels II-Regulation without any special procedure, and Article 42 that Member States shall order the return of children in the case an recognised and enforceable judgement is issued with such an certificate. In the application of the Brussels II-Regulation regarding child abduction also Hauge Convention on the civil aspects of international child abduction is used to settle disputes regarding unlawfully abducted children.[25] Of particular interest to this regard is Article 13(b) which states that 'the return of the child shall during the circumstance the child would be exposed to physical or psychological harm or an otherwise intolerable situation', not be returned pursuant Article 13.

Also relevant for this thesis to bring up is Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, which is applied in the child case *MA*[26] regarding unaccompanied minors. The Regulation called the Dublin-I Regulation requires Member States to examine asylum applications of individuals seeking protection under the Geneva Convention relating to the Status of Refugees[27]. The Dublin I-Regulation creates a transit system within the Union. If an asylum seeker have first landed in one Member State and seeks asylum in another, the last Member State may deport the asylum seeker to the first Member State.
Relevant provisions in Dublin-I for this thesis are Article 5(2) 'first lodged his application' and Article (6) 'has lodged his or her application'.[28]

1.3.4 Legal framework of children's rights in CFR

For the purpose of establishing the boundaries concerning the applicability of the CFR and indirectly Article 24 'the right of the child', following provisions will be discussed, Article 51 CFR stipulates the scope of the CFR, Article 6 TEU[29] that recognises that the Charter has same legal value as the Treaties and Article 52(7) states that 'explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'. Further, a more thorough examination of Article 24 CRF will follow. The provision states essentially three things. Firstly, the well-being of the child must be protected. Furthermore, the child shall have the right to express his or her

[25] Hauge Convention of 25 October 1980 on the civil aspects of international child abduction, UNTS, vol. 1343, p.89.
[26] Case C-648/11 *MA and Others* [2013] I-0000.
[27] Geneva Convention relating to the Status of Refugees of 28 July1951. UNTS, vol. 189, p.137.
[28] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L. 50/1-50/10; 25.2.2003.
[29] Consolidated Version of the Treaty on European Union, OJ 2010 C83/01.

views in matters that concerns the child. Secondly, the child's best interest shall be of primary consideration in actions taken which concerns them by public authority or private institutions. Thirdly, children have the right to maintain contact with both their parents on a regular basis as long as this is not against their best interest.

1.4 Disposition

I have divided this thesis into five parts. The first part deals with children's rights under worker's rights. Within in this legal field the child receives derived rights from the worker to reside with the worker as a family member. While the child resides with the worker also a right to education is acquired. The section commences with a short introduction describing the legal field in large, in the way scholars have described it as being instrumentalism. This description of context then is followed by a case law analysis, which is focused on finding the answer to what meaning CJEU has given children's rights within this specific field of EU law.

The second part of this thesis addresses the legal filed revolved around EU citizenship, which may be referred to as individualistic rights of the child, since the EU citizenship gives the child a free standing right. A brief presentation of this individualism paradigm is followed by an additional case law analysis of what meaning CJEU has given to the rights of the child within this field of EU law.

The third part of this thesis addresses children's rights within the field of child protection and what may be referred to as a protectionism paradigm. A short general description concerning the increased work regarding child protection in EU and some problematic that has occurred when adopting the Brussels II-Regulation will be brought up. This is followed by the case law analysis that is divided into four parts namely abducted children, legally moved children, vulnerable children that are being placed at foster homes and institutions and last unaccompanied minors and the application of Dublin I-Regulation.

The fourth part deals with the rights of the child in the CFR. First I will establish when the CFR applies by determining its scope, and then examine how Article 24 in the CFR has been applied by CJEU by bringing up relevant case law for that purpose.

In the fifth part of this thesis, I will finally draw the conclusion concerning the chosen question namely what meaning CJEU has given children's rights in EU law. Inhere I conclude what meaning the children's rights has been given by the CJEU in each legal field following upon each other in the order set out in the thesis. In these conclusions I also have given an answer to sub question two: Are the rights of the child differently interpreted by CJEU depending on the interest they are balanced against? Lastly I will also provide a separate answer to the third question: Does the right of the child

or the non-existence of the rights of the child raise any problematic issues in EU law?

2 INSTRUMENTALISM

Since late 1960's children became part of EU legislation with the adoption of Regulation 1612/68 on freedom of movement for workers within the Community. Children as a legal subject became visible in EU law as family members to workers when they followed along with their parents within EU.[30] The objective in Regulation 1612/68 was and still is to abolish discrimination of workers in regard to nationals in the Member State were the worker is established. Initially the underlying objective was also to encourage free movement of workers within EU for the purpose of increasing productivity on the internal market. If the worker was prevented from bringing along the family when moving or not being offered to live under dignified circumstances the worker would be prevented from moving. Thereto, the worker and the workers family members should be able to live under best possible conditions, and not be prevented from increasing their standard of living. [31] To remove the mentioned hindrance from the free movement would inspire workers to move and this could solve the problem of high unemployment at one place within EU and the lack of workers at another place where they were needed. To allocate workers would thus increase the productivity on the internal market and also provide for better living conditions for workers and their families.[32]

In this context of free movement of workers, children received rights under the worker when moving along as family members to the worker. This type of legislation sees the individual as a mean to an end and may be called instrumentalism. It seeks to ensure that the productivity of the market increases, and the worker is the mean to accomplish this while the family is used as an encouragement for the worker to move so that the worker can become productive.[33] The rights of the worker as well as the rights of the child was granted through the financial interest of the economic actor in a capital driven logic were the child was the mean to motivate the worker to move, and the worker was used as a mean to increase the production on the internal market.[34] In a way the worker and the family member or the child to the worker more precisely sits in the same boat so to speak.

In regard to the rights of the child Stalford explains however that the relationship between the rights of the child is dependent upon the right of the workers right. The child right is not free standing and only derived from the workers right. The workers right is based on the premise that the worker

[30] Stalford, H., *Children and the European Union: Rights, Welfare and Accountability* (Kluwer Law International, Netherlands, 2012) p 16.
[31] See Preamble of Regulation 1612/68 on freedom of movement for workers within the Community , OJ L 257, 19/10/1968.
[32] Barnard, C., *The Substantive Law of The EU; The four freedoms* (University Press Oxford, UK, 2013) p 273.
[33] McGlynn, C., *Families and the Euroapean Union Law, Politics and Pluralism* (Cambridge University Press, UK, 2006) p 56 and p 67.
[34] *Ibid*, pp 46-47.

is economically active in the host Member State and it is when that premise is fulfilled that the child has a derived right coming from the workers right. In *'Children and the European Union: rights, welfare and accountability'* Stalford put it like this to quote:

> 'This body of law has been heavily criticised for its instrumental approach insofar as it endowed children with merely 'parasitic rights' that where highly dependent on and vulnerable to decisions of their parents'.[35]

What Stalford meant is that if the child had rights they would perish as soon as the parent decided to move again.[36] However, CJEU has been quite insistent in ensuring that at least when the child has received a right to education. That the child shall not be deprived of that right as will be discussed in the case law analysis. Even if the CJEU has ensured that the child's right is not merely parasitic the argument as such is still valid though. At least for the purpose to illustrate that the child's right is not a free standing right to begin with, the parable may be used to explain that the right the child have is dependent upon the right of the worker who must work for the child to receive the right in the first place. On the other side Stalford is right that the child's right will be more vulnerable than the parents, since the child most likely will accompany the parent if the parent decides to move. Nevertheless, how families plan their lives are not for the EU legislator to become involved in.

The fact that the child's right is built upon this premise of only being a derived right may be explained by two reasons. This has to do with how the creation of EU law and why it took form, the initial objective was to create a common market to prevent the outburst of war again in Europe. The early idea simply started with the thought that workers should be able to move so that full use could be made of the workforce in Europe. Then the rights of the workers commenced to take form and develop, from that first seed planted.[37]

The second reason is that current laws in one era of time are a reflection of the norms prevailing in the society at that time. The family norms in the late 1960's were conservative. The family consisted of the married couple a man and a woman, and built upon the presumption of the existence of the hierarchy between the husband and wife, wife and children. The father was the breadwinner, and the mother the primary carer of the children, the children a part of this family unit.[38]

---

[35] Stalford, H., *Children and the European Union: Rights, Welfare and Accountability* (Kluwer Law International, Netherlands, 2012) p 16.

[36] Compare with Advocate General Opinion Darmon in Case C-389/87 *G. B. C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen* [1989] I-00723, to that regard see text related to footnote 59, bellow in this thesis.

[37] Craig, P., & De Burúrca, G., *The Evolution of EU Law* (Oxford University Press, UK, 2011) p 16.

[38] McGlynn, C., *Families and the Euroapean Union Law, Politics and Pluralism* (Cambridge University Press, UK, 2006) p 26-27.

2.1 The childs right to education in Article 12 Regulation 1612/68

In one of the early cases *Casagrande*[39] Article 12 in Regulation 1612/68, which states that the workers child has the right to education in the host Member State under equal conditions as the children of the nationals, was interpreted by CJEU. Essentially the question concerned if the provision contained the principle of non-discrimination, and if that was the case, to what extent that principle should apply. Did it prohibit more than just the discrimination concerning the admission to education or should the application reach further. The claimant was a child to a deceased worker whom was living with his mother and claimed that he had a right to education granted under Article 12 in Regulation 1612/68. The family was Italian nationals and the child had lived with the worker in Germany where he had attended secondary school for the school year 1971/1972. He claimed to be entitled 'educational grant' on equal terms as German students since he fulfilled the national provisions which permitting educational grant to German children.[40]

CJEU held that Article 12 obliged Member States to provide education to children of workers whom had or was having an employment within the territory of the Member State. Furthermore, the Member State had to take all efforts in regard to ensuring that these children under the best possible circumstances was able to participate in education in the Member State. CJEU further held that the objective of Regulation 1612/68 is to eliminate obstacles to the free movement of workers and their family members exercising their right to free movement in accordance with objective standards in freedom and dignity.[41] If the child to the worker would benefit from the education given in the host Member State, they had to be able to do so under equal conditions as the children of nationals in the host Member State, and rely on the national provisions, which provided the right to receive educational grant.

Not only should the children of workers have the right to attend school in the host Member State they should also be encourage by being provided same possibilities as children of nationals. CJEU held namely that Article 12 did not only refer to the admission, but also to general measures intended to facilitate educational attendance of children of workers as well. They should also be offered to attend their education under the same conditions as children of nationals in the host Member State.[42] The reasoning behind the broad interpretation of Article 12 is partly found in AG Warner's Opinion. He points out that Article 12 must have a broad interpretation since the purpose with it is to integrate children of migrant workers into the society in

[39] Case C-9/74 *Office national des pensions v Emilio Di Crescenzo and Angela Casagrande, widow of Romeo Barel* [1992] I-03851.
[40] *Ibid*, paras 1-2.
[41] *Ibid*, para 4.
[42] *Ibid*, paras 5-9.

the host Member State. Due to this, children of workers shall have access to all advantages provided to children of nationals. [43] CJEU ensured that the workers child should have equal rights to education as the children of nationals under the national laws of the Member State. Important to hold in mind also is that the national laws may concern how the education is organised in the Member State. However, the rights of national children concerning education within the Member State were the child of the worker is present shall reflect back on the workers child when the principle of equal treatment is applied.

A similar question arose in *Alaimo* a student and daughter to an Italian worker working in France, studied at the Collège d'Enseignement.[44] She was awarded study finances concerning that education, but changed school when she the second year was not accepted to continue her studies there. Enrolling at École Delegue instead, only being able to claim grant from the department instead of the state, she was refused grant on the ground that she was not a French student and could therefore not receive financial aid.[45]

CJEU confirmed *Casagrande* in *Alaimo* by stating that not only the admission to an education fell within the scope of application but also the education itself, and stated that the Member States must treat children of workers equal to children of nationals in the host Member State. The child to a migrant worker therefore shall have the same benefits regarding educational grants as children of the host Member State without any distinction concerning whether the grant is local or provided by the state.[46] Accordingly, no distinction is allowed within the sector of financing student grant within the Member State. The Member States may not circumvent the obligation to treat the workers children equal to children of nationals in respect of granting study finances. If Member States only were obliged to grant study finances under the responsibility of the state, the granting of study finances to education, which the Member State wished only nationals to attain could be allocated to other sectors than the state. The outcome of the judgement means for the child's right to education that it also entails the right to acquire study grant under equal conditions as children of nationals.

The right to study grant derived from Article 12 and Article 7(2) in Regulation 1612/68 was put to the ultimate test in *Di Leo*[47] and *Bernini*[48]. Concerning the application of Article 7(2) which states that the worker 'shall enjoy the same social and tax advantages as national workers' CJEU held that maintenance for study finances falls within the scope of being a social advantage, which also the child enjoys if the worker enjoys it. Being

[43] Opinion of Advocate General Warner in Case C-9/74 *Office national des pensions v Emilio Di Crescenzo and Angela Casagrande, widow of Rome Barel*, delivered on 11 June 1974.
[44] Case C-68/74 *Angelo Alaimo v Préfet du Rhône* [1975] I-00051.
[45] *Ibid*, para 2.
[46] *Ibid*, para 5.
[47] Case C-308/89 *Carmina di Leo v Land Berlin* [1990] I-04185.
[48] Case C-3/90 *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] I-01071.

in need of support by the parent is considered to be dependent upon the parent, which means that the child fulfils the requirement of being a child to a worker for the purpose of applying Regulation 1612/68. After settling who could be considered a worker and thereby who could be considered a child to a worker CJEU in essences asked the question in both *Di Leo* and *Bernini* whether the host Member State could oppose to grant study finances to a workers child who wanted to pursue the education in another Member State.

Miss Di Leo, an Italian national and daughter to an Italian worker in Germany, wanted to pursue studies in medicine in Italy and applied for educational grant in Germany. Mrs Bernini also a child to an Italian worker had lived in the Netherlands were her father worked. She wanted to move to Italy to pursue her education in architecture and applied for study finances in the Netherlands.[49] Germany refused to grant Mrs Di Leo study finances on the ground that she was a child to a worker and did not qualify. Netherlands refused Mrs Bernini on the ground that she had to be resident in the Netherlands in order to qualify for study grant. CJEU held in *Di Leo* that Article 12 in Regulation 1612/68 did not contain any restriction in regard to the place were the child pursued the education, and that the principle of equal treatment did not allow any restrictions in regard to the children of workers.[50] *Bernini* was a pure confirmation of *Di Leo,* but to a certain degree clarified more precisely that the Member States were not allowed to impose an extra condition on the right to study grant in regard to the child of the worker in the form of requiring them to be resident in the host Member State while pursuing the education. For the rights of the child to education to apply when the child wants to pursue the studies abroad this meant that, the child has to be considered dependent upon the parent.[51] When this criterion is fulfilled the child has a right to be granted study finances under equal terms as children of nationals pursuing studies abroad. The Member State is not allowed to impose an extra condition making it practically impossible for the child to make use of the right under equal terms as children of nationals in the host Member State.

Both Mrs Di Leo and Mrs Bernini had lived as children of a worker in the host Member State, and been part of the educational system in the host Member State. In *Meeusen* the question took on a new dimension.[52] Netherlands refused to grant study finances to Mrs Meeusen a Belgian child of a frontier worker living in Belgium. Mrs Meeusen considered herself to have been discriminated against and the question if she had a right to study finances went up to the CJEU.[53] Could a child to a frontier worker rely on Article 7(2) in Regulation 1612/68 and be granted study finances even if the child never had lived nor had the worker in the host Member State. CJEU

[49] Case C-3/90 *Carmina di Leo v Land Berlin* [1990] I-04185, paras 3-4.
[50] *Ibid*, paras 14-16.
[51] Case C-3/90 *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] I-01071, paras 28-29.
[52] Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] I-03289.
[53] *Ibid*, para 11.

stressed that the preamble made it clear that no discrimination concerning frontier workers and their family members are allowed. Further a dependent child of a frontier worker not resident in the host Member State may rely on Article 7(2) of Regulation No 1612/68 and acquire study finance while pursuing the education in another Member State, then the host Member State. To impose the condition that the child must be resident in the host Member State would be discriminatory. The condition the child must fulfil is to have lived with the parent during the time the parent have been a worker.[54] It is apparent that CJEU apply the principle of equal treatment in a consistent manner on the right to be granted study finances also in relation to children of frontier workers. That means that all children that have acquired the derived right of being a child of a worker shall have the right be granted study finances under equal conditions as children of nationals in the host Member State.

2.2 The concept workers influence on Article 12 Regulation 1612/68

Who may be considered a worker under EU law also became relevant in relation to answering the question, who may be considered to be a child to a worker and have a right to education under Article 12 of Regulation 1612/68. In *Mencarelli* a commissioner was considered a worker and the daughter could therefore be considered a child of a worker. Therefor having a right to additional financial support for her accommodating at the school she was attending in the host Member State on equal terms as children of nationals. [55] The concept worker was examined in *Echternacht and Moritz* to settle whether Regulation 1612/68 could apply to the workers children in question. If they could have a right under Article 12 the Regulation 1612/68 conferring them a right to education. Netherlands had refused two foreign students, children of German nationals, grants for their university studies. [56] Echternachts father worked for an international organization in the Netherlands and was not regarded to be a worker. The father of Moritz's on the other side was considered to have ceased being a worker and therefore could Moritz's not be considered a child of a worker.[57]

CJEU considered however that someone having a post in an international organization situated in a host Member State did fall within in the concept of being a worker and Regulation 1612/68 supported by Article 48(1) and (2) of the Treaty therefor applied. The other question concerned if Regulation 1612/68 continued to apply to a child after that the worker had ceased to work in the host Member State. CJEU held that in accordance

[54] *Ibid*, paras 21-25.
[55] Case C-43/79 *Tito Mencarelli v Commission of the European Communities* [1980] I-00201.The father was employed at the commission, CJEU held that he was a worker. Therefore his daughter had a right to receive reimbursement for educational costs including the accommodation costs in regard to her education.
[56] Case C-389 and 390/87 *G. B. C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen* [1989] I-00723, para 3.
[57] *Ibid*, para 5.

with Article 12 of Regulation 1612/68, a child of a worker must be able to pursue his or her higher education. Further in order to be successful also be able to complete the education in the host Member State.[58] If the child has lived in the host Member State with the worker and become installed in the educational system in that Member State the child has a right to finish his or her education.[59]

AG Darmon stressed that the provision concerning the child's right to complete the education could not be made conditional upon whether or not the parent decided to stay in the host Member State or not. That would give raise to situations in which families became precarious because it often was prone to depend on the behaviour of the father in the family, and on what he decided to do. If the child had received rights and strictly would depend on the parent's right, which could affect the child's right that would be contrary to the spirit of EU law.[60] CJEU gave the child's right to education a freestanding meaning. After that the child had received the derived right from the worker and become installed in the education the child had a strong right to education to lean back on. Once the right to education received that right cannot be taken from the child due to some arbitrariness in behaviour of a parent who suddenly wants to move somewhere else. Nevertheless it is likely that the child will move with the parent if the parent decides to move even before the education is finished in the host Member State. What is clear though is that the right as such makes it possible for the child to stay in the Member State if the parent decides to move in order to finish the education.

In *Brown* the scope and limits of when the concept worker will provide the child a derived right to rely on Article 12 in Regulation 1612/68 was examined. Mr Brown was a student brought up in France that had dual nationality, British and French. He was seeking student allowance in the UK for the purpose to pursue studies in electrical engineering at the Cambridge University. Before pursing the courses he had taken a job at a Company in Belfast claiming it to be 'pre-university industrial training' part of the university studies.[61] Mr Brown claimed himself to be a child of a worker since his parent had been working and residing in the UK before he was born. Mr Brown had never had the status of being a family member of a worker though. Despite this the question was could he still benefit from Regulation 1612/38 and Article 12 therein.[62] CJEU held that Mr Brown was not a child of a worker. Because the wording of Article 12 is clear and states that 'it grants rights only of a child who has lived with his parents or either one of them in a Member State whilst at least one of his parents resided there as a worker.' Since Mr Brown he had not resided with at least one of

[58] *Ibid*, para 21.
[59] *Ibid*, para 23.
[60] Opinion of Advocate General Darmon in Case C-389/87 and 390/87 *G. B. C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen*, delivered on 25 January 1989.
[61] Case C-187/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] I-03205, para 3.
[62] *Ibid*, para 29.

his parents, whilst at least one of them were working in UK Regulation 1612/68 did not apply. For the rights of the child concerning the right to education in Article 12 CJEU made the provision conditional upon the child having resided with the worker to come in enjoyment of that right.

2.3 The concept child in Article 12 Regulation 1612/68

CJEU interpreted the concept 'child' in *Landesamt* and the relevance the child's age had for the right to be entitled education pursuant Article 12 in Regulation 1612/68.[63] Mr Gaal was a Belgian who sought education allowance to continuing his University studies in the UK. His income consisted of an orphan allowance that he received from his deceased father. He was not dependent upon his mother.[64] The application was rejected on the ground that he had 'reached the age of 21 years of age and was not dependant on his parents'.[65] The question referred to CJEU was if the concept of 'child' for the purpose of Article 12 of Regulation 1612/68 was subject to a condition of age or dependency in the same way the rights governed by Article 10(1) and Article 11 of Regulation 1612/68 was. The German Government argued that there was a close connection between Article 10, 11 and 12 in Regulation 1612/68 and that Article 12 therefore had to be interpreted restrictively.

CJEU was of another opinion and held that such a view was not acceptable. Article 12 does not refer to either one of the other two provisions, and the principle of equal treatment provides that a child of a migrant worker must be able to complete his studies successfully. To make Article 12 subject to limitations such as age or the child having to be dependent upon a parent for the Article to apply would conflict with the letter and the spirit of that provision.[66] CJEU held that the relevant conditions to look at was if the 'child' had lived with his or her parents while the parent had the status of being a worker as had been held in *Brown*.[67] CJEU reached the conclusion that the definition child in Article 12 was not subject to the same limitations as set out in Art 10 and 11 of Regulation 1612/68.[68] According to Article 10 the child must install him- or herself and not reached the age of 21 or still be dependent upon the parent.

To not make Article 12 conditional upon Article 10 is logical argued AG Tesauro, since it is possible for the child to rely on other provisions in EU law to reside in the same Member State as the parents. As pointed out by the

[63] Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] I-01031.
[64] *Ibid,* para 3.
[65] *Ibid,* para 4.
[66] *Ibid,* paras 22-25.
[67] *Ibid,* para 27, also see Case C-197/*86 Steven Malcolm Brown v The Secretary of State for Scotland* [1988] I-03205, para 30.
[68] Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] I-01031, para 31.

child still needs to be safeguard and protected from unfair discrimination in relation to children in the host Member State.[69] This means that the right of the child to education once it is acquired create a concept of the child that is not governed by the child's age or the child being dependent upon a parent. Simply it means that once the child has received a right to education it cannot be lost. The child may rely on the right in the host Member State and expect equal rights to education as the child of a national in that Member State.

2.4 The childs right to a primary carer in Article 12 Regulation 1612/68

In *Landemsamt* the concept child concerning the age limit in regard to Article 12, which had no such limit. An adult who had acquired the right would be able to use it. What about the circumstance of the child being a minor and the parent to the child ceased be a worker, or the parent a third-country national got divorced. What would happen with the right to education for that minor child, and or if the minor was a third-country national child? In *Baumbast and R* the meaning of Article 12 in Regulation 1612/68 was examined further as being a free standing right to education. In essence the questions boiled down to whether the minor child had a right to be joined by a primary carer in order to be able to continue the education?[70]

The family Baumbast lived in the UK and consisted of Mr Baumbast a German national, Mrs Baumbast a Colombian national and their children. The father in Mr Baumbast a German national had ceased to work in the UK were he held the status worker, and joined a German company in China. His wife was a Colombian national and they had two children, one together a German and Colombian national and one from Mrs Baumbast previous marriage a Colombian national.[71] The children attended school in UK and the family also had sufficient resources and a comprehensive sickness insurance in Germany.[72] CJEU held that the right conferred from Article 12 had to be interpreted in alignment with the principles of liberty and dignity enacted in the free movement. Furthermore, if the child installed in the education system in the host Member State would not be able to finish her or his education successfully, that would prevent the worker in the first place to exercising the free movement of work pursuant Article 45 TFEU.[73]

[69] Opinion of Advocate General Tesauro in Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal,* delivered on 9 February 1995, para 14.
[70] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] I-07091.
[71] *Ibid,* para 18.
[72] *Ibid,* para 19.
[73] *Ibid,* paras 50 and 52.

The acquired right to education did not cease to exist if a parent ceased to be a worker or got divorce from a worker.[74] CJEU used two lines of arguments explaining why the child had a right to be joined by a primary carer. Firstly the right to education presupposed that the child could be joined by the parent since the child otherwise would risk being depriving of the right.[75] The right could not under any circumstance be made ineffective receiving a restrictive interpretation.[76] Secondly the right to education had to be interpreted in light of the right to family life pursuant Article 8 ECHR[77] since the right to family life is a fundamental right recognised in EU law.[78] The principle of equal treatment in conjunction with the right to family life provided that Article 12 had to be construed in a manner which provided that the child could, 'under the best possible conditions' attend the courses in the host Member State. In other words that the child shall be able to finish the education under the same conditions as children of nationals of the host Member State.[79]

When the child had acquired a right to education under Article 12, that provision also conferred a right to the primary carer of the child to reside with the child. The child's right to education is in this respect rather far reaching. The same rules applied to the third-country national child since Article 10 in Regulation 1612/68 is not restricted in regard to the nationality of a family member.[80]The meaning the CJEU gave the child's rights to education was that it allows a primary carer to join the child. The child who is a minor shall not lose the possibility to enjoy the right to education fully. Regardless if the parent is a work any longer or is a third-country national that has got divorced the child's right to education shall remain and the solution CJEU has used is to confer a derived right from the child's right to education to the child's primary carer.

In *Baumbast and R* it was held that a child that had acquired a right to education had a right to be joined by a primary carer. However in *Baumbast and R* the children were joined by primary carer that had sufficient resources and a comprehensive sickness insurance to not become a financial burden to the host Member State. What would happen if the primary carer did not have sufficient resources when joining the child in the host Member State?

---

[74] *Ibid,* para 63. To clarify, in regard to the matter concerning the divorce in the Case R. Mrs R a third-country national was married with a French worker, they had two children and they got divorced. The national authority did not want to grant Mrs R right to residence on the ground that she was divorced. Question in that Case was whether she could have a right to reside with her children in order for them to finish their education as a primary carer. When the child had a right to education CJEU held, it was irrelevant in regard to the right to be joined by a parent and third-country national that was divorced.
[75] *Ibid,* para 71.
[76] *Ibid,* para 74.
[77] 1950 European Convention of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series, No. 5.
[78] *Ibid,* para 73.
[79] *Ibid,* para 71.
[80] *Ibid,* para 56.

In the Cases of *Ibrahim*[81], *Texiera*[82] and *Alarape and Tijani*[83] the concept primary carer was thoroughly examined by CJEU. The primary carer in *Ibrahim* was a Somalia national who lived in UK with her Danish husband and their four children were attending school. The husband lost his status as a worker.[84] The couple separated and Ms Ibrahim was not self-sufficient depended on social assistance to cover her living expenses. She therefore applied for social housing assistance.[85] She claimed to have a derived right to reside pursuant Article 12 in Regulation 1612/68 in UK, based on the circumstance that she had children attending school.[86] The primary carer in *Texiera* was Mrs Teixiera that also lacked sufficient means, she even became homeless under a period. Mrs Texiera a Portuguese national had moved with her husband to UK where they worked. The daughter was born and attended school in UK but the couple divorced. [87] To be able to support herself and the daughter Mrs Texiera applied for housing assistance for homeless people and based her claim on the right of residence under Article 12 of Regulation 1612/68.[88] The daughter was at the age of fifth at the time of the proceedings and therefor the national court wanted to know if she after reaching the age of maturity still would be entitled to be joined by a primary carer.

In *Alarape and Tijani* the primary carer was a third-country national mother a soon to be doctoral student also a third-country national. Ms Alarape mother to Mr Tijani, both Nigerian nationals lived in UK. Ms Alarape had married a French national and Mr Tijani had attended school and had obtained a bachelor's degree a master's degree and been accepted to doctoral studies at the University in Edingburgh.[89]. They applied for residence permit but did not fulfil the five year requirement set out in Directive 2004/38 of having been lawfully resident in the host Member State. Therefore the question arose whether Ms Alarape could be considered a primary carer providing emotional support to Mr Tijani and if she was if they had to share the same household. In regard to the question if a primary carer could have a derived right to reside with the child without having sufficient resources. CJEU put child's right to education in focus and confirmed the reasoning in *Baumbast*.[90] The once acquired right to

[81] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] I-01065.
[82] Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] I-01107.
[83] Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] I-0000.
[84] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] I-01065, paras 15-16 and 19.
[85] *Ibid*, para 20.
[86] *Ibid*, para 22.
[87] Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] I-01107, para 20.
[88] *Ibid*, para 23.
[89] Opinion of Advocate General Bot in C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*, paras 14 -17.
[90] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] I-01065, para 29.

education cannot be deprived the child and that right is an independent right.[91] Article 12 may therefore not be made conditional upon the child having sufficient resources and a comprehensive sickness insurance in accordance with Article 7 in Directive 2004/38 in order to have a right to be joined by a primary carer. The primary carer may therefore rely solely on Article 12 in Regulation 1612/68.[92]

In the second step taken by CJEU in *Texiera* that developed the concept primary carer further, concerned whether a child that had reached the age of maturity also could have a right to be joined. CJEU held that held that Article 12 and the rights therein was not affected by the age of maturity. Since Article 12 also encompasses completion of higher education.[93] CJEU made the analogy to the right of financial assistance provided for in Article 12. The age of a workers child who had acquired a right to education and reached the age over twenty-one, no longer dependent upon the parents still had a right to financial assistance.[94] The primary carer had therefor a right to reside with the child after that the child reached the age a maturity, as long as the child was in need of the care and support from the parent to be able to accomplish the education. It was left to the national court though to establish whether that circumstance was at hand.[95] In regard to the age and maturity CJEU also dealt with the question if the emotional support provide by the primary carer could be considered to entitle the primary carer a derived right to residence and also while providing this emotional support did the primary carer have to live in the same household as the child. [96]

CJEU held that the age did not affect the application of Article 12 and it encompassed higher education. CJEU never answered the question whether the primary carer had to live in the same household as the child though. If the child's right to pursue the education and there would arise a risk that the child would not be successful in the studies without the primary carer after the age of maturity, then primary carer had a derived right to residence. This emerging concept of the child's right to be joined by a primary carer meant that other factors then age and maturity would be decisive in determining whether the child had the right to be accompanied also after reaching the age of maturity. The cases have to read as the CJEU states that the child has a right to be joined also after that the child has reached the age of maturity. However, when passing this age limit it will be left to the national courts to decide whether there exists a need for the child to be joined. If a child would be in need of emotional support from a primary carer then the national court may permit that a primary carer joins the child.

[91] *Ibid*, para 42.
[92] *Ibid*, para 32.
[93] Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] I-01107, para 80.
[94] *Ibid*, para 82.
[95] *Ibid*, para 86.
[96] Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*[2013] I-0000, para 22.

In *Czop and Punakova* the question arise whether also a self-employees child could have a right to education and equal treatment under Article 12 in Regulation 1612/68, that the child's primary carer could have a derived right to residence under Regulation 1612/68. [97] Ms Czop a self-employed mother of four children, a polish national had come to UK on a student visa in 2002. One child was born in Poland and the other three in UK. In 2006 her son Lukasz Czop from Poland joined the family in UK and commenced his education there. [98] Ms Czop went out of business for a period and applied for income support in 2008. Ms Czop's application was rejected on the ground that she did not have a right to residence in UK for the purpose of the national Regulation regarding income support to apply.[99] Ms Czop claimed that she had a derived right of residence in UK because of her self-employment. Because as a general principle in EU law self-employment equated with worker. Since she had been a worker and her children became installed into the education system during this time they had acquired a right to education under Article 12 in Regulation 1612/68. Relying on the reasoning in *Baumbast*, *Ibrahim* and in *Texiera* Ms Czop claimed to therefor have a derived right to residence as a primary carer and therefore a right to social assistance benefits during the time she was unemployed.[100]

CJEU stated that for the child to have a right to education the parent had to acquire the status worker in the host Member State.[101] Ms Czop, nor her husband had been workers since they were self-employed.[102] The fact that Ms Czop was Lukasz primary carer was not sufficient for her to have a derived right to residence. CJEU held that the literal wording in Regulation 1612/68 had to be observed. Pursuant Article 12 only the child of an employed, whom the child had resided with when the employed was working in the host Member State could fall within the scope of application. To follow the literal wording supported by both the general scheme of Regulation 1612/68 as well as Article 46 TFEU only employees and their children was encompassed by Regulation 1612/68. CJEU also held supported by the fact that Article 12 had been reproduced into Regulation 492/11 governing free movement of workers in Article 46 TFEU there was no reason for diverging from the wording. Article 12 has a clear and precise wording and the Article would lose its effectiveness if it was not respected.[103] Due to this, a child of a self-employed could not have a right to education pursuant Article 12 that a primary carer could receive a derived a right from.

From a child's rights perspective it appears strange that CJEU made such a distinct different between children of workers and children of self-employed workers. Both the worker and the self-employed person contribute to the

[97] Case C-147/11 *Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11)* [2012] I-0000.
[98] *Ibid*, para 11.
[99] *Ibid*, para 14.
[100] *Ibid*, para 17.
[101] *Ibid*, para 26.
[102] *Ibid*, para 30.
[103] *Ibid*, paras 29-33.

finances in the host Member State.[104] The only thing that separates the worker who is employed and the worker who is self-employed is that, the self-employed worker works under the direction of him or herself. CJEU has held that anyone who pursues activities that are genuine and real is a worker. The self-employed person which on a regular basis under a certain time period perform tasks which are 'genuine and real' produces an income, is under the supervision of him or herself and receives remuneration from the income earned ought to be considered a worker.[105] Consider that the objective with Regulation 1612/68 is to ensure that workers are not being discriminated against, as well as the purpose with Article 12 in Regulation 1612/68 is to ensure that children of workers receives equal treatment . It is a rather strange conclusion to exclude the self-employed person and their children form the enjoyment of that right since that self-employed person contributes to the productivity within the host Member State.

[104] See Opinion of Advocate General La Pergola in Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, delivered on 28 January 1999, para 15. Regarding the question if a frontier workers child should be excluded from the possibility to be granted study finances, on the ground that the child is not resident in the host Member State. La Pergola argued that such a requirement could not be imposed. Due to the fact that the frontier worker, which 'are entitled to not be discriminated against in regard to 'employment and by the social benefits granted by the Member State to which they pay their taxes and social security contribution'.

[105] Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] I-05939. In *Raccanelli* the question was if a doctoral student could be considered a worker, the meaning of the concept 'worker' could according CJEU not be construed narrowly. CJEU held that 'any person who pursues activities which are real and genuine' is to be considered a worker, 'to the exclusion of such small scale activities which are marginal' (see para 33). If the doctoral student preparing his thesis on the basis of a grant contract, for a 'certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration' (see para 37) he is to be considered a worker.

3 INDIVIDUALISM

The idea to impose the EU citizenship status as part of the Maastricht Treaty in 1993 was not a coincident.[106] Not only had the idea started to flourish amongst scholars that to different extents envisioned a federalist EU a United European Union a model based on the United States in the 1970.[107] In addition, CJEU played an important part in the creation of the concept EU citizenship before it was introduced into the Maastricht Treaty. The CJEU dealt with issues, which arise when economically active persons on the internal market for example ceased to be economically active and maybe decided to become students.[108] In a legal environment were provisions did not provide a clear cute answer and CJEU had to balance the dynamic creating tensions between the internal market ideology and the goal of integration, the EU citizenship like status emerged.

According Kochenov and Plender the EU citizenship is merely a codification of CJEU case law, due to the prevailing continuity in the cases pre-Maastricht and after. It is possible to distinguish similarities between the quasi-like status in the pre-Maastricht Cases and in the after-Maastricht Cases revolving around the status of EU citizenship.[109]After the introduction of the EU-citizenship in the Maastricht Treaty, CJEU interpreted the concepts bearing in EU law first time in *Baumbast* were the CJEU held that Article 21 TFEU have direct effect.[110] CJEU held therein that the EU citizenship is a fundamental status[111], which entailed the right to reside in other Member States if the EU citizen could provide for himself and the family members in the host Member State. To have sufficient resources and a comprehensive sickness insurance and thereby not become a burden to the

[106] The Maastricht Treaty, provisions amending the treaty establishing the European Economic Community with a view to establishing the European Community, Maastricht 7 February 1992.
[107] See *inter alia* Director General Internal Policies of the Union, Policy Department C Citizens' Rights and Constitutional Affair, *Altiero Spinelli – European Federalist*. This source is a paper written as part of a symposium to honour the memory of Spinelli. Altiero Spinelli together with Enersti Rossi wrote the Ventotene Manifesto, and is considered one of the founding fathers of the federalist movement. He worked towards a federalisation of Europe in the spirit of the United States as the role model, and against current fascistic influences in Europe.
[108] Kochenov, D., Sir Plender R., *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text* (European Law Review, Netherlands, 2012) p 373.
[109] *Ibid*, p 371. More specifically the authors points out Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] I-04239, Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] I-04265 and Case C-186/87 *Ian William Cowan v Trésor public* [1989] I-00195 as typical examples of Cases, which points out that the EU-citizenship status in the Maastricht Treaty is a mere codification of an already pre-existing status.
[110] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] I-07091, para 84.
[111] *Ibid*, para 82.

social system in the host Member State enabled the EU citizen to move and reside without having to fulfil the requirement of being economically active in the host Member State as a worker. [112]

3.1 The childs right to free movement in Article 21 TFEU

CJEU then interpreted the status of EU citizenship concerning children for the first time in *Zhu and Chen*. That appears to have constituted a marriage between the rights interpreted in *Baumbast.* In that Case, both the EU citizenship right to free movement and the child's right to be joined by a primary carer to give full effect to the right to education pursuant Article 12 in Regulation 1612/68 were handled separately but in *Zhu and Chen* together. However, with the small adjustment concerning the right to be joined by a primary carer, which was used *mutatis mutandis* and turned into the right to be accompanied instead of joined when exercising free movement. In *Zhu and Chen* the principle of the child's right to be joined by a primary carer overlaps from the instrumentalism paradigm into the individualism paradigm on free movement of EU-citizens. By joining the right to EU citizenship and the right to be accompanied by the primary carer CJEU took the steps necessary to ensure that the EU citizenship became a right of substance rather than a mere installation for the child. From having been dependent upon the worker's right to receive rights of residence and the right to education and that in addition, the primary carer could come to rely on. The child now had a free standing right, which the parent or primary carer could have a derived right from. That was the outcome in *Zhu and Chen.*

The child and infant Cathrine had been born in Northern Ireland by her mother Mrs Chen a Chinese national. Mrs Chen married to Mr Chen, worked for a large company in the People's Republic of China. Mr Chen often travelled in his work to various Member States.[113] Previous the birth of Cathrine they had one child born in China in 1998. In addition, which AG Tizzano stresses in her Opinion, the Chen couple already had one child and according to Chines policy laws regarding birth control the Couple Chen were prevented from having a second child in China. Mrs Chen therefor decided to move to the UK and give birth to her second child there. Mrs Chen had planned the birth of Cathrine in Belfast because she knew that Cathrine would acquire Irish nationality and therefore membership in the Union. Mrs Chen herself could benefit from this and establish herself with the child in the UK.[114] It was clear that the child was dependent upon the mother both financially and emotionally. Because Cathrines acquired Irish nationality, she lost her right to become a Chines national and could not

[112] *Ibid,* paras 86-89.
[113] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] I-09925, paras 7-8.
[114] Opinion of Advocate General Tizzano in Case C-200/02 *Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department*, delivered on 18 May 2004, paras 10-14.

visit China for more than 30 days at a time.[115] Mrs Chen applied for residence permit in UK. However, the UK authority considered that Mrs Chen did not have a right to reside in the UK and rejected that application When Mrs Chen appealed the decision, the national court wanted to know if the infant Cathrine had a right to move and reside in UK, and If the answer was answered in the affirmative, would this mean that the minor child's mother the primary carer would have a right to reside with the child in the UK?[116] The Irish and Brittish governments argued that the situation was wholly internal and that EU law therefor did not apply. CJEU was of a different opinion. The fact that a person was born in the host Member State and had not exercised his or her free movement, could not sum up in the conclusion that the person did not come in enjoyment of rights conferred by EU law.[117]

The UK Government was also of the opinion that Mrs Chen tried to 'illegally circumvent the national legislation' due to her planning of giving birth to baby Cathrine in Northern Ireland were she knew that Cathrine would acquire Irish nationality and receive EU citizenship which Mrs Chen could claim to have a derived right from.[118] CJEU held that the argument was irrelevant. It did not matter that Mrs Chen had planned were to give birth to her child. Even if that meant the child would acquire the nationality of the Member State. Since each Member States is free to decide whether to apply *jus solis* or *jus sanguinis* in accordance with international laws. In consideration of that, Member States are not allowed to impose an extra condition upon the acquired status as has been held in both *Micheletti*[119] and *Kaur*[120].[121]

Furthermore, CJEU held that the EU citizenship is a fundamental status according to Article 20 TFEU which encompasses every person who is a

[115] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] I-09925, para 13.
[116] *Ibid*, paras 14-15.
[117] *Ibid*, paras 18-19.
[118] *Ibid*, para 34.
[119] Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] I-04239. Mr Micheletti had dual nationality Argentine and Italian, he was a student in Spain. He wanted to set up a dental-practice but was refused to do so due to a national rule determining that a person with dual nationality shall be considered to have the nationality were the person last was habitually resident. In Mr Micheletti's case that was in Argentine and he was therefore not considered to be a community national. CJEU held that Member States are not allowed to impose an extra condition upon an already acquired civil status, and a host Member State may not challenge civil statuses. 'It is for each Member State [...] to lay down the conditions for the acquisition and loss of nationality.'
[120] Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice* [2001] I-01237. The Case concerned if an overseas British citizen could be refused to reside in UK. Ms Kaur invoked Union law claiming that she was a citizen of the Union due to her British nationality. CJEU held that the acquisition and lose of nationality was within each Member States competence to establish. The national law defines who is a national of the Member State.
[121] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] I-09925, para 40.

national of a Member State, even an infant not able to care for herself and whose well-being is dependent upon a parent. The EU citizenship status further confers a right to its holder to reside in another Member State according to Article 21 TFEU. The right may be subject to limitations and conditions set out in secondary law. Such limitations for the EU citizen and their family members is primary to have sufficient resources and to be covered by a comprehensive sickness insurance to not become a burden on the social assistance system in the host Member State.[122] In this regard, CJEU made no distinction between a minor child and an adult. Could the minor child fulfil the obligation of having sufficient resources and a comprehensive sickness insurance than the child had a right to residence pursuant Article 21 TFEU and at the time effective Directive 90/364 in the host Member State. Were the child's financial resources came from had no significance.[123]

Concerning the question whether Mrs Chen could have a derived right of residencies due to her position as a primary carer to Catherine not be considered dependent upon Catherine for the purpose of applying Directive 90/364. However, Catherine would not be able to rely on the free movement provision on her own if the mother was not allowed to reside with her. To not allow the parent a derived right would in the circumstances mean that the child's right to residence would not be of 'any useful effect'. In other words, the child would be deprived of the right to residence if the primary carer could not accompany the child. CJEU relied on the reasoning used in *Baumbast* in relation to Article 12 of Regulation 1612/68.[124]

To conclude the primary carer of a child resident in a host Member State who never have exercised the right to free movement but fulfils the condition of having sufficient resources and a comprehensive sickness insurance, has a derived right to reside with the child in the host Member State. Because the useful effect of the right conferred to the child as an EU citizen to exercise the right to free movement would otherwise be deprived the child. Furthermore AG Tizzano stressed that it would be against the interest of the child, if the mother was not allowed to reside with the child in the host Member State. The child could not manage by her-self and to be abandoned by the mother for the purpose of the child being able to stay would not have been a reasonable solution. The denial would have gone against the principles set out in Article 8 concerning the right of family life in ECHR.[125] CJEU did follow this line of reasoning as well when interpreting Article 21 TFEU, and interpreted Article 21 TFEU it in the light of Article 8 ECHR, even if it is a bit unclear from the sole reading of the

[122] *Ibid*, paras 25-27.
[123] *Ibid*, para 41.
[124] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] I-07091, paras 71-75.
[125] Opinion of Advocate General Tizzano in Case C-200/02 *Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department*, delivered on 18 May 2004, paras 93-94.

Case. However, reference was made to *Baumbast* and paragraphs 71 to 75 therein, which uses this line on reasoning.

The problem in claiming that the child has an independent right to residence is that the child still is dependent upon the parent if the right will have any useful effect. The child will go wherever the parent goes and the right is rather used under the influence of the primary carer. Still it is in the interest of the child that CJEU constructed the EU citizenship in regard to the child in this manner since there will arise situations such as this in issue when it is appropriate that the EU citizen child is under the enjoyment of EU law. The child is recognised as an individual with its own rights, add to this the child's rights in the CFR the child's right to family life in Article 7 CFR and the child's best interest pursuant Article 24 (2) CFR is observed when EU law applies. Noteworthy is that the child's right to residence is limited in regard to the child having sufficient resources and a comprehensive sickness insurance. Compare this with *Texiera*[126], *Ibrahim*[127] and *Alarape and Tijani*[128] the conclusion can be drawn that may be read *e contrario,* as when no economic contribution has been made to the host Member State in the form of the worker paying taxes and make social security contributions, or the EU-citizen has sufficient resources and a comprehensive sickness insurance to not become a burden to the host Member State, then the free standing right will not be given any effect in EU law under the right to free movement in Article 21 TFEU and Article 45 TFEU. (See further under point 3.5 to what extent in Case C-86/12 *Alopka*)

3.2 The childs right to a primary carer in Article 21 TFEU

To what extent could a primary carer have a derived right to residence in regard to an EU citizens child's right to be accompanied. Or if the same thing is argued in the reverse, to what extent may a child be considered dependent upon the primary carer and therefor have a right to be accompanied by a primary carer. These questions were examined by CJEU in *Iida*.[129] MR Iida was a Japanese national and married to a German national in the United States. The couple had a daughter Mia while living there who acquired German, American and Japanese nationality. The family then moved to Germany were Mr Iida was granted a residence permit under the national family reunification laws. He also had a full-time employment in Germany. The couple separated and Mr Iida's spouse moved to Vienna with the daughter Mia in Austria. On a regular basis, Mr Iida held contact

[126] Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] I-01107.
[127] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] I-01065.
[128] Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] I-0000.
[129] Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] I-0000.

with his daughter spending one week in Vienna to visit her and having her home at the weekends in Germany.

Mr Iida applied for a residence card as a family member of an EU citizen. The national authorities rejected the application though, on the ground that Directive 2004/38 did not apply in the specific situation.[130] CJEU held the fact that Mr Iida did not join the daughter and spouse in the other Member State meant that he could not benefit from Directive 2004/38 since he did not accompany the his EU citizen child.[131] Since secondary legislation did not apply, CJEU went on to examine whether a right of residence could be derived from Article 20 and 21 TFEU. In that regard CJEU held that the right a third country national may acquire is not an autonomous right but a derived right based on the rights of the EU citizen to enter and reside in another member state.[132] The CJEU concluded that the child who was accompanied by her mother in Austria was not deprived of the right to reside in the host Member State in accordance with the principle set out in *Zhu and Chen*, nor was she under any risk of losing her status as an EU citizen. Mr Iida was further seeking the right to residence in the Member State of origin and not in the host Member State, he had always stayed in the Member State of origin. CJEU held that a hypothetical link to apply EU law could not be created for the purpose of applying EU law.[133] In other words, the situation was considered wholly internal and EU law did not apply.

For the child's right of free movement as an EU citizen this meant that, the child has a right to be accompanied in a host Member State when exercising the right. However, the primary carer must have his or her habitual residence in the Member State the child resides in to create the EU link. It is unclear if the primary carer must live in the same household as the child. Nevertheless, it is not sufficient that the primary carer visits the child even if it is on a regular basis in the host Member State, while the primary carer still resides in the Member State of origin. (Note that CJEU also interpreted if it was possible for Mr Iida to have a derived right solely on the basis of Article 7 CFR 'the right to family life' and Article 24 'the rights of the child', the issue will be handled under section 5 in this thesis).

3.3 The childs right to EU-citizenship in Article 20 TFEU

In most Cases the status of being an EU citizen becomes relevant first when the EU citizen exercises his or her right to free movement and EU law becomes applicable. However, in *Ruiz Zambrano* CJEU held that in certain specific circumstances EU law will apply without the activation of a cross-border link, to prevent the circumstance of an individual risk being deprived

[130] *Ibid*, paras 23-32.
[131] *Ibid*, paras 61-65.
[132] *Ibid*, paras 67-68.
[133] *Ibid*, para 77.

of the fundamental status of being an EU citizen. Such were the circumstances in Ruiz Zambrano were the possibility for the children, EU citizens to remain in the Member State of their origin was threatened, on the ground that their parents would maybe not have a derived right to residence there. The child's dependency on the parent and primary carer who was a third-country national was in other words put into the ultimate test.[134]

Mr Ruiz Zambrano and Mrs Moreno López, Colombian nationals, living in Belgium sought asylum due to the ongoing hostile situation in their home country. Mr Ruiz Zambrano and his wife had been exposed to death threats by private militia, witnessed assaults directed towards a brother and having their youngest child abducted during an entire week.[135] Because international law prevented Belgium from sending them back to Colombia, they remained in Belgium, without work permission since the national authorities refused to acknowledge their right to residence. Despite this, Mr Ruiz Zambrano signed an employment agreement for full time work so that he could provide financially for his family. During the stay in Belgium Mrs Ruiz Zambrano gave birth to two children, Jessica and Diego. Both the children acquired Belgian nationality. After the second child had been born, the Zambrano couple lodged an application seeking the right to residence in Belgium as ascending relatives to Belgian nationals. [136] After a control by the national authority at the workplace of Mr Ruiz Zambrano it was detected that he worked there without a work permit. Mr Ruiz Zambrano was fired immediately without being compensated for the work he had done. He applied for unemployment benefits, but due to the fact that he did not have a work permit his application was rejected.

Mr Ruiz Zambrano claimed that EU law applied to him and that he therefore had a direct right to rely on the Treaty. Alternatively, he considered that he had a right to rely on the judgment in Zhu and Chen. The judgment that gave the third-country primary carer of an EU citizen child, that had sufficient resources and a comprehensive sickness insurance, a derived right to reside with the minor in the Member State. Mr Ruiz Zambrano claimed that he fell under the exemption to not be required to have a work permit so that he could fulfil the requirement of having sufficient resource and his children's right to residence would not be deprived of its 'useful effect'.[137] CJEU pointed out that according to Article 20 every person holding a nationality of a member State enjoys the status of being a citizen of the Union.[138] Since both Jessica and Diego have Belgian nationality, they are citizens of the Union. Further it was empathized that Article 20 TFEU

[134] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] I-01177.
[135] Opinion of Advocate General Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi,* delivered on 30 September 2010, para 19.
[136] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] I-01177, paras 14-22.
[137] *Ibid*, paras 27-35.
[138] *Ibid*, para 40.

> 'Preclude national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[139]

Conclusively, to refuse to grant work permit and the right to residence of a third-country national parent whom the child is dependent upon would have that effect.[140] For the child's right this meant that the child whom is a national of a Member State, and thereby is an EU-citizen cannot be deprived of that right even if the parents are third-country nationals without any rights to reside in the Member State. To force the parents to leave the territory of the Member State would indirectly mean to force the child to leave the territory. The child that had a right to the status of EU citizenship would be deprived that right if the child was forced to leave the territory of the Member State. Therefor has the primary carer received a derived right to reside with the child in order for the child to enjoy the useful effect of the right conferred by the status EU citizenship.

In *O and S* the circumstance in a way was similar to those in *Ruiz Zambrano*, except from the fact that the third-country national who faced being expelled from the Member State was a step-parent of an EU citizen and married to another third-country national whom had a right to reside in the Member State already. Mrs S a Ghana national living in Finland was married with a Finish national with whom she had a child. The couple divorced, Mrs S received custody of the child who was an EU citizen and was remarried to a third-country national Mr O. Mrs S and Mr O had together two children. Mr O applied for residence in Finland, the application was rejected due to the fact that he could not show that he had subsistence means.[141] Since the primary carer of the child had a right to reside in the Member State in question there was no risk for the EU citizen child to risk losing the 'genuine enjoyment of substance of rights' in accordance with the principle set out in *Ruiz Zambrano*. Nevertheless, since both parents in contrast to *Dereci* was third-country nationals CJEU could apply Directive 2003/86 on family reunification, which they could not in *Dereci.*[142] (See to what effect under heading 5.2 in this thesis and further discussion what this meant for the rights of the child in EU law).

In '*The Concept of EU citizenship in the case law of the ECJ*' Leanarts stresses that a conjunct reading of *Ruiz Zambrano*, *McCharty*[143] and

---

[139] *Ibid*, para 42.
[140] *Ibid*, para 43.
[141] Case C-356/11 *O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L. (C-357/11)* [2012] I-0000, paras 19-23.
[142] *Ibid*, paras 68-69.
[143] In Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] I-03375, a UK national with dual nationality, British and Irish got married with a Jamaican national. Mrs McCharthy Never exercised her free movement Mrs McCharthy applied for Irish passport then Mr McCharthy applied for residence permit as family member to an EU citizen. The application was rejected. CJEU held that Mrs McCharthy had never exercised her right to free movement and always resided in her Member State of origin therefor could not Directive 2004/38 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States apply.

Dereci[144] means that for the concept of 'deprivation' which has to be at hand if Article 20 TFEU shall apply to the situation, must in its nature force the EU citizen to leave the Union. Not only the territory of a certain Member State, but the Union as a whole.[145] This interpretation when applying Article 20 TFEU in the developing line of Cases following *Ruiz Zambrano* has been criticised for restricting the application of EU citizenship. In defence, CJEU held that EU law does not apply in wholly internal situations with the exception of the risk of losing the status of being a union citizen. In the circumstances EU law does not apply and a fundamental right risk being in breach CJEU has left the responsibility of the national courts to seek support in the national constitution and ECHR as was suggested in *Dereci* to solve the legal issue in accordance with these instruments.[146]

In *Zambrano* Article 21, 24 or 34 in the CFR were invoked to be interpreted in conjunction with Article 20 TFEU. However according to Leanarts CJEU would have created a problem if it had given an affirmed that they should be read together with Article 20 TFEU since the CJEU then had acted outside of its own competence extending the scope of Article 20 TFEU. To bind the fundamental rights to the status of EU citizenship would have turned EU into a federation like system and to its very least create an association comparable to the legal system in the United States and the Bill of Rights which is an intrinsic part of being an American citizen.[147] For the child's right this illustrates were the limits goes in regard to an acquired right in EU law. The right to not have to leave the territory of the own Member State exists because the child is an EU citizen. The primary carer receive a derived right to reside with the child whom otherwise would not be capable to enjoy the substance of the right.

[144] Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] I-11315, concerned a Turkish national who had entered into Austria illegally. He had there got married with an EU citizen, together they had three children. The Austrian authority rejected his application for residence permit. Mr Dereci invoked the right to residence permit under Directive 2004/38. CJEU held that when the EU citizen had not exercised his right to free movement the situation was wholly internal and EU law did not apply. Since wife and children did not have to leave the Union, the risk of loss of substance of rights doctrine in Zambrano did not apply either.
[145] Leanarts, C., *The Concept of EU citizenship in the case law of the ECJ* (ERA Forum, 2013) p 575.
[146] *Ibid*, p 583.
[147] *Ibid*, pp 577-578.

3.4 The Member States obligation in Article 20 TFEU

The principles set out in the previous judgements of *Chu and Zhen*[148], *Iida*[149] and *Ruiz Zambrano*[150] were confirmed in *Alopka*. Ms Alopka was a Togo national living in Luxemburg who had a relationship with a French national Mr Moudoulou. She applied 'for discretionary leave' in Luxembourg which the authorities refused to grant. She had given birth to twins, and the children acquired French nationality. Ms Alopka applied eventually under EU legislation for a right to reside in Luxemburg, claiming that since she did not have a relationship with the children's father she could not stay in France and that the children needed healthcare in Luxemburg due to their premature birth.[151] The question referred to CJEU concerned whether Article 20 TFEU read in conjunction with Article 20, 21, 24, 33 and 34 of the CFR could be construed as conferring a derived right of a third-country national who lives with her children that are EU-citizens in a host Member State were they have lived ever since birth. CJEU reformulated the question to also include Article 21 TFEU, and stated that a third-country national family member do not enjoy autonomous rights in EU law but may have derived rights to residence and entrance in certain circumstance in a Member State.[152]

CJEU held that Ms Alopka could not be considered a beneficiary of the Directive 2004/38 Article 3(1) since she was in a similar situation as the parents in *Zhu and Chen* and *Iida* and could not be considered dependent in relation to her children.[153] CJEU empathized that the EU citizen exercising the right to free movement, must have sufficient resources and a comprehensive sickness insurance to be able to rely on the free movement provision Article 21 TFEU.[154] When the EU citizen is a child, the child has a right to be accompanied by a primary carer to not be deprived of the rights useful effect as has been held in *Zhu and Chen* and *Iida*. The decision whether the child had sufficient resources in accordance with Article 7(1) of Directive 2004/38 to reside in the host Member State was left to the national authorities to settle. Moreover, if the conditions set out in Article 7(1) of Directive 2004/38 were not achieved, Article 21 TFEU does not hinder a Member State from having national laws refusing Ms Alopka residence.[155]

---

[148] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] I-09925.
[149] Case C-40/11*Yoshikazu Iida v Stadt Ulm* [2012] I-0000.
[150] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] I-01177.
[151] Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] I-0000, paras 13-14.
[152] *Ibid*, paras 21-23.
[153] *Ibid*, para 25.
[154] *Ibid*, para 27.
[155] *Ibid*, paras 28-31.

CJEU then examined whether Article 20 TFEU prevents the Member State from having national laws which refused Ms Alopka residence caused by the derived right she had in relation to her children. It was stressed that since it was not excluded that Ms Alopka may 'benefit of a derived right to reside in France', to refuse Ms Alopka the right of residence in Luxemburg would not result in the circumstance that her children would have to leave the territory of the EU. Therefore did neither Article 20 TFEU exclude national laws that required that both the children and the primary carer had sufficient resources in order be allowed to reside in the host Member State.[156] For the child's right this means that if a primary carer accompanying the child in a host Member State and does not have sufficient resources and a comprehensive sickness insurance, the last resort for the child is to move to the Member State were the child is a national. That Member State is responsible for the child to remain in EU.

[156] *Ibid*, para 35.

4 PROTECTIONISM

It was in the 1990's that the child's interest was started to be acknowledged in EU law, as a concept which was extended to exist also outside the sphere of the family. A wide spectrum of different measures with the purpose to protect children at a EU level has since the start been developed. Directives, Regulations and different policy and action programs as well as the CFR have been part of an increasing work in the endeavour to protect children in EU. Prior the accession of the Lisbon Treaty the Union traditionally has taken guidance from Human Rights, and concerning the right of the child both ECHR and UNCRC has influenced the work within EU. [157]

Before entering into the Lisbon Treaty the competence of EU concerning the possibilities to cooperate in criminal matters was limited, since it required intergovernmental decision making to take action. The earlier legislative decisions in regard to the protection of the child was taken under the first pillar, the later decision referable to the third-pillar was possible to taken after the accession of the Lisbon Treaty which broadened the competence of EU with in the ambit of safety and security.[158] Within this growing paradigm which has moved the child's right from the economical and international ambit into the that of safety, security and social justice children's rights has become more than part of an greater economic goal. The vulnerability of the child and younger individuals has become acknowledged and progressive steps towards ensuring that the well-being of the child is protected have been taken within EU. [159]

To the protective measures must also Brussels II-Regulation be included; it is attributable to international child law. Already existing international instruments inspired the construction of the provisions forming an own EU instrument for protection of children in issues arising regarding parental responsibility in cross-border situations. Besides national rules in the Member States governing the choice of jurisdiction in parental responsibility disputes the European Custody Convention[160], the Hauge Child Abduction Convention[161], the Hauge Protection of Minors Convention[162] and the Hague Child protection Convention[163] was important

[157] Canetta, E., Meurens, N., McDonough, P., Ruggiero, R., *EU Framework of Law for Children's Rights* (Directorate-General For Internal Policies – Policy Department Citizen's rights and constitutional affairs, 2012).
[158] *Ibid*, p 13.
[159] McGlynn, C., *Families and the European Union Law, Politics and Pluralism* (Cambridge University Press, UK, 2006) p 63.
[160] European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20 May 1980, ETS No 105.
[161] Convention of 25 October 1980 on the civil aspects of international child abduction, UNTS, vol. 1343, p.89.
[162] Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of minors. UNTS, vol. 1969, p.145.

for the writing of the Brussels II-Regulation.[164] In year 2000 the first version of Brussels II-Regulation[165] came which dealt with parental responsibility when marriages ended in cross-border situations. The aim was to create a system which would effectively govern which court that would have jurisdiction in child custody matters. Also if the child was illegally moved or in using the term used in the Brussels II-Regulation abducted, by one of the parents ensure that the child immediately would be returned to the Member State of origin. This Regulation has been subject to a lot of criticism though; in the first version for example focused around the nuclear family it did not provide any protection for children of co-habitants or to step-children.

Evidently, the hierarchy of relationships within the EU with the marriage placed at the top was still the prevailing norm and created problems when the family constellation in reality existed in more forms then that. The inflexible view of the family resulted in the unequal treatment of children, even if the aim with the Brussle II-Regulation was to protect them under EU law and not let any child slip through the cracks. The Commission proposed therefore in 2003 a new Regulation which replaced the first Brussle II-Regulation dealing with the issue, now encompassing all children regardless if their parents were married or not.[166] The new Regulation is however not unproblematic either. It deals with matters deduced to family law in the Member States and these laws influence the application of Brussels II-Regulation.

4.1 Abducted children's best interest

The question arises if an enforceable judgment in Accordance with Article 21 and 42 could be declared not enforceable by a court in another Member State. Pursuant Article 21 the 'judgement given in a Member State' shall be recognised in the other Member State without any special procedure being required'. Pursuant Article 42 the return of a child may be ordered by the court issuing the judgment by the issuing of a certificate fulfilling three criteria. That the child has been given the right to be heard, and the parties has been given the same opportunity and the court has taken into account Article 13 in 1980 Hauge Convention stating that the authority that shall enforce the judgment may refuse to order to return a child if there exist a risk that the child will suffer psychological of physical harm.

---

[163] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, UNTS, vol. 2204, 1:39130.
[164] Dutta, A., Schulz, A., *First Conerstones of the EU Rules on Cross-border Child Cases: the Jurisprudence of CJEU of the European Union on the Brussels IIa Regulation from C to Health service executives* (Journal of Private International Law, 2014), p 2.
[165] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003.
[166] McGlynn, C., *Families and the Euroapean Union Law, Politics and Pluralism* (Cambridge University Press, UK, 2006) p 58.

Mrs Rinau a Lithuanian national married in 2003 Mr Rinau a German national, and they lived in Germany. In 2005 their daughter Luisa was born. A few months after the daughter's birth Mrs and Mr Rinau separated, and Luisa stayed with her mother.[167] In July 2006 Mrs Rinau went with her daughter to Lithuanian on vacation for two weeks with Mr Rinaus consent. Mrs Rinau decided to remain in Lithuanian and not return to Germany. Mr Rinau applied successfully for the right to custody of Luisa in the German court. The dispute resulted in several proceedings back and forth in the national courts. [168] In June 2007 however, the German court established the divorce between Mr and Mrs Rinau and granted the custody rights to Mr Rinau.[169] Mrs Rinau turned to Lithunianan court and applied for non-recognition of the German judgment. To the part that ordered the return of the child and the granting of the custody rights to the father Mrs Rinau invoked that the decision should be set aside and that a new application for a decision should be granted for non-recognition of the German judgment.[170] The national court turned to CJEU and requested if it is possible to apply for non-recognition of a judgment that have been settled pursuant Article 21 regarding parental responsibility, and certified in accordance with Article 42, in the circumstances no application for the judgments enforcement has been made.

Also the question was asked if a national court may re-open a judgement ordering the return of a child to review it when the national court in the Member State of origin has failed to comply with the procedure laid down in the Brussels II-Regulation, including protecting the best interest of the child?[171] CJEU held that according to Article 11(8) of the Brussels II-Regulation a non-return judgment pursuant Article 13 of the 1980 Hague Convention has no effect when the judgement is enforceable in accordance with Section 4 of Chapter III order to secure the return of the child in the Brussels II-Regulation.[172] The rules are governed by the underlying objective of the 1980 Hauge Convention, which is to ensure that the conditions for promoting the immediate return of the child are upheld. The CJEU held that if a non-recognition judgement would enjoy procedural autonomy it would result in the delay of the return of the child to the Member State of origin. CJEU further stated that certified judgements, priority has been given to the jurisdiction of the Member State of origin, and non-recognition judgments are preceded by judgements taken pursuant Article 11(8), 40 and 42.[173] This means that a judgement issued pursuant Article 21 may be stopped from being enforced by a non-recognition judgement. However, that non-recognition judgement does not prevent the national court in the Member State of origin in the case that child has not been returned to issue a certificate in accordance with Article 11(8), 40 and

[167] Case C-195/08 PPU *Inga Rinau* [2008] I-05271, para 28.
[168] *Ibid*, paras 29-36.
[169] *Ibid*, para 38.
[170] *Ibid*, para. 41.
[171] *Ibid*, para. 42.
[172] *Ibid*, paras 57-70.
[173] *Ibid*, paras 62-65.

42.[174] The reason for handling certified judgments in this manner is *inter alia* explained by Article 11(3), which provides that the national courts must act expeditious when handling the return of wrongfully removed children.[175] The priority is to return the child to the Member State were the child has his or her habitual residence prior to the wrongful removal. To allow the national court in the Member State were the child is wrongfully retained to review judgments prior the enforcement would slow down the process. This would constitute a risk to the well-being of the child and the Brussels II-Regulation would risk lose its useful effect, which is to protect the child.[176] This judgement meant for the right of the child that the criteria set out in Article 13 in 1980 Hauge Convention should not apply to the child if a judgment had been issued pursuant Article 21 and Article 42 in Regulation 1612/68.

Ms Purrucker gave prematurely birth to twins, a boy and a girl called Merlin and Samira in Spain. The children had to be hospitalised. Merlin left the hospital a couple of months and Samira had to stay a bit longer.[177] Ms Purruckers relationship with Mr Vallés Pérez ended and she wanted to move to Germany. Mr Vallés Pérez agreed to only have access and gave Ms Purrucker custody rights to Merlin and Samira.[178] Mr Vallés Pérez then changed his mind and brought a proceeding before the national court in Spain seeking a provisional measure to be awarded custody rights of the children. Ms Purrucker brought a proceeding before the national court in Germany also seeking custody rights. Mr Vallés Pérez successfully brought a proceeding in Germany for the enforcement of the Spanish judgement, which granted provisional measures rights to custody.[179] Ms Purrucker contested the provisional measure awarded on the basis of Article 20 in Brussels II-Regulation. The question arise and in essence concerned if a provisional measure which may be granted under urgent circumstances also is possible to enforce as a judgement issued under Article 21 in Brussels II-Regulation.[180] CJEU stating that Article 20 is not subject to the dealing of jurisdiction in regard to parental responsibility. What it provides is the possibility for the national court in urgent cases to take provisional measures existing in national law even if the national court of substantive jurisdiction is another court.[181] CJEU stated that the Brussels II-Regulation because it is EU law prevail national law. It prevails also therefore International Conventions entailed in Article 59 to 63 in the Brussels II-Regulation. CJEU held that Brussels II-Regulation builds upon the principle of mutual trust between Member States, which according to the CJEU 'is a cornerstone for the creation of a genuine judicial area'.[182] To allow

[174] *Ibid*, paras 97 and 111 the operational part 1 and 2.
[175] *Ibid*, para 76.
[176] *Ibid*, para 81.
[177] Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] I-07353, para 27.
[178] *Ibid*, paras 28-29.
[179] *Ibid*, paras 31 and 37-38.
[180] *Ibid*, para 57.
[181] *Ibid*, paras 60-62.
[182] *Ibid*, paras 69-71.

enforcement and recognition of judgements within the scope of Article 20 in all Member States including Member States having substantive jurisdiction would give raise to the risk of the parties trying to circumvent the provisions in Brussels II-Regulation. Creating the possibility of forum shopping, this would be contrary to the intention of the EU legislator. CJEU further held that the objective of the Brussels II-Regulation is to safeguard the best interest of the child when a decision is taken that concerns the child and the legislator has decided that the best suited court is the one that is closely situated to were the child was habitual residence.[183]

4.2 Abducted children's best interest under changed circumstances

The two most questionable judgments are *Detiček*[184] and *Povse*[185] in regard to how the best interest of the child is used to justify a clear cut application of the main rule in the Brussels II-Regulation, which is a fast as possible return of the child if the child has been abducted.

In *Detiček* the national court in Italy ruled that the father was entitled the custody rights to the daughter Antonella, who should be placed at a children's home during an undecided period of time. Ms Detiček then took the daughter with her to Slovenia were she had her family and Antonella adjusted into the new social environment.[186]The Italian judgement was declared enforceable in Slovenia and the Slovenian court ordered the return of Antonella to Italy. Ms Detiček appealed the judgement and invoked Article 13 of 1980 Hauge Convention arguing that Antonella had become adjusted into the society in Slovenia and it would be against her best interest if she was returned to Italy. To send her back would mean that she would suffer psychological and emotional trauma. [187] Antonella had also expressly stated that she wanted stay with her mother in Slovenia.[188]Question, arise if a provisional measure according Article 20 could be taken to overrule an enforceable judgement such as the one at issue to protect the fundamental rights of the child? CJEU stressed that the underlying objective of the Brussels II- Regulation was to protect the best interest of the child in accordance with recital 12 of the Brussels II-Regulation. According to Article 8 in the Brussels II-Regulation the main rule is that the national courts were the child is habitually resident has jurisdiction.[189] An exemption to that rule is found in Article 20, which under certain exceptional circumstances may give a court jurisdiction to grant provisional, protective measures even if the national court has no substantive jurisdiction. These conditions consists of three accumulative requirements set out in Article 20, namely the case is urgent, the person or its asset is present in the Member

[183] *Ibid*, para. 91.
[184] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] I-12193.
[185] Case C-211/10 PPU *Doris Povse v Mauro Alpago* [2010] I-06673.
[186] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] I-12193, paras 19-20.
[187] *Ibid*, para 43.
[188] *Ibid*, para 25.
[189] *Ibid*, paras 35-37.

State in question and the measure is be provisional.[190] Nonetheless, CJEU stressed that Article 20 of the Brussels II-Regulation cannot be interpreted in such a manner that it disregard the right of the child in Article 24 in CFR especially Article 24(3) stating that the child has a right on a regular basis to remain contact with both his or her parents.[191] Moreover, it is presumable that wrongful removals of children deprive them of the possibility to remain in contact with both their parents, and only if it is not contrary to the best interest of the child.[192] CJEU then reached the conclusion that all interests involved must be objectively examined, also those concerning the child and the social environment relating to him or her before the national court that have substantive jurisdiction.[193] CJEU also held that the CFR supported this interpretation. That to follow through with the objective of the Brussels II-Regulation to return the child in accordance with an enforceable judgement meant that Article 24(3) actually had been considered. The reasoning behind was depended on a general assumption that the return of the child would most likely result in that the child would remain in contact with both the parents. This meant that even if the child has become adjusted into the society a general presumption that the child shall be returned is in its best interest, because then can the child remain in contact with both his or her parents according Article 24 (3) CRF.

Another example of this kind of doubtful reasoning in regard to Brussels II-Regulation is found in *Povse.* Sofia the daughter to Mr Alpago an Italian national and Ms Povse an Austrian national, was taken from Italy to Austria. Eventually the national court gave Ms Povse provisional custody. In that judgement, Mr Alpago was considered to not be capable of being responsible for Sofia and that he would cause her harm if he was awarded the custody right. Instead Mr Alapago was granted access to the daughter under supervision of a social worker, but Ms Povse did provide him minimal access. This led to the result that the father could not engage fully as a parent according to the social worker, which affected the interest of the child.[194] The Italian court therefore decided to issue another judgment demanding Sofia back to Italy so that the relationship between father and child could be re-established. The national court in Austria refused to order the return of Sofia due to the grave risk Mr Alpago constituted to Sofias psychological well-being. The question that arises was to what effect provisional protective measure could have in the case a mother was granted custody rights and moved back to her Member State of origin with the child. Could this change the child's habitual residence if the child became adjusted into the new social environment? CJEU held that the national court having jurisdiction had been given a central position in the Brussels II-Regulation and judgements concerning provisional measure taken by these courts was to be considered as judgements, even if they may be changed due to

[190] *Ibid*, paras 38-39.
[191] *Ibid*, paras 53-55.
[192] *Ibid*, paras 56-58.
[193] *Ibid*, para 60.
[194] Case C-211/10 PPU *Doris Povse v Mauro Alpago* [2010] I-06673, para 23.

changed circumstances regarding the custody of the child.[195] If the court that had jurisdiction because of the child's habitual residence before the unlawful removal would be prevented from taking provisional measures, due to the change in the child's habitual residence that occurred during the child staying in the other Member State. I would make it problematic for the national court of substance to take provisional measures granting one parent custody rights until the final judgment would be taken.[196] The national court also sought an answer to the question if a provisional measure may be taken against a certified and enforceable judgement that is irreconcilable with a prior judgement.[197] CJEU stressed that a clear division has been establish between courts in the Member States in and in the Brussels II-Regulation, and the task of the court were the enforcement is sought is to provide that the child will be returned securely and rapid.[198] If any question arises concerning the application of law the issue must be raised in the court that has made the error in accordance with the national law of that court.[199] A certified judgment cannot be prevented enforcement even if it is irreconcilable with a previous judgement awarding provisional parental responsibility to the parent in the Member State were the child is present.[200] Lastly, the national court requested an answer to the question if a certified judgement could be prevented enforceability due to changed circumstances in regard to the best interest of the child. CJEU held that if a significant change in circumstances had appeared the issue had to be solved in the court with jurisdiction, since this court also has jurisdiction to consider the best interest of the child. Because of this, the court of enforcement must strictly abide the procedural rules and is not allowed to review any substantive matter in the judgement since that would be to act outside own its jurisdiction.[201]CJEU held that a certified judgement could not be prevented from being enforced, not even under the circumstance the same court had issued a previous judgement irreconcilable with the new judgement. Changes concerning the best interest of the child could not prevent the enforceability of a certified judgement. The legal situation had to be solved in the national court that had jurisdiction in the matter, in that court could also the best interest of the child be considered. It seems more important to protect a rigid application of Regulation 1612/68 in order for it to not be misused. Though it appears as the rights of the child is not recognised the CJEU place the responsibility on the court that has the substantive jurisdiction to be considered the suitable court to protect the best interest of the child.

[195] *Ibid*, para 46.
[196] *Ibid*, para 47.
[197] *Ibid*, para 69.
[198] *Ibid*, para 73.
[199] *Ibid*, para 75.
[200] *Ibid*, para 79.
[201] *Ibid*, paras 80-82.

4.3 Lawfully moved children's best interest

In contrast to *Rinau*[202], *Purrucker*[203], *Detiček*[204] and *Povse*[205] the judgments *Mercredi*[206] provides a different understanding of how the best interest of the child is used. The court interpret the concept habitual residence namely in the light of the best interest of the child. To decide which court that would be best suited to deal with a legal proceeding regarding custody issues concerning the child. By comparison in the judgments above the court had held that the best suited court was the one were the child was habitual resident and if the child had be unlawfully abducted the court were the child was habitual resident prior to the unlawful abduction. In *Mercredi* the child was lawfully moved and therefore interpreted CJEU the concept. Ms Mercredi had lawfully moved from UK to France with the daughter Cholé. She and the daughter was resident in France during four day[207], when the father applied for custody rights in regard to Chloé. The English court was of the opinion that it was the first seized court and that the proceeding therefore should be held there. The mother applied for sole custody rights in France and that court was of the opinion that it was the court were Chloé was habitually resident, and therefor had jurisdiction.[208] CJEU Since only the mother had custody rights of Chloé she had been lawfully moved.[209] However, the concept 'habitual residence' had to be given an autonomous meaning for the purpose of a uniform application in the Member States.[210] The CJEU pointed out that when determining the concept 'habitual residence' it must be read in the light of the other provisions of the Brussels II-Regulation. In that regard the best interest of the child had to be considered when interpreting Article 8(1) in the Brussels II-Regulation. CJEU held that habitually resident correspond to how much the child has become integrated in the social and family environment. The national court has to do a test and consider all factors of importance in each individual case to evaluate if the child has become habitual resident in the new Member State.[211] Factors such as the reasons for the stay, the child's nationality, child's age if it is an infant or an child in school age, if it is an infant how well is the mother integrated in the new social environment etc.[212] Furthermore CJEU held that the concept 'habitual residence' is a place that reflects integration, duration, regularity, reasons for stay.[213] For the child's right this meant that if the child is lawfully moved larger consideration will be taken in regard to different aspects of the child's life to determine which court is most suited to handle any cross-border custody issue in regard to the

[202] Case C-195/08 PPU *Inga Rinau* [2008] I-05271.
[203] Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] I-07353.
[204] Case C-403/09 *Jasna Detiček v Maurizio Sgueglia* [2009] I-12193.
[205] Case C-211/10 PPU *Doris Povse v Mauro Alpago* [2010] I-06673.
[206] Case C-497/10 PPU *Barbara Mercredi v Richard Chaffe* [2010] I-14309.
[207] *Ibid*, para 43.
[208] *Ibid*, paras 20-29.
[209] *Ibid*, para 42.
[210] *Ibid*, paras 44-45.
[211] *Ibid*, para 46-47.
[212] *Ibid*, paras 48-54.
[213] *Ibid*, para 56.

child. This stands sharp contrast to the systematic applied in *Rinau, Purrucker, Detiček* and *Poves* in which the children were abducted.

4.4 Voulnerable children's best interest

In two judgments *C*[214] and *S*[215], CJEU included public matters referable to parental responsibility into the concept civil matter, and thereby making the Brussels-II Regulation applicable in matters when public authority placed children in foster homes or even send them away to be treated of self-destructive behaviour at a secure institution in another Member State. The Brussels II-Convention covers civil matters only even it does refer to placement of children at foster home or institutional care pursuant Article 1(2)(d).

In *C* CJEU managed to subsume also child-care issues treated as public matters in national law, to fall within the scope of the Brussels II-Regulation. The interpretation was justified by the purpose to treat all children equal and provide for them the same protection. The case took place in Sweden were the Social Welfare Board had ordered that the children, child A an Swedish and Finish national and child B a Finish national immediately should be placed in a foster home.[216] Directly after the decision had been taken A and B's mother C took the children and moved to Finland were they became resident.[217] CJEU acknowledge that to take a child into care is not expressly stated in Article 1(2). Stating that does encompass parental responsibility, which falls within the scope of Brussels II-Regulation. The provision indicated that it only should be used as a guide.[218] According to the preamble of the Brussels II-Regulation the purpose is to ensure equal treatment of all children which means that all decisions taken in relation to parental responsibility is covered by the Brussels II-Regulation, 'including measures for the purpose of protecting children'.[219] To exclude decisions relating to parental responsibility taken by the authority for the purpose of protecting the child by place it in a foster home or in an institution would risk to have the effect that the effectiveness of the Brussels II-Regulation disappeared.[220] To not include public decision related to parental responsibility in the concept 'civil matter' would compromise the objective of the Brussels II-Regulation as well as the principle of equal treatment, which is to protect children.[221] This meant that children when the national authority decides to take protective measures and is taken to another Member State a judgement can be issued ordering the children back to the Member State at issue. The meaning of this in regard to the child's right in EU law is that if the national authority has decided to

[214] Case C-435/06 *C* [2007] I-10141.
[215] Case C-92/12 PPU *Health Service Executive* [2012] I-0000.
[216] Case C-435/06 *C* [2007] I-10141, para 14.
[217] *Ibid*, para 15.
[218] *Ibid*, paras 28-29.
[219] *Ibid*, para 31.
[220] *Ibid*, para 36.
[221] *Ibid*, paras 45-47 and 51.

take the child into care for the purpose of placing that child in a foster home and the parent tries to escape the measure by moving to another Member Sate then it is possible to bring the child back for the purpose of providing an suitable solution for the child so that the child may continue to go to school etc. and not become marginalised in the society.

If the placement of a child in foster home or in an institution was covered by the Brussels II-Regulation did also a placement at a secure institution account as a decision by administrative authority referable to parental responsibility. In the Case *S* was considered to not be possible to help in Ireland. Due to S self-harming, aggressive and violent behaviour the authority on Ireland wanted to place her at a secure institution in England which they hoped could help her.[222] CJEU held that the concept parental responsibility in relation to public authority in Article 2(9), had to be interpreted as encompass the transferred responsibility to take care of the child from the parent to the administrative authority. The broad interpretation served the purpose of protecting the child.[223] Furthermore, CJEU held that children who were placed at institutions were in a particular vulnerable situation and it would go against the objective of the Directive to exclude placement at secure institutions.[224] Account had to be taken in regard to the prerequisite of prior contentment from the central authority with jurisdiction to grant a place of the child at a secure institution in the Member State before a court before the judge may order a child to be taken into care in another Member State.[225]

For the child's right this means that the national authorities can decide to place the child into a secure institution in other Member States. It is doubtful that this serves the best interest of the child to be forced not only into a secure institution but also to move to another Member State. It is likely that the child due to its self-destructive behaviour did not have much saying in the matter. From one perspective one may argue that if the institution is good and the child actually may benefit from treatment at it then it is positive that the possibility to do this exists. From another perspective one may argue that an already vulnerable individual is being put into an even greater risk to fare badly.

4.5 Unaccompanied children's best interest

Another protective measure in regard to the protection of children in EU law is found in Regulation (EC) No 343/2003 of 18 February 2003 the so called Dublin I-Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. It has been held quite clear that the first transit Member State the refugee enters when entering EU is the one were asylum may be sought. However,

[222] Case C-92/12 PPU *Health Service Executive* [2012] I-0000, para 24.
[223] *Ibid*, paras 59-60.
[224] *Ibid*, para 64.
[225] *Ibid*, paras 67-95 and 112.

in the *MA* CJEU took another standpoint in regard to unaccompanied minors, stressing the importance to protect children. The child MA an Eritrean national arrived to UK and lodged an application for asylum there.[226] The only problem was that she had already lodged an application for asylum in Italy as well. Due to this, the national authorities in the UK ordered her to be send back to Italy in accordance with the Dublin I-Regulation. The order was never executed since MA brought a proceeding before national court, the High Court of Justice of England and Wales, Queens Bench Division and challenged the order of being transferred to Italy.[227] MA received on 25 March 2010 refugee status in accordance with Article 3(2) of the Dublin I-Regulation by the Secretary of State.[228] The High Court of Justice declared that in accordance with Article 6 of the Dublin I-Regulation an 'unaccompanied minor claiming asylum and having no family member legally present in the territory of one of the Member States is liable to be removed to the Member State were he first made an asylum application'.[229] Since the application was dismissed MA appealed the matter before the Court of Appeal (England and Wales) (Civil Division), in a joined case with two other the appellants also unaccompanied minors in similar circumstance. The appeal concerned how Article 5(2) and Article 6 in the Dublin I-Regulation should be interpreted in regard to unaccompanied minors. Due to the differences in the wording between Article 5(2) 'first lodged his application' and Article (6) 'has lodged his or her application' it was unclear whether the children's application in the UK precede the application made in Italy.

CJEU had to clarify how the provisions should be construed when the minor asylum seeker had lodged an application for asylum in more than one Member State.[230] CJEU commence by stating that according to Article 6 in the Dublin I-Regulation the responsible Member State for the asylum seeking minor is the Member State in, which the family members to the minor lives. In the case the child is unaccompanied and per definition does not have any family members in any Member State, then the responsibly Member State is the one there the application has been lodged according to Article 6 second subparagraph.[231] Further since it was not clear what 'has been lodged' meant the court held that in EU law not only a textual interpretation has to be made but also the context must be considered to which the provision refers as well as the objective of the Dublin I-Regulation. CJEU held that the sentence 'where the minor has lodged his application' in Article 6 could not have the same meaning as 'first lodged his application' in Article 5(2) and Article 13 of the Dublin I-Regulation.[232] The reasoning behind was that it is important that Member States does not prolong the procedures involving unaccompanied minors. They belong to a

[226] Case C-648/11 *MA and Others* [2013] I-0000, para 14.
[227] *Ibid*, para 16.
[228] *Ibid*, para 17.
[229] *Ibid*, para 27.
[230] *Ibid*, para 42.
[231] *Ibid*, paras 47-48.
[232] *Ibid*, paras 50-51.

category of individuals who are particularly vulnerable. The last lodged application shall therefore be considered valid and the Member State shall no send them back. This conclusion was also considered supported by the preamble of the Dublin I-Regulation in which reference to the CFR is made, including Article 24(2) the best interest of the child, which the Court pointed out must be considered when interpreting Article 6 in the Dublin I-Regulation.[233] This means for the right of the child that the most vulnerable individuals unaccompanied asylum seekers shall be protected from being thrown back into the system again if they have not followed it in the way the EU legislator has stipulated. The unaccompanied child will enjoy the protection of the Member State were the child has lodged the application and is present in.

[233] *Ibid*, paras 55-58.

5 CHARTER OF FUNDAMENTAL RIGHTS

Lastly the forth paradigm that I will refer to as a quasi-paradigm turned up with the introduction of the CFR. The fundamental rights of the child in Article 24 in the CFR, is a concept that both in international law and in EU law has a quite short history.[234]

In 1990, UNCRC entered into force. The overall concept is that the child partly is a part of a family and partly also a human being with its own identity. Who with age and maturity become more and more capable of taking his or her own altering decision. The governing idea is thus that children are human beings and as such they are endowed with human rights, which extend over of the field of civil, political, economic and cultural. These rights are connected to their human dignity that each child has.[235]

Nevertheless before the UNCRC was adopted, and likewise the CFR, ECtHR recognised children when applying Article 8 ECHR 'the right to family life'. It was in particular the best interest of the child was developed as a concept applicable to children. Because CJEU commenced to apply Article 8 ECHR and recognised the human right as a fundamental right, it became part of EU law.[236] CJEU has stated that Article 7 CFR provides a corresponding right in regard to Article 8 ECHR, which means that ECtHR interpretation is valid in EU law.[237]

[234] Commentary of the Charter of Fundamental Rights of the European Union, p 209.
[235] *Ibid*.
[236] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] I-06279, para 41.
[237] Case C-400/10 PPU *J. McB. v L. E.* [2010] I-08965, para 53.

5.1 CRF its scope and application

The CFR is a codification of already existing principles and rights. Further did the fundamental rights enshrined in CFR exist initially as 'general principles' in EU law.[238] As a legal instrument the fundamental rights appeared in the judgement of CJEU in 1969.[239]
It was first held in *Stauder*[240] that fundamental rights are a part of general principles of EU law. The inclusion meant that CJEU received a foundation for justifying EU measures that were imposed on Member States. The EU legal order building upon the principles of EU primacy and direct effect, had to find a way to become adjustable with fundamental rights in the Member States, since it became evident that it was impossible to disregard from fundamental rights when applying EU law.[241] Evolving from this premise two lines of case law was created and became a doctrine, which continues to develop, of how the fundamental rights shall be applied in EU law.[242] The first line follows upon *Wachauf*[243], which states that fundamental rights apply when EU law is implemented or applied and the second line follows upon *ERT*, which states that fundamental rights apply when EU law is derogated from by national measures such as a public policy.[244]

Unfortunately did not the CFR make it much clearer in regard to when the CFR becomes applicable in EU law. It is stated in Article 51 CFR that it applies to 'Member states only when they are implementing EU law'. This came across as somewhat cryptic since the case law of CJEU suggests otherwise. To not exemplify in Article 51 CRF any more precise criteria keeps it open for interpretation. Nevertheless when Member States are obliged to apply EU law they also must adjust to how CJEU has decided

[238] Stalford, H., *Children and the European Union, Rights, Welfare and Accountability* (Kluwer Law International, Netherlands, 2012) pp 30-31.
[239] A. Rosas, *When is the EU Charter of Fundamental Rights Applicable at National Level?* (Jurisprudence, Mykolo Romeris University, Luxembourg, 2012) pp 1270-1275. References in the Article is made to Cases such as Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] I- 02609 in which CJEU held Member Stats are obliged to apply fundamental rights when implementing Union law as stated in para. 19. In connection to this obligation also C-63/68 *Regina v Kent Kirk* [1984] I-02689 and C-249/86 *Commission of the European Communities v Federal Republic of Germany* [1989] I-01263 was mentioned as sources. In The Case C-260/89 *ERT* [1991] I-02925CJEU established the test in regard to when fundamental rights applies, which is when the national measures falls within EU law see para. 42. *Carpenter* Case C-60/00 is further mentioned as an example when it is difficult to draw a clear line between when national law or EU law shall prevail, in the tension between the public interest and the protection of an EU citizen's fundamental right to provide services and the right to family life.
[240] Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] I-00419.
[241] A. Rosas, *When is the EU Charter of Fundamental Rights Applicable at National Level?* (Jurisprudence, Mykolo Romeris University, Luxembourg, 2012), p 1271.
[242] Groussot, X., Pech, L., & Petursson, G.T., *The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication* (Eric Stein Working Paper, 2011) p 1.
[243] Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] I- 02609.
[244] *Ibid*.

that EU law shall be understood.[245] It may be that it was considered that Fundamental Rights ought to be considered part of EU law already since it enjoys the status of primary law and is recognised as such pursuant Article 6 TEU. Article 6 TEU provides that 'the Union recognises the rights, freedoms and principles set out in the CFR of the EU […] which shall have same legal status as the Treaties.' When EU law is applied the CFR shall already have approved the EU rule, and therefore lies the duty not so much in the hands of the Member State to ensure that this is the case, but rather in the hands of CJEU.

In *Åkerberg*[246] CJEU made reference to the *DEB*[247] Case in which it was established that Article 51 CFR must be read in conjunction with Article 6 TEU and Article 52(7) that provides that CJEU shall give guidance to the national court when EU law applies to national law.[248]
This mean that CJEU has the possibility to interfere in the national legislation to ensure that it is in compliance with EU law in the circumstance EU law apply and there is a breach of a fundamental right. The limit though, regarding the possibility to apply the Fundamental Rights was set in regard to the competence of EU to apply EU law.[249] This in accordance with Article 51(2) in the CFR that states that 'The Charter does not extend the field of application of EU Law beyond the powers of EU or establish any new power or task for EU, or modify powers and tasks as defined in the Treaties'.

Furthermore, when EU law is to some degree but not entirely applicable within an ambit of national law, which to a large extent is governed by national law, the national court may apply the national constitution to ensure that the fundamental rights are protected as long as 'the primacy, unity and effectiveness of European EU law are not thereby compromised'.[250] This legal context will have an effect on the application of the right of the child in Article 24 CFR and effect how the application by CJEU and national courts will look like.

---

[245] A. Rosas, *When is the EU Charter of Fundamental Rights Applicable at National Level?* (Jurisprudence, Mykolo Romeris University, Luxembourg, 2012), p 1273.
[246] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] I-0000. Mr Åkerberg Fransson was charge for serious tax offences since he had provided the tax authority in Sweden wrong information, and failed *inter alia* to pay tax amounting to 319 143 SEK 2004 and 307 633 SEK 2005. A part of the amount was attributed to unpaid VAT. The tax authority ordered him to pay surcharges of 35 690 SEK and 35 862 SEK. Mr Åkerberg Fransson claimed that to punish him twice was contrary to the principle *nes bis in diem* pursuant Article 50 in the CFR. The question was if the CFR could apply regardless if no other EU law was applied.
[247] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] I-13849.
[248] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] I-0000, para 19.
[249] *Ibid*, para 22.
[250] *Ibid*, para 29.

5.2 Article 24 CRF the rights of the child

Article 24 The Rights of the Child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concerns them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interest must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interest.

5.2.1 Article 24(1) the childs right to be heard

Pursuant Article 24(1) the child has a right to express his or her views freely. In particular this speaks of the child as being an 'agent' that will say an autonomous individual with a mind of his or her own, able to make decisions concerning the own circumstances. This self-reliance is dependent upon the influence, advice and support from others though. In accordance with the child's age and maturity. The provision does therefor entail a limitation, which makes it possible to consider these aspects of a child's evolving ability to manage him or herself. Article 24(1) is supported by Article 6 in the ECHR, according that article when the authorities is in contact with children the child has the right to receive all relevant information for the purpose of being able to express his or her views.[251]

The right for the child to be heard is included in Brussels II-Regulation in recital 19 in the preamble, it is stated that 'the hearing of a child is an important part of the application of the Brussels II-Regulation, although this instrument is not intended to modify national procedures'. Pursuant Article 11(2) the child shall have the right to be heard when it has been wrongfully removed and Article 12 and 13 in Hauge Convention on child abduction applies. These provisions deal with the order of the return of a child that has been wrongfully removed. According Article 12 the authorities shall order the return of the child within one year unless the child has been settled into the new environment. According to Article 13 the authority may refuse the return of the child if there is a grave risk that the child would suffer harm if it was returned to the Member State of origin.

In *Zarraga* the German court refused to recognise the Spanish judgement ordering Andrea back to Spain to her father, were she expressly had stated that she did not want to live.[252] Andrea had not been heard in the Spanish proceedings and the German court considered that it ought to be able to set aside the enforceable judgement due to the fact that there had been a breach of Andreas fundamental right in Article 24(1) CFR.[253] The Brussels II-

[251] Commentary of the Charter of Fundamental Rights, pp 210-211.
[252] Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] I-14247, para 29.
[253] *Ibid*, paras 35 and 42.

Regulation of the return of the child in Article 42, requires that when a certificate is being issued in regard to a judgment concerning custody rights the child's right to be heard must be observed according to Article 42(2)(a). As one ground for the certificate to be valid, 'the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regarded to his or her age or degree of maturity'. This was the provision that the German court considered to be in breach with Andreas right to be heard in CRF and CJEU interpreted. Could the breach of the child's fundamental right to be heard allow for the set aside of a certificated enforceable judgment issued under Article 42(2)(a).

In regard to the child's fundamental right to be heard, CJEU held that the Brussels II-Regulation had to be interpreted in accordance with the CFR.[254] However, the only court allowed to review an issued certificate was the court that had issued it in the first place. That court should correct its own mistake if it had made one. CJEU explained further that Article 24(1) the right for the child to be heard consisted in the opportunity to be heard. That the best interest of the child pursuant Article 24(2) provided that when determining if the child shall be heard the age and maturity of the child must be considered.[255] If it is in the best interest of the child to not be heard then it shall not be that. Therefore is the right of the child to be heard not an absolute right. [256] The CFR was applied in conjunction with the Brussels II-Regulation and interpreting the right to be heard therein. The CFR was used to shed light on what the right to be heard meant in the Brussels II-Regulation.

5.2.2 Article 24(2) the best interest of the child

In the second part of the rights of the child provision, Article 24 (2) the purpose is to impose an obligation on public authority and private institutions to view the issues concerning the child from a child's perspective. The provision may be seen as a supportive provision, which back up other provisions that must be interpreted in the light of the best interest of the child.[257]

In the Brussels II-Regulation the best interest of the child is of main concern to consider according recital 12 as well as the rights in CFR shall be recognised and the principles observed with due regard to Article 24 CFR. These objectives are referred to frequently by CJEU, which often uses the best interest of the child as a ground for justification why a provision shall be understood in a certain manner. What is problematic though is that the principle of mutual recognition is interpreted in the light of the best interest of the child, and CJEU or less contends that is in best interest of the child, because the return of the child will fulfil Article 24(3) the child's right to be accompanied by both parents, which may be or may not be true depending

[254] *Ibid*, para 60.
[255] *Ibid*, para 63.
[256] *Ibid*, para 64.
[257] Commentary of the Charter of Fundamental Rights of the European Union, p 212.

on all specific circumstances in the case. (See also how CJEU has used the best interest of the child in *Rinau, Purrucker I, Detiček, Povse* and *Mercredi* in section 4.1 in this thesis)

A good example though when the best interest of the child has been used to interpreted a provision in EU law is found in the *MA* case. In this case CJEU applied the best interest of the child when interpreting the Dublin I-Regulation in a highly professional manner. It had been possible for CJEU to make another interpretation of the relevant provision. Instead of following the logic of the other provisions when in relation to the somewhat unclear provision CJEU interpreted it in the light of the best interest of the child. Something that meant that the child was to be helped by the Member State in were the child had lodged an application, without the child having to go through any more traumatising movements. The objective to protect the unaccompanied minors was reached as far as is possible on a supra legal level.

5.2.3 Article 24(3) the childs right to both the parents

In the third part of the rights of the child in Article 24 (3) it is stated that the child has a right on a regular basis to remain in contact with both his or her parents. According the provision the only exemption from this is when it would be against the best interest of the child. This Article has been used in different types of cases for instance in *Iida, McB* and *O and S.* Both in *Iida* and *McB* the CFR was invoked for the purpose to provide them certain rights under EU law, however not particular successfully. In Iida a derived rights as a primary carer to a child that had moved to another Member State was claimed. In *McB* custody rights, that normally has to be acquired under national law. In *O and S* though the national court were instructed how to construe Article 7(1)(c) in Directive 2003/86 in accordance with Article 24(3) CFR.

In *Iida* CJEU did not only revolve the interpretation of Article 20 TFEU and Article 21TFEU in regard to the question if a primary carer is not accompanying the child to another Member State and stays in the Member State were the child is a national. In conjunction with Article 7 the right to family life in the CFR CJEU interpreted Article 24(3) the child's right to on a regular basis remain in contact with both his or her parents, and if that provision could give the primary carer a derived right from the child. This would mean that Mr Iida under EU law would acquire a right of residence in the Member State were his daughter was a national. The reasoning of CJEU was the following. For the CFR to apply, national law that regulates the right to residence must be governed by EU law. Since EU law govern residence permits the CFR applies. However, EU law does not apply when the situation is wholly internal and due to the fact that Mr Iida has not moved to join Mia his daughter in the other Member State. Therefore did the CFR not apply.[258] The reasoning behind CJEU conclusion is that the

[258] Case C-40/11*Yoshikazu Iida v Stadt Ulm* [2012] I-0000, para 80.

CFR has to be applied within in its own limits pursuant Article 51(1) CRF.[259] In regard to what this meant for the child's right in circumstances at issue the child was not deterred from exercising her right to free movement and was already accompanied. The third-country national primary carer whom did not join her could not have a derived right to residence since there was no EU link and due to this the CFR did not apply.

Mr McB invoked that ought to have custody rights derived from Article 7 and Article 24 in CFR, since he was the father of the children he had together with E and because they have lived in a marriage like relationship. CJEU held that it would be 'incompatible with requirements of legal certainty´ if Article 2(11) in Brussels II-Regulation could be interpreted in conjunction with the CFR Article 7 and Article 24 in a manner that gave a parent custody rights when national laws did not. Article 2(11) provides that a child has been unlawfully removed when a person who does not have custody rights of the child, move with the child to another Member State. CJEU held that to give effect to Article 7 and Article 24 in a manner that Mr McB argued, would extend the application of the CFR outside the scope of competence of CJEU pursuant Article 51(1) in the CFR. The CFR of the mother would also be infringed by such an interpretation.[260] CJEU did elaborate on how Article 7 CFR and Article 24 CFR had to be understood. When applying Article 7 this provision had to be read in a manner so that it respected the best interest of the child, and the child's right to on a regular basis remain in contact with both the parents. Brussels II-Regulation did provide that the best interest of the child is of main concern when interpreting Brussels II-Regulation. National laws, that gives the mother an automatic custody right, and the farther has to seek to receive is not prevented by Article 24 CFR. Because the national proceedings in which the custody rights is settled may consider all relevant aspects of fact that may have an impact on the child and interpret the situation in regard to the best interest of the child .[261] In regard to the right of custody CJEU gave the child's right protection under national law, where the best interest of the child could be considered

In *O and S* CJEU interpreted Article 7(1)(c) in the light of the rights of the child and the right to family life contained in the CFR.
CJEU held that the objective with the Directive is to promote family reunification and protect especially minors. The person who must have sufficient means to be able to provide for the family in the Member State addressed to the 'sponsor', and not the third-country nation who seeks to reside with his spouse in the host Member State.[262] CJEU held that Article

[259] *Ibid*, para 78. Article 51(1) of the CFR provided that the CFR is 'addressed to the Member States when they are implementing European Union law', and Article 51(2) that the CFR does 'not extend the field of application beyond the field of European Union law or the powers of the Union or establish any new powers and tasks as defined in the Treaties'.
[260] Case C-400/10 PPU *J. McB. v L. E.* [2010] I-08965, para 59.
[261] *Ibid*, para 62.
[262] Case C-356/11 *O. and S. v Maahanmuuttovirasto (C-356/11) and Maahanmuuttovirasto v L. (C-357/11)* [2012] I-0000, para 73.

7(1)(c) in the family reunification Directive had to be read in line with fundamental rights and principles enshrined in the CRF.[263]In interpreting Article 7 the right to respect for family life CJEU held Article 8(1) of ECHR is a corresponding right which has been interpreted in a manner that also considered the right of the child. The provision therefore also has to be read in conjunction with Article 24 taking into consideration the best interest of the child and the need for a child to maintain contact with both parents his or her parents on a regular basis.[264] Moreover, CJEU held that when Member States interpreting national law they have to comply with not only EU law but also make sure that the CFR rights are not conflicted when implementing secondary legislation.[265] When the national authorities estimate if the 'sponsor' has sufficient resources in accordance with Article 7(1) of Directive 2003/86 to provide for the joining family member, consideration must be taken in regard to Articles 7 and 24(2) and (3) of the CFR. The best interest of the child as well as and the respect for family life as is stated in Article 5(5) in the Directive 2003/86 and recital 2.[266]

[263] *Ibid*, para 75.
[264] *Ibid*, para 76.
[265] *Ibid*, para 78.
[266] *Ibid*, para 80.

6 CONCLUSION

When determining what a right means such as what a child's right mean in EU law, drawing from the interpretation of the CJEU. It is called for to weigh in at least three different aspects when defining the rights of the child. The first aspect is who is the right addressed to, in other words whom is considered to be a child for the right to apply? The second aspect to consider is what does the right comprise of, what will be the benefit of falling within its scope? The third aspect to consider is when it exist rights that appears within different fields of EU law, such as children's rights under worker's rights, EU citizenship rights and protective measure rights, how are these children's rights looked at by the CJEU? What are the similarities or differences between how the CJEU handle the rights? By putting these different aspects together the question initially asked in the introduction of this thesis, '*What does the right of the child in EU law mean?'* will finally receive its answer.

Within the legal field of free movement of workers and their family members, the child move with the worker to resided with the worker and while doing so receives a derived right to residence under Regulation 1612/68. The objective with the directive is to not also facilitate free movement of workers and their family members but also to promote integration into the society of both the worker and the workers family members. As part to this objective to promote integration the child is conferred a right to education under Article 12 in Regulation 1612/68 which states that 'children of a national of a Member State who is or has been employed shall be admitted to that states general education […] under the same conditions as the nationals, of the State, if such children are residing in the territory'.

The basic premise for coming into enjoyment of the right to education is to be a child of a worker. This means that when considering who has the right to education, the aspect of who is a worker also has a decisive influence for the purpose of applying Article 12 in Directive 1612/68. In *Echternacht and Moritz* the ECJ concluded that for the child to a worker to become entitled to rely on Article 12, the child must live with the worker. Also it is possible to have lived with the worker during the time the worker was economically active and then ceased to work was held in *Landesamt*. In *Brown* the court concluded that it is not sufficient though to just be a child of a worker if the child never has lived with the worker while working in a host Member State. Accordingly, to be considered a child to a worker and thereby fall within the scope of application of Regulation 1612/68 and thereby have a right to education pursuant Article 12, the child must live or have lived with the worker while the worker has been economically active.

In consideration of the second aspect to discern what the child's right to education consists of I consider that one must go back to where it all began, to the ruling in *Casagrande.* CJEU namely held that the principle of equal

treatment is part of Article 12 in Regulation 1612/68, which means that the children to workers shall enjoy the same right to education under equal conditions as the children to nationals in the host Member State. In subsequent judgements of *Alaimo, Di Leo, Bernini* and *Meuseen* the CJEU upheld that principle of equal treatment as the determining factor to settle what the right contained. The children to workers have under Article 12 in Regulation 1612/68 the right to study grants, to pursue and finish their education even high education, and they may under equal conditions also go to another Member State.

Emphasise has been put on the child's ability to be able to pursue and finish the education successfully. In this respect another line of case law namely *Baumbast, Ibrahim, Texiera* and *Alarape* appeared, establishing the right of the child to be joined by a primary carer. CJEU ensured that the right to education would not lose its useful effect, in the case the worker ceased to work in the host Member State, did not have sufficient means and a comprehensive sickness insurance or was a third-country national with no other right to residence in the host Member State. In respect of this CJEU attached a derived right to residence to a primary carer in order for the child to be able to finish his or her educations. A child that has come in enjoyment of the right to education shall be able to pursue it. In respect of this the acquired right to education it does not allow any restrictions imposed on children to workers in comparison with the children of nationals in the host Member State. They shall enjoy the same rights and without exceptions, the same possibilities to pursue their education successfully. In other words, the workers child's right to education mirrors back from the rights the child of the national has to education. When the rights are mirrored back completely then the child becomes fully integrated into the education system in the host Member State.

Within the legal field of EU citizenship the child's right appeared as an individual right, which is conferred to the child from Article 20 TFEU. The status of EU citizenship does rest solely upon the necessary condition that the individual is a national of a Member State. *Zhu and Chen* confirmed that this was a status which was not tied to age; rather it was tied to the nationality of the individual. Catherine was namely only an infant when CJEU confirmed that she was entitled to rely on her status, the status as an EU citizen. When the child is a national of a Member State this means that the child also is an EU citizen and may rely on Article 20. Article 20 TFEU is however a rather constrained Article, which only applies in the extreme situation. It was applied in *Ruiz Zambrano* where it was held that when the EU citizen was at the risk of losing the substance of the rights contained in Article 20 TFEU then that provision would apply even if there was no cross-border link.

The risk which nevertheless activated the application Article 20 TFEU lied in the circumstance that the EU citizen child would be forced to leave the territory of the Member State where the child was a national; had the third-country national parents not been granted residence in the Member State the

family was living in. CJEU considered that it was not an acceptable solution and applied the substance of rights doctrine.
For the child's right as an EU citizen this meant that a minimum safety-net was provided the child giving full effect to the EU citizenship, through allowing the parents to remain in the Member State with the child. CJEU Further confirmed in *Alopka* that each Member State has a responsibility towards its own citizens. Mrs Alopka a third-country national mother of twins with France nationality living in Luxemburg did not have sufficient resources and a comprehensive sickness insurance for her twins EU citizens to be able to rely on Article 21 TFEU. CJEU held that Mrs Alopka could rely on Article 20 TFEU if she moved with the children to France.

However this is a minimum condition and it may not always keep families together, even if that is not in the best interest of child pursuant Article 24 CFR and breach the right to family life in Article 7 CFR since the CFR does not apply when there is no cross-border link according Article 51(2) CFR. In *O and S* CJEU confirmed the *McCarthy* and *Dereci* line of reasoning that limited the application of the substance of rights doctrine contained in *Ruiz Zambrano* to only encompass the situation when the EU-citizen was forced to leave EU as a whole. CJEU interpreted that Article 20 TFEU did not prevent national laws which required that the third-country national had to have sufficient resources in order to not be expelled from the Member State. The fact that the third-country national stepfather was living with the EU-citizen child was not a reason for preventing such an application. Because the child would be able to remain in the Member State, with the mother and primary carer whom held a residence permit under the national laws.

For the child to have a right to rely on Article 21 TFEU and be able to exercise his or her right to free movement the child must have, as was held in *Zhu and Chen* and confirmed not the least in *Alopka* sufficient resources and a comprehensive sickness insurance. This is in line with how the EU citizenship right applies to adult EU citizens who do want to become economically active in the host Member State. Due to the fact that the child is dependent upon his or her parents, to give the right contained in Article 21 TFEU effect the CJEU has given the child a right to be accompanied by the primary carer. The primary carer thereby receives a derived right vis-à-vis the child's right to free movement. For the primary carer to receive the derived right though, he or she must actually accompany the child. It is not sufficient that the parent visits the child in the host Member State. Not even on a regular basis to remain in contact with the child, as has been concluded in CJEU in *Iida*. In respect of this the interest CJEU has endeavoured to maintain in regard to EU-citizenship is to give full effect to the EU-citizenship as a right that contains two aspects. The first aspect is to ensuring that no EU-citizen may risk being deprived of the status EU-citizen by being forced to leave EU, due to the circumstance that the EU-citizen happens to be a child to third-country national parents. The second aspect that the CJEU has sought to accomplish is to ensure that when the EU-citizen exercises the right to free movement, he or she may be accompanied by a primary carer in order for the right to have any useful effect. In

addition, it may be added that the principle *effet utile* both was used in regard to give the child's right to education useful effect as well as the EU-citizenship.

Within the legal field of child protection and the application of the Brussels II-Regulation, which basically contains jurisdictional rules it appears to me that they are being applied rather static. Which emanates into cases which appears to not consider the best interest of the child, even if this is one of the main objectives Brussel II-Regulation seek to protect. This may be explained by two behind lying reasons. The first that the principle of the mutual recognition contained in the Brussel II-Regulation requires that judgement of other jurisdictions are being respected and enforced in the Member State where the child is present that has been abducted. The second reason that the objective with the Brussel II-Regulation allows no exceptions from the main rule, not even under circumstances when that seems necessary in order to protect the well-being of the child. The objective with the Brussel II-Regulation simply stipulates that the objective is to return children that have been abducted as quickly as possible.

This objective in its turn provides that all return orders are urgent and therefor may not any protective provisional measure in order to prevent the child from being returned be taken. They are per definition urgent and the requirement is therefore impossible to fulfil, when an order of return has been certified in a judgment concerning parental responsibility by the court that has substantial jurisdiction. That will say the court were the child is habitual resident. However in regard to were the child has his or her habitual resident two concepts are being used. Firstly, in the case the child was moved to another Member State with the parent that has sole custody rights and thereby has moved lawfully. A test shall apply in regard to where the child is habitual resident if a parent in the cross-border relation wants to claim custody rights in regard to the child. This test is flexible and consists of an analysis of all important aspects of the child's stay in the Member State.

Secondly, in the case the child moved unlawful to the other Member State because the parent who took the child did not have sole custody rights. In that case is always the court were the child lived prior to the unlawful move the court that is considered to be the best suited court to handle the issue. Any change in circumstances, which shows that the child has adjusted into the social environment shall not be considered because in this situation is the best interest of the child to be returned.

As if this wasn't strange enough the 1980 Hauge Convention on child abduction, which the Brussel II-Regulation builds upon and refers to. Even if the Brussel II-Regulation has precedence of the Hauge Convention should it be totally disregarded from? Article 13 in the 1980 Hauge Convention stipulates that the national court were the child is present may refuse to enforce the order to return the child if the return would result in the if 'there is a grave risk that his or her return would expose the child to physical or

psychological harm or otherwise place the child in an intolerable situation'. Furthermore, the return may be refused if 'the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views'. Despite this the CJEU held that the return order had to be enforced in both the case, the child was going to be placed at a children's home in the Member State were the child according to the Brussel II-Regulation had her habitual residence and was under a grave risk to suffer psychological harm. Similar was the situation in the case were the court with substantial jurisdiction first had issued that the father of the child was unsuited to have custody of the child. The child was deemed to be at a grave risk to suffer psychological harm. When the mother was reluctant to give the father access to the child the national court changed the judgement and gave the father full custody rights.

In respect of this it is rather complicated to draw any other conclusion then the two main stirring interests are that recognisable judgements shall be recognised and enforced and that children that have been abducted shall be returned. Also in the case it is unlikely that the court that has substantive jurisdiction will reach another verdict in the best interest of the child. Just because the child has been ordered back and a new application for the breach of the child's fundamental right has been filed to that court. CJEU has failed in regard to the rights of the child to reach forward to a well-balanced interpretation of the Brussel II-Regulation. No circumstances are the same. Room for an exemption from the main rule when this is called for, that favour the true meaning of the best interest of the child would bring the Brussel II-Regulation into the twenty-first century.

Lastly, also the third question will be dealt with, namely: *Does the right of the child or the non-existence of the rights of the child raise any problematic issues in EU law?* An answer will be provided that touches upon problematic arising within each of the set-out paradigms for the writing of this thesis. To begin with, it is important to stress that the child's right to education is a free standing right once the child has acquired the right through the derived right to rely on Regulation 1612/68 coming from the workers right. Also that this right has been interpreted by CJEU as conferring a derived right to a primary carer of the child in order for the child to be able to finish the education in the host Member State on equal terms as children to nationals. It is inherent though in the right that it provides a possibility for the family to plan for the child to make use of the child's right to education, rather than that all children that have acquired such a right to education on equal terms with children of nationals will stay in the host Member State and actually finish the education there. Especially, this problematic is something that affects minor children to a larger extent than children that are self-reliant enough to make use of their rights fully themselves without their parents being physically present.

CJEU has been precocious though and ensured that the child may be joined by a primary carer in order to finish the education in the host Member State. If may be added this also is a will of the parent. Nevertheless, since this

right does extend over all levels of education and also after the age the child has reached maturity. There may be a risk that Article 12 will be used as a measure for third-country national parents or EU-citizen parents that are no longer economically active and does not full fill the requirements in Directive 2004/38, to try to take advantage of the derived right by fraudulently claim that the child is in need of emotional support in order to be able to finish their education. Nevertheless, this problematic will be left to the national courts to detect and deal with.

The fact that Regulation 1612/68 only concerns children to workers is another problematic aspect of the right to education in EU law. The delimitation means that all other children who are not children to a worker will be excluded from the scope of application. Unless, the CJEU would treat the right to education as a general principle in EU law also considering that Article 14 in CFR provides that everyone has a right to education.

Furthermore, regarding children's EU-citizenship rights, it is inevitable to not consider the phenomenon when the primary carer plans the birth of the child in a Member State, which applies *jus soli*. That has the effect to generate the status to the child of becoming a national of that Member State, and there through the child becomes an EU-citizen, which the third-country national primary carer has a derived right from to reside with the child within EU. The problematic is two divided. It is a good thing for the child's right that CJEU has ensured that the child's EU-citizenship shall be ensured and that the child may move freely within EU as well as not being forced to leave the territory of EU, even if the third-country national parent planned or because of different other circumstances gave birth to the child in a Member State of which the child acquired the nationality. Nevertheless, whether or not this is to be considered morally right or wrong may very well depend on the specific circumstances surrounding the Case in question, even if that has little to do with the particular right as such. In addition in regard to the child's right to free movement only a limited group of people that has sufficient means will be able to benefit from the free movement contained in Article 21 TFEU. As well as it remains within in the Member States competence to decide who will be able to acquire the status nationality there.

Within the paradigm of protectionism and the highlighted measure, more precisely the Brussles II-Regulation, the provisions does not so much concern the right of the child since they are jurisdictional rules. However, the provisions do have an impact on the child's life and the static use of them may have negative effect for children. Such as under the circumstance the child has moved to another Member State with one of the parents in order for both to get away from an abusive parent for example. The impact of the child's right or the non-existence of the child's right may be immense when Brussles II-Regulation is applied in order to return a child that is considered to have been abducted. For instance when considering Article 24(3) CFR, which provides that the child on a regular basis has a right to both, his or her parents. This right shall always be interpreted in the light of

the best interest of the child contained in Article 24(2) CFR. However, when the CJEU has used Article 24(3) in conjunction with the Brussles II-Regulation it has only been used in a general sense neither referring to the individual case pointing out that the best interest of the child must be considered, nor departing from the objective contained in the Brussles II-Regulation which is argued to inherently have been constructed in a manner, which protect the best interest of the child. The rights of the child in this context do only appear as a smokescreen to justify the underlying principle of mutual recognition of judgments.

Bibliography

Articles

Butler, I., *The EU Charter of Fundamental Rights: What can it do?*, 2013, Background paper, Open society European Policy Institute, Brussels, pp 1-6.

Dutta, A., & Schulz, A., *First Conerstones of the EU Rules on Cross-border Child Cases: the Jurisprudence of CJEU of the European Union on the Brussels IIa Regulation from C to Health service executives*, 2014, Vol.10 No.1, Journal of Private International Law, pp 1-41.

Groussot, X., Pech, L., & Petursson, G.T., *The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication*, 2011, No.1, Eric Stein Working Paper, pp 1-36.

Kochenov, D., & Plender, R., *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 2012, 37 European Law Review, University of Groningen, Netherlands, pp 369-396.

Laciaková, V., & Michalicková, J., *Rights and Principles-is there a need to distinguish them in the CFRof the European Union?* Contemporary Readings in Law and Social Justice, 2013, Volume 5(2), Paneuropean University, Bratislava, pp 235-243.

Lamont, Ruth., *Free movement of persons, child abduction and relocation within the European Union*, 2012, Vol. 34, No. 2, Journal of Social Welfare & Family Law, Routledge Taylor & Francis Groups, Liverpool UK, pp 213-244.

Leanarts, C., *The Concept of EU citizenship in the case law of the European Court of Justice*, 2013, ERA Forum, pp 569-583.

Mak, C., *Children's Rights in EU Law*, 2013, No. 8, Center for the Study of European Contract Law Working Paper Series, pp 1-10.

McGlynn, C., *Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights*, 2002, Volume 8, Issue 3, European Public Law, Kluwer Law International, pp 387-400.

Rosas, A., *When is the EU Charter of Fundamental Rights Applicable at National Level?*, 2012, Jurisprudence, Mykolo Romeris University, Luxembourg, pp 1269-1288.

Ruxton, S., *What about us? Children's Rights in the European Union, next step,* 2005, The European Children's Network, Brussels, pp 1-162.

Stalford, H., *The citizenship status of children in the European Union*, 2012, The international Journal of Children's Rights 8:Kluwer Law international, Netherlands, pp 101-131.

Vandenhole, W., *Children's Rights in EU external Action: Beyond Charity and Protection, Beyond Instrumentalism and Conditionality*, 2011, No. 19, International Journal of Children´s Rights, pp 477-500.

Literature

Barnard, C., *The Substantive Law of The EU: The Four Freedoms,2013,* fourth edition, Oxford, University Press Oxford.

Craig, P., & De Búrca, G., *The Evolution of EU Law*, 2011, second edition, Oxford, University Press Oxford.

Lang, A., Nascimbene, B., & Condinazi, M., *Citizenship of the Union and Freedom of Movement of Persons*, 2008, vol 14, Martinus Nijhoff publicers, Leiden and Boston.

Rosas, A., & Armati, L., *EU Constitutional Law an Introduction*, 2010, Hart Publishing Ltd, Oxford, Portland and Oregon.

McGlynn, C., Families and the European Union: Law, Politics and Pluralism, 2006, Cambridge University Press, Cambridge.

Stalford, H., *Children and the European Union: rights, welfare and accountability*, 2012, Hart Publishing Ltd, Oxford.

Treaties

Maastricht Treaty provisions amending the treaty establishing the European Economic Community with a view to establishing the European Community, Maastricht 7 February 1992.

Consolidated Version of the Treaty on European Union, OJ 2010 C83/01.

Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2010 C83/10.

Charter of Fundamental Rights of the European Union, OJ 2010 C83/02.

Secondary legislation

Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19/10/1968, p. 2–12.

Decision no 1/80 of the association council of 19 September 1980 on the development of the association, not published in OJ.

Directive 24/33 of 22 June 1994 on the protection of young people at work, OJ L 216, 20/08/1994, p. 12–20.

Decision 293/2000/EC taken by the Commission and European Parliament consists of measures to combat sexual exploitation and violence against children, OJ L 034, 09/02/2000 P. 0001 – 0005.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L. 50/1-50/10; 25.2.2003.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 03/10/2003, p 12–18.

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12,2003, p 1.

Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30/04/2004, p 77–123.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA,OJ L 101, 15/04/2011, p. 1–11.

Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, replace the previous Council Framework consisting of Decision 2004/68/JHA, OJ L 124, 25/04/2014, p. 1–18.

International agreements

1950 European Convention of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series, No. 5.

Geneva Convention relating to the Status of Refugees of 28 July1951, UNTS, vol. 189, p.137.

Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection**.** UNTS, vol. 1969, p.145.

European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20 May 1980, ETS No 105.

Convention of 25 October 1980 on the civil aspects of international child abduction, UNTS, vol. 1343, p.89.

1989 United Nations Convention on the Rights of the Child, UNTS, vol. 1577, p.3.

Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, UNTS, vol. 2204, 1:39130.

Other materials

Canetta, E., Meurens, N., McDonough, P., & Ruggiero, R., *EU Framework of Law for Children's Rights*, Directorate-General For Internal Policies – Policy Department Citizen's rights and constitutional affairs, 2012, pp 1-49.

Director General Internal Policies of the Union, Policy Department C Citizens Rights and Constitutional Affair, *Altiero Spinelli – European Federalist*, pp 1-54.

De Schutter, O., with assistance of Van Goethem, V, EU Network of independant experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, pp 1-417.

European Commission, Communication from the Commission: Towards an EU Strategy on the Rights of the Child, COM (2006) 367.

Monaco strategy, Council of Europe, Strategy for the Rights of the Child (2012-2015), COM(2011)171 final.

Stockholm strategy, Building a Europe for and with children COE(2009-2011).

Table of Cases

Civil status

Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] I-11613.

Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] I-07639.

Education

Case C-9/74 *Office national des pensions v Emilio Di Crescenzo and Angela Casagrande, widow of Romeo Barel* [1992] I-03851.

Case C-68/74 *Angelo Alaimo v Préfet du Rhône* [1975] I-00051.

Case C-43/79 *Tito Mencarelli v Commission of the European Communities* [1980] I-00201.

Case C-197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] I-03205.

Case C-389/87 *G. B. C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen* [1989] I-00723.

Case C-308/89 *Carmina di Leo v Land Berlin* [1990] I-04185.

Case C-3/90 *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] I-01071.

Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] I-01031.

Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] I-03289.

Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] I-05939.

Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2010] I-01065.

Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] I-01107.

Case C-542/09 *European Commission v Kingdom of the Netherlands* [2012] I-0000.

Case C-147/11 *Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11)* [2012] I-0000.

Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] I-0000.

Citizenship

Case C-186/87 *Ian William Cowan v Trésor public* [1989] 00195.

Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] I-04239.

Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] I-04265.

Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice* [2001] I-01237.

Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] I-07091.

Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] I-06279.

Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] I-09925.

Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] I-01177.

Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] I-03375.

Case C-40/11*Yoshikazu Iida v Stadt Ulm* [2012] I-0000.

Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] I-11315.

Case C-356/11 *O. and S. v Maahanmuuttovirasto (C-356/11) and Maahanmuuttovirasto v L. (C-357/11)* [2012] I-0000.

Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] I-0000.

Case C-423/12 *Flora May Reyes v Migrationsverket* [2014] I-0000.

Brussels II-Regulation

Case C-435/06 *C* [2007] I-10141.

Case C-195/08 PPU *Inga Rinau* [2008] I-05271.

Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] I-07353.

Case C-403/09 *Jasna Detiček v Maurizio Sgueglia* [2009] I-12193.

Case C-211/10 PPU *Doris Povse v Mauro Alpago* [2010] I-06673.

Case C-400/10 PPU *J. McB. v L. E.* [2010] I-08965.

Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] I-14247.

Case C-497/10 PPU *Barbara Mercredi v Richard Chaffe* [2010] I-14309.

Case C-92/12 PPU *Health Service Executive* [2012] I-0000.

Unaccompanied minors

Case C-648/11 *MA and Others* [2013] I-0000.

The Charter of Fundamental Rights

Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] I-00419.

Case C-63/68 *Regina v Kent Kirk* [1984] I-02689.

Case C-249/86 *Commission of the European Communities v Federal Republic of Germany* [1989] I-01263.

Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] I- 02609.

Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] I-02925.

Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] I-13849.

Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] I-0000.

Advocate Generals Opinions

Opinion of Advocate General Warner in Case C-9/74 *Office national des pensions v Emilio Di Crescenzo and Angela Casagrande, widow of Rome Barel,* delivered on 11 June 1974.

Opinion of Advocate General Alaimo in Case C-68/74 *Angelo Alaimo v Préfet du Rhône,* delivered on 29 January 1975.

Opinion of Advocate General Darmon in Case C-389/87 and 390/87 *G. B. C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen,* delivered on 25 January 1989.

Opinion of Advocate General Tesauro in Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal,* delivered on 9 February 1995.

Opinion of Advocate General La Pergola in Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep,* delivered on 28 January 1999.

Opinion of Advocate General Tizzano in Case C-200/02 *Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department*, delivered on 18 May 2004.

Opinion of Advocate General Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi,* delivered on 30 September 2010.

Opinion of Advocate General Bot in Case C-529/11 Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department, delivered on 15 January 2013.