8

Economic and Social Sustainability behind the Rights of EU Migrants

8.1 Enlargement Limiting the Reach of Law in Order to Safeguard the EU

This chapter demonstrates that the current free movement framework is a manifestation of sustainable migration, where economic and social sustainability considerations dictate the attribution, limitation, or extension of rights of EU migrants. To show this, the analysis begins with an investigation of the 2004 enlargement, one of the most complicated enlargement processes which involved the accession of various states with diverse economies. The differentiation of clauses and transitional periods, compared to previous Accession Treaties, brings to the forefront the way economic considerations dictate the attribution of rights to soon-to-be EU migrants. The relevant section draws attention to the limitation of rights for nationals of the Central and Eastern European Countries (CEECs) in contrast to the full attribution of rights to nationals of acceding states who were not thought of as posing risks to the economic sustainability of the EU. And so, it highlights the legal tools devised to ensure sustainability of migration in the framework of accession. Following, Section 8.2 presents the current framework regulating free movement and suggests that its legal design should be understood as the most contemporary and elaborate manifestation of sustainable migration in law.

The massive enlargement of the EU during the new millennium had been progressively prepared since the 1990s to ensure that acceding states would not pose challenges to the EU project of growth. Eventually, accession took place via the Accession Treaties signed with the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, Slovakia, Malta, and Cyprus in 2003; Romania and Bulgaria in 2005; and Croatia in 2012. While the enlargement had the political significance of reuniting Europe, the drastic increase of EU population due to this accession was perceived as a risk, because the EU was struggling with internal

unemployment, restrained growth, and an ageing society.[1] The most complicated transitional regime was thus put in place to avert risks. At the same time, the accession process put a lot of focus not only on growth aspects (unlike the previous enlargements), but also on the social advancement demanded from the candidate states and their obligation to equally support the European social model put in place by that stage.[2]

Overall, the process of enlargement stretched over more than a decade, beginning with the Europe Agreements reviewed in Chapter 7 for the CEECs, and the Stabilisation and Association Pact in the case of Croatia. The negotiations emphasized the economic and social considerations behind the regulation of labour migration from the candidate countries in different ways.[3] First, there was a fear of migration flows due to the difference in development levels between the candidate countries and the EU.[4] This was linked to the effects of migration for social and economic development more broadly, and the potential of adverse effects to the EU labour market.[5] Anticipated migration flows were discussed in comparison with the south enlargement, where similar fears of uncontrolled migration existed – but these in fact never materialized.[6] During the time of negotiation, many academic studies were examined by the

[1] Communication, Agenda 2000 Pour une Union plus forte et plus large, Vol I, COM(97) 2000 final 7.

[2] HAEU, GJLA-180, Union européenne, Le Conseil, Rapport du Groupe 'Élargissement' en date du 2 Octobre 1997 au COREPER, Objet: Élargissement, Examen des avis de la Commission sur les demandes d'adhésion à l'Union présentées par les pays associés d'Europe centrale et orientale, 11125/97 LIMITE ELARG 18.

[3] Michael Dougan, 'A Spectre Is Haunting Europe . . . Free Movement of Persons and the Eastern Enlargement' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Bloomsbury 2004).

[4] Commission Opinion on Romania, COM(97)2003 final 48, 88; Commission Opinion on the Czech Republic, COM(97)2009 final 23, 46; Commission Opinion on Poland, COM (97)2002 final 30, 49; Commission Opinion on Bulgaria, COM(97)2008 25, 44; Commission Opinion on Hungary, COM(97)2001 final 28, 48; Commission Opinion on Slovenia, COM(97)2010 final 27, 47; Commission Opinion on Slovakia, COM(97)2004 final 42, 75; Commission Opinion on Latvia, COM(97)2005 final 45; Commission Opinion on Croatia, COM (2004)257 final 98.

[5] HAEU, GJLA-206, European Commission, Secretary General, The free movement of persons for the pursuit of economic activity in the context of Enlargement, Information note by M Verheugen addressed to the Members of the Commission, Directors Generals and Heads of service, 12 April 2000, O/139/2000 SEC(2000)663/3.

[6] HAEU, DORIE-204, Annexe 2 à l'avis de la section des relations extérieures, de la politique commerciale et du développement du Comiteé économique et social sur 'L'élargissement de l'Union européenne' 24 Oct 1997: Rapporteur M Masucci CES 856/ 97 fin annexe 2 I-RD/CH/ic point 5.3.

Commission in order to explore the migration potential of these enlargements, but there were no conclusive indicators on anticipated migration.[7] The anticipation of migration flows was expressed as a pressing concern due to high levels of unemployment in the Member States.[8] In this context, a potential collapse of national employment markets could arise as (a) migrants from acceding states, who were more skilled, could take up employment, and no jobs would be left for the unskilled workers in Member States, and (b) migrants from the acceding states could take up work for lower wages and with more flexible arrangements, disrupting the potential of national workers to find work.[9]

Second, candidate countries and their labour force were considered to pose risks for the EU due to their social model.[10] Following the fall of communism and with the fast-track transition to market economy, the candidate countries had not managed to put in place a framework that could ensure social protection at work at levels similar to those offered by the EU, where social policy covered a broad range of subjects from living and working conditions, health and safety at work, equal opportunities, dialogue between social partners and social protection, among others.[11] This meant that the costs of the industrial sector, were they to use labour force from the candidate countries, would be extremely low, which could

[7] HAEU, GJLA-204, Commission Information note by M Verheugen, The free movement of persons for the pursuit of economic activity in the context of Enlargement, 12 April 2000, SEC (2000) 663/3, Section 3; Commission, Information note on the Free Movement of Workers in the context of Enlargement, 6 March 2001, Annex 1–3; Answers given by Mr Verheugen on behalf of the Commission on 28 February 2003 to Written Question E-0113/03 by Mogens Camre (UEN) to the Commission (28 January 2003) with the subject: Migrant workers from the new Member States [2004] OJ CE 88/587.

[8] Agenda 2000, Vol I, COM(97)2000 final 7; HAEU, DORIE-205 Rapport sur la communication de la Commission 'Agenda 2000 – Pour une Union plus forte et plus large' (COM (97)2000 – C4-0371/97) A4-0368/97/PARTIE C, Avis des commissions parlementaires et lettres des délégations du Parlement européen aux commissions parlementaires mixtes PE 224.339/Partie C/def, Avis (article 147 du règlement) à l'intention de la commission des affaires étrangères, de la sécurité et de la politique de défense, Rapporteurs: M. Oostlander et M Baron Crespo, Commission de l'emploi et des affaire sociales, Rapporteur pour avis: M Harald Ettl, point 24 and B.

[9] Agenda 2000, Vol II, COM(97)2000 final 20, 36; HAEU, DORIE-204, annexe 2 (n 6) point 5.4; HAEU, GJLA-206, European Commission, Secretary General, Corrigendum to the Information note by M Verheugen addressed to the Members of the Commission, Directors Generals and Heads of service, 14 April 2000, O/139/2000 SEC(2000)663/3 following the meeting of the heads of cabinet of 13 April 2000.

[10] Agenda 2000, Vol II, COM(97) 2000 final, Section 6.1.

[11] Ibid.

lead to distortion of competition and social dumping.[12] For this reason, for the first time in accession negotiations, we see an emphasis by the Commission on the full incorporation of the European social model in the candidate states, a model which, according to the Commission, is characterized by a balance between social justice and economic efficiency.[13]

Finally, the need for sustainable development of the acceding countries was also set in light of their emigration patterns.[14] There was a constant pressure on the candidate countries to accelerate their development both economically and in terms of social standards to ensure that they keep their nationals in their territories.[15] This emphasis had a double face: one related to eliminating push factors for migration, and a second one related to making use of human resources needed to restructure their economies, which would eventually become part of the EU economy.[16] The issue of antagonism between the labour of migrants from the acceding states, and the TCN migrant labour and the potential effects for the EU external relations also appeared in marginal ways.[17]

[12] Ibid, Section 7.2; HAEU, DORIE-204, annexe 2 (n 6) point 5.4; Parlement européen, Résolution sur la communication de la Commission intitulé 'Agenda 2000-Pour une Union plus forte et plus large' première partie, chapitre II, 'Cohésion économique et sociale' (COM (97) 2000 – C4-0523/97), A4-0210/98, 1998-06-18, PE 270.314/15 point M.

[13] Agenda 2000, Vol II, COM(97) 2000 final, Section 6.1. Commission Opinion on Romania, COM(97)2003 final 90; Commission Opinion on the Czech Republic COM (97)2009 final 85; Commission Opinion on Poland COM(97)2002 final 97; Commission Opinion on Bulgaria, COM(97)2008 80, 48; Commission Opinion on Estonia COM(97) 2006 final 44; Commission Opinion on Hungary, COM(97)2001 final 89; Commission Opinion on Lithuania, COM(97)2007 43; Commission Opinion on Latvia, COM(97)2005 final 83; Commission Opinion on Slovenia, COM(97)2010 final 49.

[14] HAEU, DORIE-207, Rapport sur la communication de la Commission "Agenda 2000" – Première partie. Chapitre Π, COM(97)2000 C4-0371/97, A4-0210/98, PE 225.091/def, Avis (Article 147 du règlement) à l'intention de la commission de la politique régionale, commission de l' emploi et des affaires sociales, Rapporteur pour avis: M Hans Lindqvist, Point 9 et Avis (Article 147 du règlement) à l'intention de la commission de la politique régionale, commission de la pèche, Rapporteur pour avis: M Pat the Cope Gallagher.

[15] Agenda 2000, Vol II, COM(97) 2000 final 41.

[16] HAEU, DORIE-205 (n 8) point 1.3.

[17] Agenda 2000, Vol II, COM(97) 2000 final, Section 6; HAEU-GJLA 246, Commission, DG External Relations, Director General Note for the attention of MM Prat, Cadieux, Abbott, Avery, Benavides, Nuttall, Coher, Rhein, DG I, Burghardt, Secr Gen, Brussels, 05.03.1992, 003389.

In this regard, transitional measures had to be put in place with due account of the different risks.[18] The Central and Eastern European enlargement had the potential to restore security in Europe, providing the basis for making the EU a global actor and enriching the internal market by, *inter alia*, human capital.[19] An immediate accession without specific safeguards could not guarantee the integration capacity of the EU or support its project of growth and progress. As a result, following the consideration of different options that could ensure a smooth transition, free movement of workers was regulated in the relevant Accession Treaties as follows.[20]

Labour migration in the first two years following accession would take place subject to national measures or bilateral agreements. Member States would be allowed to extend this two-year period by three more years.[21] In case of serious disturbance to the labour market, Member States could maintain national measures for a total of seven years.[22] Nationals of the acceding states already employed at the date of accession for more than twelve months or accepted to a national labour market following accession for a period longer than twelve months would enjoy

[18] Agenda 2000, Vol II, COM(97) 2000 final 20, 36; HAEU, DORIE-205 (n 8) point 24; Parlement européen, Résolution du 3 avril 1998 sur les effets de l'élargissement de l'Union européenne sur la coopération dans le domaine de la justice et des affaires intérieures, A4-0107/98 [1998] OJ C 138/214, point 17; Résolution du Parlement européen sur le rapport global de suivi sur le degré de préparation à l'adhésion à l'UE de la République tchèque, de l'Estonie, de Chypre, de la Lettonie, de la Lituanie, de la Hongrie, de Malte, de la Pologne, de la Slovénie et de la Slovaquie A5-0111/2004 [2004] OJ C 102E/829, point 15.

[19] Agenda 2000, Vol II, COM(97) 2000 final 4; HAEU, EN-2228, Study group on enlargement formed within Directorate F of the Commission and produced a report called 'A strategy for enlargement', November 1991, 4.

[20] For an overview, see Georg Ziegler, 'The Accession Negotiations on Free Movement of Workers' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (TMC Asser Press 2002).

[21] Act concerning the conditions of the 2003 Accession (2003 Accession Treaty) [2003] OJ L 236, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 2; Protocol concerning the accession of Bulgaria and Romania to the European Union (2005 Accession Treaty) [2005] OJ L 157, Article 20, Annexes VI, VII, Paragraph 2; Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community (2012 Accession Treaty) [2012] OJ L 112, Article 18, Annex V, Paragraph 2.

[22] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 4; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 4; 2012 Accession Treaty, Article 18, Annex V, Paragraph 4.

access to the labour market of that state.[23] What is more, labour migrants employed at the Member States during the transitional period would benefit from non-discrimination, as the application of Article 7 of Regulation 1612/68 was not subject to the transitional arrangements. At the same time, the transitional arrangements required that nationals of the acceding countries and their families should not be treated more restrictively than those of third countries working in that Member State.[24]

The Accession Treaties also provided for the possibility to review the transitional provisions within two years following accession.[25] Considerable discretion was left to Member States as to how they would unilaterally regulate labour migration from the acceding states in the transitional period. Specifically, they were allowed to individually open their labour markets to the nationals of the acceding states two years after accession.[26] At the same time, such Member States would be allowed to go back to restrictions within the first seven years if they underwent or foresaw disturbances on their labour market which could threaten the living standards or employment levels in a particular region or occupation.[27] In such a case, the Commission would review the Member State's request and decide on the extent to which the application of the relevant EU law provisions could be wholly or partially suspended. This type of resort to domestic law could 'in urgent and exceptional cases' take place by *ex post* notification.[28] What is more, where old Member States decided to suspend the application of free movement provisions, the acceding Member States were also protected insofar as they could restrict the application of free movement for migrant workers from all the other

[23] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 2; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 2; 2012 Accession Treaty, Article 18, Annex V, Paragraph 2.

[24] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 14; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 14; 2012 Accession Treaty, Article 18, Annex V, Paragraph 14.

[25] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 3; 2005 Accession Treaty accession, Article 20, Annexes VI, VII, Paragraph 3; 2012 Accession Treaty, Article 18, Annex V, Paragraph 3.

[26] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 1, Paragraph 12.

[27] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 7; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 7; 2012 Accession Treaty, Article 18, Annex V, Paragraph 7.

[28] Ibid.

acceding Member States, to seal themselves from disturbances in their developing labour markets.[29]

Rights of family members were regulated as follows. For migrants from acceding Member States who had already been employed in EU Member States for longer than twelve months, family members residing with them at the date of accession would have immediate access to the labour market of the specific state.[30] Family members who resided with the worker following accession and during the application of the transitional regime would have access to the Member State labour market after residence there for at least eighteen months, or from the third year following the date of accession.[31]

Finally, Member States also addressed the issue of posted workers. Germany and Austria were allowed to limit the application of EU law and thereby the movement of posted workers to their national labour markets to address serious existing and threatened disturbances in specific service sectors.[32] These services or sectors were mentioned in detail for each of these countries. By a declaration, Germany and Austria expressed their understanding of the phrase 'certain regions' to potentially comprise of the entire national territory.[33] In general, during the period of transitional arrangements, Member States were required to ensure that no new restrictions to the rights of migrant workers would be introduced (standstill clause) and that they gave preference to workers from the acceding Member States over those who are nationals of third countries as regards access to the labour market.[34]

[29] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 11; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 11; 2012 Accession Treaty, Article 18, Annex V, Paragraph 11.

[30] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 8; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 8; 2012 Accession Treaty, Article 18, Annex V, Paragraph 8.

[31] Ibid.

[32] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 13; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 13; 2012 Accession Treaty, Article 18, Annex V, Paragraph 13.

[33] Declaration no 19, Joint Declaration by the Federal Republic of Germany and the Republic of Austria on the free movement of workers: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia, Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236.

[34] 2003 Accession Treaty, Article 24, Annexes V, VI, VIII, IX, X, XII, XIII, and XIV, Paragraph 14; 2005 Accession Treaty, Article 20, Annexes VI, VII, Paragraph 14; 2012 Accession Treaty, Article 18, Annex V, Paragraph 14.

Malta and Cyprus were not covered by these detailed arrangements. Instead, they joined immediately the free movement *acquis*. The higher economic and social development of these countries compared to the CEECs was the reason behind the immediate application of the free movement framework.[35] The stance of the Commission, as expressed in archival documents, is that Malta and Cyprus stood out from the rest of the candidate countries for three reasons: they did not share common borders with any Member States; the difference of wage levels between them and the Member States was not as marked; and the relevant research did not identify them as posing migration-related risks to the EU Member States most affected at the time (Germany and Austria).[36] For the same reasons, Malta was even allowed to unilaterally resort to procedures restricting the movement of EU workers to its territory for a period of seven years if it underwent or foresaw labour market disturbances that could seriously threaten the living standards or employment in a specific region or occupation.[37] A similar derogation on the application of free movement provisions was not envisaged for the EU Member States with respect to Maltese nationals. Likewise, the transitional arrangements on Cyprus provided for no restriction on the free movement of workers *acquis*.[38]

Similarly to all the previous Accession Treaties, a general safeguard clause was incorporated allowing for the potential adoption of protective measures for three years after accession in case of difficulties related to the economic situation of the old and new Member States.[39] In addition to this, another clause was added which provided for similar measures where new Member States failed to enforce the commitments undertaken

[35] Commission Opinion on Malta, COM(1993)312; Commission Opinion on Cyprus, COM (1993)313; Rapport de mise à jour de l'avis de la Commission sur la demande d'adhésion de Malte, COM(1999)69 final, Section 3.5, 25.

[36] HAEU, GJLA-204, European Commission, DG Enlargement, Argumentaire on the Transitional Arrangement for the free movement of persons, For use in the candidate countries, Brussels, 31 May 2001, ELARG/FC D(2001); HAEU, GJLA-206, Final version of Communication from Mr Verhaugen in Agreement with Mrs Diamantopoulou, Essential elements for the draft Common Positions concerning 'Freedom of movement of persons', version of 6 April 2001 sent to the Secretary General for the college on 18.04.01.

[37] 2003 Accession Treaty, Annex XIV Malta, Paragraph 2.

[38] 2003 Accession Treaty, Annex VII.

[39] 2003 Accession Treaty, Article 37; 2005 Accession Treaty, Article 36; 2012 Accession Treaty, Article 37.

during the accession negotiations, thereby causing a serious breach or an imminent risk of such breach to the functioning of the internal market.[40]

In the Accession Treaties of 2003 and 2005, Member States attached Declarations in recognition of the elements of 'differentiation and flexibility that applied to the free movement of workers regime'.[41] They acknowledged their intention to grant increased access to the acceding states' nationals under domestic law and to improve the employment opportunities in Member States upon accession. Finally, they declared their intention to 'move as quickly as possible to the full application of the acquis in the area of free movement of workers'.[42] The overview of the main provisions of the Accession Treaties points to the extremely detailed temporal limitation of the rights of migrant workers and the more flexible review process on the transitional arrangements not only by the EU institutions but also by the Member States, which could unilaterally decide how to address labour migration from acceding states based on their national needs.

A feature of past accession processes was that workers-nationals of the acceding states, who had been already legally employed in the territory of the Member States, would immediately enjoy their rights as EU workers. This was because of the recognition that such migrants were already actively contributing to EU growth and could not cause disruptions to national labour markets. This feature was also differentiated in the Central and Eastern European enlargement. No longer was prior lawful economic activity enough: migrants employed in Member States prior to accession were required to show a more concrete tie to the labour market. They had to have already been connected to the EU market for a period of longer than a year to be able to enjoy a broader set of rights. This incrementality in the attribution of rights for already employed migrants from acceding states was established precisely to avoid economic risks at times of more limited labour demand, and thereby to ensure that the accession would not take place in a way that would make it unsustainable for the economic development of the EU.

[40] 2003 Accession Treaty, Article 38; 2005 Accession Treaty Accession, Articles 37 and 39; 2012 Accession Treaty [2012] OJ L 112, Article 38.

[41] Declarations no 6, 7, 10, 11, 13, 14, 15, 16, 18, 2003 Accession Treaty; Joint Declaration on the free movement of workers 1 and 2, 2005 Accession Treaty.

[42] Ibid.

8.2 The Free Movement Framework as a Sustainable Migration Framework

Chapter 5 presented the political aspirations of generalizing free movement rights for EU citizens and their reflection in the case-law, which broadened the protection of EU migrants in light of the primary law provisions. For some time, political scientists and legal scholars alike investigated primary law and its invocation in the case-law as a basis for the construction of a direct link between EU migrants *qua* citizens and the EU legal order.[43] In parallel, the Treaty provided that free movement rights of all citizens were to be exercised in accordance with the conditions and limitations of secondary law. The Commission thus issued a proposal for a Directive which would regulate the exercise of these rights in light of the legal and political environment created by the citizenship of the Union.[44]

The proposal of the Commission suggested the extension of residence rights without any conditions for up to six months, the removal of conditions of differential treatment between EU migrants and Member State nationals after four years of residence, and the limitation of restrictions to family reunification.[45] These aspirations were watered down by the Council.[46] A closer investigation of the final text of Directive 2004/38, which now regulates these rights, as well as of the case-law of the Court, show that economic objectives dictate both the conditions and the limitations of the right to reside, the social rights enjoyed by EU

[43] See Sandra Mantu and others (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020); Willem Maas, 'The Genesis of European Rights' (2005) 43 JCMS 1009; Dora Kostakopoulou, 'The Evolution of European Union Citizenship' (2008) 7 European Political Science 285; Dora Kostakopoulou, Sergio Carrera, and Moritz Jesse, 'Doing and Deserving: Competing Frames of Integration in the EU' in Elspeth Guild, Kees Groenendijk, and Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU* (Ashgate 2009).

[44] Proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001)0257 [2001] OJ C 270E/150, Section 1.3.

[45] Ibid.

[46] On the main changes by the Council, see Communication pursuant to the second subparagraph of Article 251(2) EC Treaty concerning the common position of the Council on the adoption of a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, SEC (2003)1293 final – COD 2001/0111.

migrants, as well as family reunification rights.[47] After reviewing how such objectives are reflected in secondary law in Section 8.2.1, Section 8.2.2 turns to the evolution of case-law, which, rather than ensuring more extensive protection via primary law, now accepts the balancing of economic and social objectives decided by the legislature. In Section 8.2.3 the more extensive protection of EU migrant workers as reflected in law and case-law is identified. Finally, Section 8.2.4 examines family reunification provisions and the way in which economic and social considerations affect their interpretation. The analysis reveals the centrality of economic and social considerations for the rights of EU migrants, showcasing the free movement framework as the perfect example of sustainable migration whereby migrants are attributed extensive social rights if they have an economic function, and these rights are limited precisely to ensure the economic sustainability of their movement.

8.2.1 Economic Preconditions of Legal Residence

An analysis of the provisions of Directive 2004/38 shows how economic objectives condition free movement rights. The Directive provides detailed conditions under which the right of free movement and residence should be exercised by EU migrants and their family members, their rights to permanent residence, and the limitations of such rights for public policy, public security, and public health reasons.

First, all EU migrants enjoy a right of residence for up to three months under Article 6 Directive 2004/38. This right is generally thought of as unlimited, owing to the special status of EU citizenship. Even this limited right to enter and reside in a Member State free from any administrative requirement is dependent on a negative condition, namely that EU migrants should not become an unreasonable burden on the social assistance system of the host state under Article 14(1) Directive 2004/38. Subsequently, if EU migrants wish to reside in a Member State for a period longer than three months, they need to comply with the conditions of Article 7 Directive 2004/38. Recital 9 of the Directive suggests that Member States may allow more favourable treatment to jobseekers;

[47] Directive 2004/38/EC 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 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 [2004] OJ L 158/77.

however, there are no more specific provisions on this in the text of the Directive.

A closer look at Article 7 Directive 2004/38 points to the economic considerations conditioning the security of residence of EU migrants in a Member State. Specifically, residence over three months is guaranteed only for EU migrants who cannot pose a risk to the economy of Member States. Residence is guaranteed for workers, self-employed persons, and their family members. Where EU migrants are not engaged in economic activity, their security of residence is dependent on them having sufficient resources and comprehensive health insurance.[48] Economic activity, or, at the very least, self-sufficiency, functions as a guarantee that they will positively contribute or, at least, that they will not negatively affect the economies of the Member States. The primary law guarantee of movement and residence derived from the EU citizen status is conditioned by the EU legislature to align free movement under the Directive with the Treaty objectives of growth and progress.

Directive 2004/38 allows some leeway for economic inactivity, but this is clearly delimited. Under Article 7(3), EU migrants can retain the status of worker or self-employed, and hence security of residence, if they are temporarily unable to work due to illness or accident, and if they are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as jobseekers.[49] In case of involuntary unemployment after less than a year of employment they must have registered as jobseekers. In this case, EU migrants maintain the status of worker for no less than six months if they pursue vocational training. However, the retention of the worker status presupposes that the training is related to their previous employment, unless they have become voluntarily unemployed.

The intimate connection of security of residence to economic considerations appears under Article 14 Directive 2004/38 on the retention of the right of residence. According to it, EU migrants and their family members can retain the right to reside as long as they do not become an unreasonable burden on the social assistance system of the host state. Incorporating the considerations of the case-law, Article 14(3) provides that expulsion should not come as an automatic consequence of recourse

[48] Article 7(1) (b) and (c), Directive 2004/38.

[49] Case C-507/12, *Saint Prix*, ECLI:EU:C:2014:2007; Case C-442/16, *Gusa*, ECLI:EU:C:2017:1004; Case C-544/18, *Dakneviciute*, ECLI:EU:C:2019:761.

to social assistance.[50] This means that Member States can remove EU migrants if they consider that such migrants negatively affect their economies, but to do so, they need to comply with the principle of proportionality and to take into account various considerations.[51]

Security of residence becomes decoupled from economic considerations after five years of residence in a host state. That is when EU migrants can access permanent residence under Article 16 Directive 2004/38.[52] Under Recital 17, this right is attributed with a view to contributing to the social objectives of the EU by strengthening social cohesion. Finally, Article 24, which provides for equal treatment of EU migrants and their family members, allows for derogation. Article 24(2) provides that Member States have no obligation to grant equal access to social assistance during the first three months of residence or to migrants who entered as jobseekers. The same provision allows Member States to restrict equal treatment regarding maintenance aid for studies to economically active migrants and their families and to only allow such aid to economically inactive migrants after the acquisition of a right of permanent residence.

Despite these safeguards, which were put in place to avert the potential economic repercussions of unlimited free movement rights, Member States have time and again voiced their concerns on how the provisions of the Directive set the scene for 'benefit tourism'.[53] The Commission has communicated to Member States that the limitations in place ensure the proper functioning of the system, stressing that economically inactive citizens and people who enter as jobseekers are excluded from social assistance to begin with.[54] Social assistance is granted to people whose

[50] Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458; Case C-456/02, *Trojani*, ECLI:EU:C:2004:488.

[51] Recital 16 inserted by the Council during the negotiations, Council Document ST 13263 2003 ADD 1 – Projet d'exposé des Motifs du Conseil 10/11/2003, Position commune arrêtée par le Conseil en vue de l'adoption d'une directive du Parlement européen et du Conseil relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des États membres, modifiant le règlement (CEE) n° 1612/68 et abrogeant les directives 64/221/ CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE Orientations Communes Délai de consultation:14.11.20.

[52] Article 18, Directive 2004/38 for family members.

[53] The concerns escalated in the Member States' intention to limit equal treatment also for workers. Cf Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 ELR 477.

[54] Communication, Free movement of EU citizens and their families: Five actions to make a difference, COM(2013)0837 final, Section 2.2.

income falls below a specific threshold, and they require support by states to meet a life in dignity. EU migrants who enjoy a right to reside in Member States do so under the condition of sufficient resources (either via employment or through proof of self-sufficiency) anyway, which would mean that their income must be higher than that under which social assistance is granted. Thus, they cannot pose a risk to public finances.

Overall, Directive 2004/38 operationalizes free movement rights for EU migrants under specific limitations and conditions as provided by Article 21(1) TFEU. The rights granted to EU migrants and the limitations thereto to protect national economies express a balancing between economic and social objectives so as to guarantee that migration is sustainable in the long-term, and that public finances are not affected by unlimited EU migration. The limitations regarding economically inactive and not self-sufficient EU migrants condition both the right to reside and access to social rights. This is not a surprise. Secondary law has always imposed such conditions on the rights of EU migrants. Nevertheless, equal treatment is provided not only under the Directive, but also under primary law, which was extensively used by the Court to extend both social and residence rights beyond the limits of secondary law during the 1990s and early 2000s, as discussed in Chapter 5. Section 8.2.2 examines the case-law and shows how the tension between primary law and the limitations set by secondary law under Directive 2004/38 were dealt by the Court during this period.

8.2.2 Legal Residence under EU Law as a Condition of Social Rights

Section 8.2.1 has shown how economic considerations underlie the rights of EU migrants in two ways. First, they appear behind the conditions of access to residence rights for a period longer than three months, and, second, they exist as a limitation behind the attribution of equal treatment rights for those not fulfilling the conditions of Article 7 Directive 2004/38. In this section I investigate how the Court has engaged with the balancing, opted for by the EU legislator, behind the need to promote EU citizen status, and the limitation of the rights of EU migrants so that they do not adversely affect the EU project of growth.

One of the first cases issued under the new framework was *Brey*, which concerned the residence rights of a German pensioner who claimed a compensatory supplement provided for under Austrian legislation to

supplement his German pension.[55] The Court followed the wording and purpose of the Directive 2004/38 and confirmed that lawful residence was dependent on the self-sufficiency of an EU migrant. It emphasized that freedom of movement was the rule, and the conditions set for it under the Directive should be interpreted strictly and in line with proportionality, in order to assess whether the grant of social security benefits to an individual might burden the social assistance system of the Member State as a whole.[56] In that case the Court suggested that the proportionality assessment should take place with reference to the personal circumstances of the applicant and on a case-by-case basis. Jesse and Carter call this the 'swansong' of the Court's qualitative approach, examined in Chapter 5.[57]

Subsequently, *Dano*, where the Court religiously followed the conditions prescribed by Directive 2004/38, came out with a bang.[58] In this case, the Court held that access to social benefits under equal treatment presupposed not lawful residence of any kind, but lawful residence in accordance with the conditions of the Directive.[59] By setting these conditions, the EU legislature aimed at preventing the movement of people who could pose risks to the social assistance system of the Member States.[60] According to the Court, if EU migrants do not comply with the conditions of the Directive on residence rights, they may not claim equal treatment under EU primary law, as this would run contrary to the objective of secondary law, 'namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State'.[61] The Court also suggested that by setting these conditions, Article 7(1)

[55] Case C-140/12, *Brey*, ECLI:EU:C:2013:565.
[56] C-140/12, *Brey*, paras 70–72.
[57] Moritz Jesse and Daniel Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress, Social Justice, Brexit and Other Challenges*, vol 16 (Brill Nijhoff 2020) 144.
[58] Catherine Barnard, 'The Day the Clock Stopped: EU Citizenship and the Single Market' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017); Julio Baquero Cruz, 'Partial Eclipse of Union Citizenship: From Grzelczyk to Dano' in *What's Left of the Law of Integration?* (Oxford University Press 2018); Niamh Nic Shuibhne, 'What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano' (2016) 23 Maastricht Journal of European and Comparative Law 908.
[59] Case C-333/13, *Dano*, ECLI:EU:C:2014:2358, para 70.
[60] Ibid, para 70 and Directive 2004/38, Recital 10.
[61] Ibid, para 74.

(b) Directive 2004/38 sought to prevent economically inactive EU migrants from using the host states' welfare system as means to fund their subsistence.[62]

This approach was confirmed in *Alimanovic* and later in *García-Nieto*, which concerned access to benefits during the first three-month period of unconditional residence.[63] The Court confirmed that only residence that complied with the conditions set by the Directive qualified for equal treatment, and not any kind of lawful residence. As put by AG Wathelet in *García-Nieto*, such an interpretation is consistent with the objective of the Directive to maintain the 'financial equilibrium of the social security system of the Member States' and to decide otherwise 'could result in relocation en masse liable to create an unreasonable burden on national social security systems'.[64]

The economic conditioning of a right to reside as a basis of equal treatment was confirmed more clearly in *Commission v the UK*.[65] The case concerned a UK law which required the existence of EU residence rights as a condition to access child benefit. The UK would essentially screen applicants who claimed this benefit and then expel them if they did not meet the conditions of Directive 2004/38 regarding residence in the UK. The Court confirmed its finding in *Brey* and *Dano* and linked these to *Bidar* and *Grzelczyk*. While acknowledging that the requirement of legal residence under EU law constituted indirect discrimination, the Court found this justified.[66] Specifically, it held that such limitations were in line with EU law and could achieve the legitimate objective of protecting public finances.[67]

One could suggest that the system in place is remedied in light of the guarantees of equal treatment after five years of residence, which prove integration and extend the rights of EU migrants in the host state in light of social considerations. Nevertheless, a look at the case-law of the Court on permanent residence creates room for more problematization.

[62] Ibid, para 76.
[63] Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597; Case C-299/14, *García-Nieto and others*, ECLI:EU:C:2016:114.
[64] Opinion of AG Wathelet in Case C-299/14, *García-Nieto and others*, ECLI:EU:C:2015:366, paras 70–71.
[65] Case C-308/14, *Commission/United Kingdom*, ECLI:EU:C:2016:436.
[66] C-308/14, *Commission/United Kingdom*, para 77. For a critique, see Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v. United Kingdom*' (2017) 54 CMLRev 209.
[67] C-308/14, *Commission/United Kingdom*, para 80.

In *Ziolkowski & Szeja*, the Court engaged with the right to permanent residence of Polish nationals during the transitional period of the Accession Treaties.[68] The Polish nationals in that case had legal residence in Germany on the basis of humanitarian grounds. The Court held that the applicants could indeed access permanent residence under Directive 2004/38, since there were no transitional arrangements regarding this. However, it also held that, to qualify for permanent residence under the Directive, one had to have legal residence that satisfied the conditions of the Directive.[69] This means that an EU migrant needs to be self-sufficient and to not pose a burden to the welfare system of the Member State, if they are to qualify for permanent residence under EU law. The length of residence is not the only qualifying factor, and social ties in a Member State are not a sufficient factor either. Economic conditions of having proven worthy, or not having adversely impacted the economy of the host state, are also attached to this status. As the applicants enjoyed legal residence on humanitarian grounds, this did not presuppose their self-sufficiency and, hence, they were excluded from the scope of the Directive.

Muir has referred to this case-law development as 'deconstitutionalization'.[70] By looking at the Treaty provisions on citizen's rights, Muir suggested that Article 21 TFEU functioned both as a benchmark against which the activities of EU and national authorities could be reviewed and as a legal basis for the adoption of further legislation.[71] Indeed as she showed, this double function is not uncommon in EU law and in the field of citizen's rights where 'the process by which political institutions have thought to circumscribe EU intervention may be reviewed against the very primary right that the legislation is intended to shape'.[72] Muir has rightly pointed out that the Court's view on primary law 'more ostensibly competes with those expressed by political authorities'.[73] Having these in mind, Muir looked at how the Court shifted its attention from the rights enshrined in primary law to the rights provided in secondary law, and

[68] Joined Cases C-424/10 and C-425/10, *Ziolkowski and Szeja*, ECLI:EU:C:2011:866.
[69] Ibid, para 51.
[70] Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' (2019) 2018 European Papers – A Journal on Law and Integration 1353.
[71] Ibid, 1357.
[72] Ibid, 1358.
[73] Ibid.

suggested that this 'deconstitutionalization' allowed more space for political dialogue.[74] Thym has also referred to the evolution presented in this section as a stark reminder of the limits of integration through law.[75]

Looking at these evolutions in light of the demand for economic and social sustainability driving the development of EU law, the following could be added. Before the adoption of secondary law implementing the free movement rights of EU citizens, the Court emphasized the primary law objective of creating an ever-closer Union of the peoples of Europe. It used this political aspiration as a means to review secondary law in place, and to disconnect the economic limitations of the secondary law adopted in the 1990s from the social and political considerations of EU citizenship status inserted in the Maastricht Treaty. After the legislator balanced the different economic and social objectives and gave them concrete expression in Directive 2004/38, the Court refrained from using the broader framing of primary law as means to review secondary law. Rather, it restricted its interpretation by confirming the balancing between economic and social considerations chosen by the EU legislature. Taking a different approach would have made the system of free movement unsustainable. As Nic Shuibhne has also suggested, the aspiration of the greatest possible freedom might be legitimate, but it does not allow for sustainability of free movement rights under the current framework.[76] Having presented the evolution of judicial interpretation, Section 8.3.3 explores how the current framework still privileges the social rights of EU migrant workers, as they are the ones contributing to the project, and differentiates their treatment from that of economically inactive EU citizens.

8.2.3 The Differentiated Status of Workers and Jobseekers

Despite the aim of the Directive 2004/38 to harmonize the conditions of residence for all EU citizens, the treatment of economically active EU migrants is differentiated both by exceptions applicable to them in the Directive and through the parallel existence of other instruments granting them rights.

[74] Ibid, 1360, 1376.

[75] Daniel Thym, 'When Union Citizens Turn into Illegal Migrants: The Dano Case' (2015) 40 ELR 249, 260.

[76] Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 ELR 477, 509.

First, in the Directive, there are exceptions that allow more privileged access to permanent residence to workers, self-employed persons, and their family members under Article 17. Under Recital 19 Directive 2004/38, the differentiated rights of economically active migrants are based on Regulation 1251/70 and Directive 75/34 and have been maintained as acquired rights.[77] What is more, workers, self-employed, and the members of their families enjoy full equal treatment rights and do not fall under the derogation of Article 24(2) Directive 2004/38. Further, under Article 14(4) Directive 2004/38, workers, first time jobseekers, and members of their families can in no case be expelled for economic reasons. Specifically, this Article provides that expulsion may in no case be adopted against economically active migrants, or EU migrants who entered the territory to seek employment. Such an expulsion would go against the long-standing right of EU migrants to move to take up work. Article 14(4)(b) provides, however, that the individuals need to be able to prove that they are indeed seeking employment, and that they have a genuine chance of being employed. In short, the claim of job-seeking is not sufficient of its own.

The differentiation in this, and the broader attribution of rights under Directive 2004/38, lies in the presumption that workers, by virtue of their status, cannot become a burden, but will rather be net contributors to the system. What is more, even if workers are entitled to equal treatment under Article 24, the chances are that they will never overburden national welfare systems, as they could be excluded from it for other reasons. Specifically, social assistance is usually aimed at supporting persons through mechanisms of solidarity so that they can have a decent livelihood. Workers and self-employed individuals would most probably be excluded on the basis of their finances, as they would have sufficient resources to ensure their livelihood without the need of state support.

In parallel to this, the Commission codified Regulation 1612/68 in line of the amendments it had undergone. Without creating new rights compared to the 1968 framework, free movement of workers is now regulated under Regulation 492/2011, which provides for a broader application of equal treatment under Article 7 in line with the broad

[77] Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24; Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10.

interpretation of the concept of social and tax advantages in the Court's case-law.[78] Family reunification rights of workers are no longer regulated by this instrument, but rather fall under Directive 2004/38. Nevertheless, in Article 10, the Regulation maintains the rights of children of workers and former workers to access education or vocational training under equal conditions to Member States nationals. Even after moving the conditions of family reunification to Directive 2004/38, the Regulation still provides for differentiated treatment not only to workers themselves but also, most importantly, to former workers and their family members.

The Court had already acknowledged the complicated link between the rights of residence of family members of workers and the rights of residence of former workers via their family members. Early on, the Court held that children of workers derived a right of residence from Article 12 Regulation 1612/68 to be able to access education in the host state.[79] This derived right of residence becomes autonomous when the parent loses the status of worker, in order to ensure that the child can continue their education.[80] The reasoning is that a worker who wants to move should not be exposed to the risk that if they lose their worker status, this would lead to the disruption of their children's education. A need to promote mobility, and thereby growth, is thus tied to an extended consideration of the importance of the protection of workers' children and their access to education.

In *Baumbast*, analysed in Chapter 5, the Court held that where a child enjoys a residence right to access education under Regulation 1612/68, this right can create residence rights for their primary carer.[81] Essentially, the loss of the status of worker by an EU migrant parent has no effect on the right of residence of their children. In subsequent case-law, the residence of the children of former workers created the basis for residence of their EU migrant parent. In *Ibrahim*, the Court confirmed *Baumbast*. Most importantly, it stated that EU migrants who are parents of children who had a residence right based on Regulation 492/2011 could enjoy a derived right of residence from their children without the need to satisfy the conditions of Directive 2004/38, that is, without the

[78] See Chapter 2. Articles 7–9, Regulation (EU) No 492/2011 on freedom of movement for workers within the Union [2011] OJ L 141/1, which also include equality in trade union membership and rights, and equality as regards access to housing.
[79] See Section 2.2.3.
[80] Case C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493.
[81] Ibid; Case C-480/08, *Teixeira*, ECLI:EU:C:2010:83.

need to have sufficient resources and health insurance.[82] The existence of a worker status in the family at some point in time trumps the need to prove self-sufficiency to enjoy residence rights. The differentiation is based on a different function served by free movement of workers and free movement of citizens. Free movement of workers develops by extensive interpretations to promote mobility and, thereby, growth. The rights enjoyed by workers are based on the objective of creating the best possible condition for the integration of family members of people on the move.[83] Free movement of citizens develops with clearly construed limitations in secondary law to minimize the negative impacts of movement on national economies. The limitation of rights under the relevant Directive is based on the objective of maintaining the financial equilibrium of the Member States.[84]

This extensive protection of residence rights lies behind the more extensive application of equal treatment in access to social assistance for former workers. In *JD*, the Court held that parents of children who enjoyed a right of residence under Regulation 492/2011 should have access to social assistance under the more favourable conditions of Article 7(2) of Regulation 492/2011 and should not be covered by the derogation of Article 24(2) Directive 2004/38.[85] JD was a worker in Germany, where his daughters were attending school by virtue of Regulation 492/2011. Due to disruptions in his work, JD received social protection benefits for a period of nine months (subsidiary unemployment benefits and subsistence benefits for daughters), which were discontinued. Due to the length of the period during which JD was unemployed, the German authorities deemed that he could no longer retain the status of a worker, but he was rather considered a jobseeker. His right of residence at that stage was derived from the fact that his daughters were attending school by virtue of Regulation 492/2011. So, the national court wondered how the derogations from equal treatment, which were meant to apply to jobseekers under Directive 2004/38, should apply to persons who had the right of residence under Article 10 Regulation 492/2011, and who could no longer be considered workers.

[82] Case C-310/08, *Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80, para 59.
[83] See also Case C-181/19, *Jobcenter Krefeld v JD*, ECLI:EU:C:2020:794, para 51.
[84] Ibid, para 66.
[85] Ibid.

As AG Pitruzzella mentioned in his Opinion, this case demanded that the Court clarify the limits of social solidarity.[86] And it did so by reference to the different objectives of free movement of workers and free movement of persons. In light of the objective of Directive 2004/38, the limitation to equal treatment is established as a means to minimize the negative economic impact of attribution of rights to migrants. In the case at hand, the Court held that there was an 'appreciable distinction' to be made between a EU migrant who worked in a Member State and had children in school there and then became unemployed (residence under Article 10 Regulation 492/2011), an EU migrant who resided in a Member State for less than three months (residence under Article 6(1) Directive 2004/38),[87] and an EU migrant who resided in a Member State as a first-time jobseeker (residence under Article 14(4) Directive 2004/38).[88] The latter two categories were those excluded from equal treatment in social assistance under Article 24(2) of the Directive 2004/38. The appreciable distinction which the Court mentioned essentially refers to the fact that an EU migrant has worked and contributed to growth in the first scenario. Due to this, their subsequent unemployment, together with the fact of having children in the host Member State, means that their claim to equal treatment should be accepted, as it would not adversely affect the economy of Member States.

What is more, in *Chief Appeals Officer and Others*, the Court drew a clear line between the permissible limitations to free movement of persons and free movement of workers.[89] In this case, which concerned social assistance for family members of EU migrant workers, the Court clarified that the unreasonable burden argument can justify limitations in the context of free movement of persons, but not in the context of free movement of workers. To justify this, the Court reminded that EU migrant workers personally contribute to the financing of the social policies followed by Member States by paying taxes and, due to this, they should be able to profit for social rights under the same conditions that national workers do.[90]

The analysis herein shows that both secondary law and case-law acknowledge a clear link between the economic contribution of an EU

[86] Opinion of AG Pitruzzella delivered Case C-181/19, *Jobcenter Krefeld v JD*, ECLI:EU:C:2020:377, para 1.
[87] C-299/14, *García-Nieto and others*, scenario.
[88] C-181/19, *JD*, para 67.
[89] Case C-488/21, *Chief Appeals Officer and Others*, ECLI:EU:C:2022:737.
[90] Ibid, para 71.

migrant and the more extensive social rights they are entitled to. The economic function of the migrant is once more the source of more extensive social rights, as has been the case from the early years of Community law. The connection between economic objectives served by migrant labour and the social safeguards that should guide the economic development reflects the way economic and social sustainability shapes EU migrants' rights. Section 8.2.4 will investigate how this connection appears in the regulation of family reunification for EU migrants.

8.2.4 The Case of Family Reunification: Social Objectives Furthering the Reach of EU Law within Defined Limits

Directive 2004/38 regulates family reunification for EU migrants. Family members mentioned in Article 2 are entitled to accompany or join the EU migrant in the host state and have a right to work there under Article 23. The Directive protects the rights of family members not in light of a functionalist narrative, but rather in connection to an aspiration to preserve family unity under the Charter.[91] Article 3 also mentions a wider group of family members whose reunification should be facilitated by Member States. The scope of family members falling under the Directive and the conditions of family reunification are considerably more extensive than the family reunification rights of legally resident TCNs under the Family Reunification Directive. However, this does not mean that the framework in place is completely stripped of economic considerations acting as a limit to migrants' rights.

First, the way family reunification rights are enjoyed by EU migrants is differentiated based on their economic function. EU workers or self-employed persons are not subject to conditions on income or housing as a precondition for reunification. This is not the case for students, pensioners, and self-sufficient EU migrants, who need to prove they have sufficient resources and comprehensive insurance. When it comes to family reunification for students, the circle of family members that can claim a right to family reunification is more limited.[92] In addition, as in the case of workers, permanent residence can be acquired under more favourable conditions for family members of EU migrants who

[91] Proposal on Citizen's Rights Directive, COM(2001)0257 final, Section 2.4.
[92] Article 7(4), Directive 2004/38.

contribute as workers or self-employed.[93] Aside from the legal regulation of the matter, the Court has engaged with the rights of EU migrants to family reunification in a significant amount of case-law which highlights the way economic and social objectives persist behind the attribution of rights. Section 8.2.4.1 examines the persistence of economic movement as a precondition for the rights of circular migrants, while Section 8.2.4.2 investigates the social orientation of the case-law behind the protection of the rights of EU children.

8.2.4.1 The Impossibility of Disconnecting Economic Considerations from the Rights of Circular Migrants

Economic objectives served by family reunification rights were apparent in the historical development of the EU legal framework analysed in Chapter 2. Social objectives are achieved by the extensive reach of EU law. The importance of attributing family reunification rights to EU migrants lies not so much in them being accompanied by their family members in a host state, but rather in the fact that they can claim such rights upon return to their state of origin. The link between an EU migrant and EU law, created by virtue of the migrant's contribution to growth, is strong enough to break the restrictions imposed by national law to its own nationals.

The case-law of the Court safeguarded the rights of EU migrants to be joined or accompanied by their family members in light of the need to guarantee that workers moved in liberty and dignity, and could thus be integrated in the host state.[94] The Court saw family life as a necessary precondition for promoting the living standards and social cohesion within Member States. Having established such rights in secondary law and having fortified them in the case-law, the Court used the functional imperative of free movement to promote the rights of EU migrants in their home state. In *Singh*, the Court held that the extension of the reach of EU law to trump national restrictions was necessary in order to remove obstacles to the free movement of workers.[95] The formula is classic. An EU migrant would be deterred from leaving their country of origin and pursue economic activity if they knew that, upon return, their family members could not join them under conditions at least equivalent

[93] Article 17(3), Directive 2004/38.
[94] See C-413/99, *Baumbast*, para 50; Case C-308/89, *Di Leo*, ECLI:EU:C:1990:400, para 13.
[95] Case C-370/90, *The Queen/Immigration Appeal Tribunal and Surinder Singh*, ECLI:EU:C:1992:296.

to those which they would normally enjoy in the host state.[96] The privileged treatment of returning EU migrants was linked with the abolition of obstacles to free movement, which was necessary for the promotion of the objectives of the Treaty.[97] Against this backdrop, EU law demanded the application of secondary law on family reunification rights when EU migrants returned to their home state. In *Eind*, the Court further held that there was no need for the migrant to continue the pursuit of economic activities upon return to their home state.[98] Such a requirement would run counter to the objectives of EU law to ensure that nationals of Member States took up work abroad. What is more, the personal motivation of the migrant to move to another Member State is irrelevant. The extended protection of EU law is not dependent on whether EU migrants moved to take up work or to circumvent national migration law, as long as they genuinely engaged in economic activity abroad.[99]

Following the adoption of Directive 2004/38, the reasoning of the Court shifted. It no longer emphasized the need to guarantee the specific free movement of economic actors, but rather focused on the aim of strengthening the rights of free movement and residence of all EU migrants regardless of whether they were net contributors.[100] In this context the Court mentioned the need to abolish obstacles to free movement of all persons under Article 3(1)(c) EC Treaty rather than on the specific functional imperatives of the free movement provisions.[101] The Court further stated that free movement for EU citizens implies the right to leave one's Member State of nationality and to become established in another Member State under the same conditions.[102]

But does this imply the elimination of economic considerations from the mix? A literal reading of the Court's case-law would require an unconditional right for EU migrants to establish themselves across the EU, and it would demand the elimination of economic objectives served by such move. It would further demand the more extensive protection of EU law applicable to all EU migrants, regardless of whether their move

[96] C-370/90, *Singh*, para 19. See also Case C-459/99, *MRAX*, ECLI:EU:C:2002:461, para 53; Case C-60/00, *Carpenter*, ECLI:EU:C:2002:434 on services, para 38.
[97] Case C-291/05, *Eind*, ECLI:EU:C:2007:771, para 32.
[98] C-291/05, *Eind*, para 44.
[99] C-370/90, *Singh*, para 23; Case C-109/01, *Akrich*, ECLI:EU:C:2003:491, para 55.
[100] Case C-127/08, *Metock and others*, ECLI:EU:C:2008:449, para 59.
[101] Ibid, para 68.
[102] Ibid. The case overturned C-109/01, *Akrich*.

served economic ends or not. This, however, is not the case. The Court has held that if EU migrants wanted to claim the privileged treatment of Directive 2004/38 against their home country upon return, their movement would need to be in line with the conditions of Article 7 of the Directive.[103] Only if they have established themselves under conditions of self-sufficiency or economic contribution can they enjoy such rights and circumvent national limitations. As discussed earlier, this would require a type of movement that, even without contributing to growth, at the very least does not hinder it. This means that as a minimum, EU migrants would have to be self-sufficient in the host state. Scholars have discussed how this is not a condition that can be met by all EU migrants, leading to exclusion from protection for those who could pose risk to the growth project.[104] This implication is actually the consequence of shaping migrants' rights with due regard to economic and social sustainability.

8.2.4.2 The Social Orientation behind the Extensive Rights of Union Children

The emphasis on the safeguarding Member States' economies is not reproduced with the same force in the case-law on family reunification rights for EU children. In a series of cases concerning residence rights for TCN parents of minor children with EU nationality, the Court has used the citizenship provisions as a basis of extending the rights of their migrant parents. This is, perhaps, the only type of case-law where social considerations regarding the protection of children are capable of significantly extending the rights of TCNs. Even in this socially oriented case-law, economy enters the mix through the requirement that the TCN parent needs to be able to provide sufficient resources to enjoy residence rights.

The residence rights of TCN parents of EU children are judicially constructed by reference to primary law, as they fall outside the scope of Directive 2004/38. Directive 2004/38 provides for family reunification of dependent relatives in the ascending line. In the cases examined by the Court on this matter, it was not the TCN parents who were dependent on the EU children, but vice versa. This did not stop the Court from

[103] Case C-456/12, *O.*, ECLI:EU:C:2014:135; Case C-457/12, *S. and G.*, ECLI:EU:C:2014:136, which recognized that similar rights can be derived from Article 45, TFEU for frontier workers.

[104] Eleanor Spaventa, 'Family Rights for Circular Migrants and Frontier Workers: *O and B, and S and G*' (2015) 52 CMLRev 753.

establishing residence rights by reference to Union citizenship and the need of genuine enjoyment of the substance of rights conferred by Article 20 TFEU.[105] The genuine enjoyment of Union citizenship rights is linked to respect for family life under Article 7 CFR and the obligation to take into account the best interests of the child under Article 24(2) CFR. This emphasis on rights is not sufficient to take away any economic guarantees underlying the residence rights of EU children and their TCN parents. Rather, the legality of residence of the child is based on a combination of Article 21 TFEU and Directive 2004/38, which has been interpreted to mean that the sufficiency of resources is considered by reference to the resources of the TCN parent.[106] The ultimate limit to residence under a combination of Article 21 and Directive 2004/38 is that the TCN parent must be able to fulfil the conditions of Article 7 of Directive 2004/38 in all cases.[107] If this is not possible because the parent cannot prove sufficient resources and comprehensive sickness insurance, then in extreme cases a right to reside could be based on Article 20 TFEU, but that would only be the case if the Union child had to leave the territory of the EU altogether because of the impossibility of granting a residence right to their TCN parent.[108]

A case which highlighted the tension of economic and social considerations behind the attribution of rights to TCN parents of Union children was *Bajratari*.[109] In that case, the children's sufficiency of resources was based on income obtained from unlawful employment, as the parents had lost their residence permit. The Court had to engage with how to achieve the balance between the social and economic objectives pursued by Directive 2004/38 – more specifically, the objective of strengthening the rights of Union citizens to move and reside freely in the Member States and promoting social cohesion on the one hand, while protecting the public finances of the Member State on the other.[110] In his Opinion,

[105] Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639; Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124; Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675 in purely internal situations. Case C-304/14, *CS*, ECLI:EU:C:2016:674; Case C-133/15, *Chavez-Vilchez and others*, ECLI:EU:C:2017:354; Case C-82/16, *KA and Others*, ECLI:EU:C:2018:308.

[106] C-86/12, *Alokpa and Moudoulou*, ECLI:EU:C:2013:645.

[107] C-86/12, *Alokpa and Moudoulou*, para 31.

[108] Ibid, para 32; Case C-87/12, *Ymeraga and Ymeraga-Tafarshiku*, ECLI:EU:C:2013:291, para 36.

[109] Case C-93/18, *Bajratari*, ECLI:EU:C:2019:809.

[110] Opinion of AG Szpunar in C-93/18, *Bajratari*, ECLI:EU:C:2019:512, paras 36–47.

AG Szpunar elaborated on the reason why the sufficiency of resources was evaluated with regard to the parent rather than the child in line with the case-law in *Chen* and *Zambrano* and noted that 'if they were adults, such children would have not only Union citizenship, which is destined to be the fundamental status of nationals of the Member States, but also the status of worker'.[111] In this Opinion, issued in 2019, nearly thirty years after the establishment of EU citizenship, this excerpt is a stark reminder of what links EU migrants to the EU legal order. It could be argued that reference to the worker status is made in support of the fact that as an adult, an EU national would have the opportunity to exercise their rights by fulfilling the conditions of Article 7 Directive 2004/38. But this is certainly not the case, as those conditions could be fulfilled by an adult as a worker, a self-employed, a student, or a self-sufficient person. What the aforementioned quote emphasizes is that the rupture of the link between the EU migrant and their state of origin, and, relatedly, the basis of claims made against that host state is to a large extent due to financial solidarity owed by Member States to EU migrants based on their economic contribution.

The Court followed the AG Opinion and explained the way the balancing took place by implying that such an evaluation was the lesser of two evils. Specifically, the Court recalled that the resources available to EU children would always be evaluated with reference to the income of their parents. However, when the parent is in a precarious situation due to unlawful residence, the risk of losing the sufficient resources required and of the Union child becoming a burden on the social assistance system would be greater.[112] While on first reading, the exclusion of income from unlawful employment could achieve the objective of protecting public finances, this objective is already ensured by the safeguards provided in Article 14 Directive 2004/38, which allows Member States to check if the conditions of the Directive are fulfilled throughout the period of residence.[113] In light of this, introducing a condition regarding the lawfulness of income of the parent was found to constitute a disproportionate interference, which went beyond what is necessary to achieve the objective pursued.[114]

[111] Ibid, para 83, reference omitted.
[112] C-93/18, *Bajratari*, para 37.
[113] Ibid, paras 38–41.
[114] Ibid, para 42.

The more protective approach of the Court regarding children has been linked in scholarship with the fortification of the status of EU citizenship or with a recognition of children as actors in their own right and not as appendices to economic actors.[115] I would argue that while the latter might be true, the derivative rights of parents of EU children should not be understood as transforming the basis of free movement rights and disentangling them from effective market contribution. Similar arguments have failed with regard to the claims of EU nationals who have never left their state of origin and their partners. Already since *McCarthy* and *Dereci*, the Court insisted on the necessity of movement meeting the conditions of Directive 2004/38 to be able to claim family reunification rights under EU law.[116] Arguments on the dependency of adult EU nationals to a TCN as a basis for claiming the more protective treatment of EU law have not succeeded. Instead, the Court has insisted that a relationship of dependency – one that would be so strong to create a right of residence under Article 20 TFEU and the effective enjoyment of rights test – would be conceivable only in exceptional cases where there could be no form of separation imaginable between the EU national and the member of their family on which they were dependent.[117] Emotional ties would not be enough. The differentiation should thus be understood in line with the greater vulnerability of children whose interests fall to be protected by societies at large in line with the need to promote the social objectives of the EU. The consistent invocation of Article 24 CFR in the relevant case-law would support that.

8.2.5 *Consolidation of Balancing and No More Attempts to Tip the Scale*

Different scholars have commented with great disappointment the different judicial evolutions of this period which point to the continued economic basis of the rights EU migrants enjoy from EU law.[118]

[115] Clare McGlynn, *Families and the European Union Law, Politics and Pluralism* (Cambridge University Press 2006).

[116] Case C-434/09, *McCarthy*, ECLI:EU:C:2011:277; Case C-256/11, *Dereci and others*, ECLI:EU:C:2011:734.

[117] Case C-836/18, *Subdelegación del Gobierno en Ciudad Real v RH*, ECLI:EU:C:2020:119, para 56; C 82/16, *K.A. and Others,* EU:C:2018:308, para 65.

[118] Moritz Jesse and Daniel Carter, 'The "Market Insider": Market-Citizenship and Economic Exclusion in the EU' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020); Dimitry

Ultimately, the economic limitations set to the exercise of EU migrants' rights under secondary law, and the hesitation of the Court to review them for compliance with primary law proves the strong economic basis of EU free movement rights. At the same time, if we look at this evolution having in mind both how the EU legal order created rights for migrants and that economic and social objectives sit at the core of this legal order, a more nuanced explanation could arise. This explanation would have as a starting point the impossibility of maintaining economic growth and social progress, by the creation of unlimited residence rights and corresponding social rights for all EU migrants. If the EU legal order is to deliver on the parallel pursuit of economic and social objectives, then the balance could not be tipped in favour of unlimited social rights for EU migrants. In other words, sustainability under EU law demands the economic and social sustainability of EU migrants' rights.

During this period, the legislative evolution by the adoption of Directive 2004/38 showed the intention to create residence rights for all EU migrants in light of the ever-closer Union of peoples. However, such rights meet an ultimate limit of self-sufficiency. It is accepted that EU migrants should be able to enjoy rights, even if they are not net contributors to the host state. Nevertheless, this does not mean that rights could be created for those that negatively impact the public finances of the Member States. In parallel, social cohesion within the Member States is promoted by the creation of a permanent status that disconnects the attribution of social rights from economic considerations. Next to this broader scope of migrants enjoying EU law rights, those who actively contribute by their economic activity are still privileged in the rights granted by EU law. In this set-up, the due consideration of a parallel pursuit of economic and social objectives, as well as the related attribution and limitation of social rights to EU migrants, frame the free movement framework as a sustainable migration framework.

Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Dimitry Kochenov and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019); Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597; Síofra O'Leary and Sara Iglesias Sánchez, 'Free Movement of Persons and Services' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); Sybe Alexander de Vries and others (eds), *EU Citizens' Economic Rights in Action: Re-thinking Legal and Factual Barriers in the Internal Market* (Edward Elgar 2018).

Regarding the case-law, during this period, the Court deferred to the legislature. It acknowledged the balancing of economic and social objectives as they were transposed in secondary law, and no longer invoked primary law to alter this balancing. The Court continues to emphasize the special citizen status when it comes to cases related to Union children, recognizing a particular vulnerability. But it does so when the attribution of rights does not come with extra costs for the host state. To do otherwise under the current consolidation of balancing behind secondary law would be unsustainable. Having concluded the historical investigation of EU migrants' rights, Chapter 9 will look at how economic and social considerations eventually shaped the regulation of migration from third countries.