

# 6

## The Fundament of the Fundaments?

### *Family Rights and the EU Charter of Fundamental Rights*

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#### 6.1 INTRODUCTION

Similarly to other conventional fundamental rights, the right to respect for family life<sup>1</sup> was not mentioned in the European Union (EU) Treaties from the outset. The right of families of economically active EU nationals (workers) has been protected through secondary legislation already since the 1960s.<sup>2</sup> However, as emphasised by the Court of Justice of the EU (CJEU) in *MRAX*,<sup>3</sup> the protection of the family life of EU Member State nationals was related to a primary objective, namely to ‘eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty’. This point had also been emphasised in *Carpenter*,<sup>4</sup> which was delivered in the same month as *MRAX*.

The strong link between the right to family life and free movement is not surprising, and the question we will examine in the following pages is to what extent this link remains essential when invoking the right to respect for family life under the EU Charter of Fundamental Rights (the Charter).<sup>5</sup> Can the Charter provisions extend the protection of family life under EU law? Or is a free movement element necessary for the activation of the Charter provisions? Moreover, how does the protection of family life under the Charter interact with the EU citizen status?

<sup>1</sup> On the right to family life in general, see, for example, C. McGlynn, *Families and the European Union Law, Politics and Pluralism* (Cambridge University Press 2006); M. Pascual and A. Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2018).

<sup>2</sup> See, for example, Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

<sup>3</sup> Case C-459/09 *MRAX* EU:C:2002:461, para 53.

<sup>4</sup> Case C-60/00 *Carpenter* EU:C:2002:434, paras 38–39.

<sup>5</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

Investigating the link between free movement, family rights, and EU citizenship is essential for the following reason. The right to family life, which is often used in case law to interpret the free movement and citizenship provisions of the Treaty on the Functioning of the EU (TFEU), relates – using a federal jargon – to the issues of localism and the moral values of national communities.<sup>6</sup> In the EU, this means that the interpretation and limitation of the right is dictated by the Charter’s horizontal clauses that guide the ‘competence valuation’, which takes place between the centre and the periphery, that is, between the EU and its Member States.<sup>7</sup> Whether family rights can be protected at the EU level or at the national level can have far-reaching consequences, especially for families that do not fit within the traditional heteronormative ideal. In the context of rule of law backsliding in some Member States,<sup>8</sup> strengthening the link between family rights and EU citizenship can consolidate the protection of queer families.

In this chapter, we examine how family rights are protected in EU law. Section 6.2 discusses the relationship between the horizontal provisions of the Charter and family rights. In this section, we highlight that the horizontal provisions of the Charter affect both the extent of protection of family life (depending on whether a claim falls within the scope of EU law) and the substance of the right (what the scope of the right can be).

In Section 6.3, we turn to the specific provisions related to the right to family life (Article 7 and its attached rights such as Article 9 on the right to marry, Article 21 on non-discrimination, Article 24 on the best interests of the child, and Article 33 on the protection of family life) and we examine how the protection they afford has been developed in the case law of the Court.

In Section 6.4, we look at the interaction of family rights with the citizenship provisions under Articles 20 and 21 TFEU. The analysis shows how the CJEU has at times protected family rights without reference to the Charter, but through embedding such rights in the protection afforded by the EU citizen status. More recent case law developments have pointed to a stronger link between the Charter and the citizenship provisions. Section 6.5 concludes our investigation, by suggesting that the EU citizenship provisions have

<sup>6</sup> C. Joslin, ‘Federalism and family status’ (2015) 90 *Indiana Law Journal* 787.

<sup>7</sup> See X. Groussot and G. T. Petursson, ‘The EU Charter of Fundamental Rights five years on – The emergence of a new constitutional framework’ in S. de Vries, U. Bernitz, and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* (Hart Publishing 2015).

<sup>8</sup> See pending Case C-769/22 *Commission v Hungary* regarding the violation of the rights of LGBT people and closed infringement case INFR(2021)2115 on the Polish ‘LGBT free’ zones. See also Chapter 12 by Nausica Palazzo.

shown more potential for the protection of family life than the Charter provisions on family rights.

## 6.2 FAMILY RIGHTS AND THE HORIZONTAL PROVISIONS OF THE EU CHARTER

Since the entry into force of the Charter, the right to respect for family life is protected under Article 7 which stipulates that ‘Everyone has the right to respect for his or her private and family life, home and communications’. Further, Article 6 of the Treaty on European Union (TEU) provides that the Charter has ‘the same legal value as the [EU] Treaties’. By virtue of this Article, the right to respect for family life has been augmented to the level of primary law. This repositioning of fundamental rights in EU law was both timely and welcomed,<sup>9</sup> as it marked a new stage in the process of European integration.<sup>10</sup>

At the same time, it has been maintained that – within the scope of EU law – the Charter is to be the *starting point and reference legislation* for any legal analysis involving fundamental rights.<sup>11</sup> The Charter is, thus, the fundament for fundamental rights protection in EU law – it impacts and steers the review of EU law in light of fundamental rights. Relatedly, the protection offered under Article 7 of the Charter is dependent on and conditioned by the applicability of the Charter.

Before analysing the substantive scope of Article 7 of the Charter and related rights under the Charter in Section 6.3, it is, first, important to lay down and explain the circumstances under which the Charter is applicable. Second, since the Charter rights and principles are applied on the basis of a methodology that is impacted by the horizontal provisions found in Title VII of the Charter, this section will also address the main elements of the horizontal provisions and their implications for the right to family life.

<sup>9</sup> See Groussot and Petrusson (n 7).

<sup>10</sup> K. Lenaerts, ‘Exploring the limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375. See also P. Eeckhout, ‘The EU Charter of Fundamental Rights and the federal question’ (2002) 39 *Common Market Law Review* 945.

<sup>11</sup> In their Joint Declaration of January 2011, the presidents of the Strasbourg and Luxembourg courts stated that ‘[T]he Charter has become the reference text and the starting point for the CJEU’s assessment of the fundamental rights which that legal instrument recognises.’ Opinion of Advocate General Bot in Case C-108/10 *Scattolon* EU:C:2011:211, para 108 states: ‘Since the Charter now occupies a central place in the system of protection of fundamental rights in the Union, it must, . . . constitute the reference legislation each time the Court is called upon to rule on the compliance with an EU measure or a national provision with the fundamental rights protected by the Charter.’

When analysing the case law of the CJEU, where fundamental rights play a role, three main categories of cases emerge: (1) cases that deal with actions of the EU institutions,<sup>12</sup> including annulment cases under Article 263 TFEU; (2) cases that deal with the implementation of EU law at the national level, that is, the situation when Member States are implementing and applying EU secondary law at the national level;<sup>13</sup> and (3) review of Member State actions in light of fundamental Treaty provisions/principles, such as the citizenship provisions, free movement provisions, or other fundamental provisions of EU law.<sup>14</sup> Each of these categories represents an ‘entry point’ through which the EU Charter, with all that follows, may enter the scene of EU law.

For the first category of cases, Charter rights may be used to review the legality of EU secondary norms. Examples of such cases include *Digital Rights Ireland*,<sup>15</sup> and *Schrems I* and *Facebook Ireland and Schrems (Schrems II)* cases,<sup>16</sup> where Articles 7 and 8 of the Charter played an important role in gauging the validity of EU secondary norms. The first case where the CJEU referred to the Charter revolved around family rights. This was *Parliament v Council*,<sup>17</sup> a case that concerned the European Parliament’s (unsuccessful) claim for the annulment of the final subparagraph of Article 4(1), Article 4(6), and Article 8 of Directive 2003/86 on the right to family reunification.<sup>18</sup>

In the second category of cases, we have the situation where EU secondary norms are to be interpreted in light of fundamental rights when implemented and applied at the national level. This category features the largest number of cases, which concern, for example, deportation and family reunification regulated in secondary law, the national application of which must be compliant with fundamental rights. Many examples relate to the application of Directive 2004/38,<sup>19</sup> and other instruments, such as Regulation 2201/2003

<sup>12</sup> Case C-370/12 *Pringle* EU:C:2012:756. On the limitations of the scope, see Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* EU:C:2016:701.

<sup>13</sup> Case 5/88 *Wachauf* EU:C:1989:321. See also Case C-817/19 *Ligue des droits humains* EU:C:2022:491, paras 86–87.

<sup>14</sup> Principle of non-discrimination or Article 19 TEU.

<sup>15</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and others* EU:C:2014:238.

<sup>16</sup> Case C-362/14 *Schrems (I)* EU:C:2015:650, and Case C-311/18 *Facebook Ireland and Schrems (Schrems II)* EU:C:2020:559.

<sup>17</sup> Case C-540/03 *Parliament v Council* EU:C:2006:429.

<sup>18</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

<sup>19</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. See Recital 31, Preamble: ‘This Directive respects the fundamental rights and freedoms and observes the principles recognised in

concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.<sup>20</sup>

In the third category of cases, we have the application of Treaty provisions in review of Member States' measures. In this category, we find the typical free movement situations such as in *Carpenter*, where the right to family life is a threshold over which Member States need to go to successfully justify a restriction to free movement. In this category, we would place cases that are based on the fundamental provisions found in the Treaty, namely Article 20 and/or Article 21 TFEU on EU citizenship and the rights of EU citizens to move and reside freely in the territory of member states.<sup>21</sup> The cases concerning citizenship and fundamental rights, in particular the right to family life, can broadly be fleshed out in three main areas: firstly, situations where Union citizens are being deported from a host member state; secondly, claims that involve the Union citizen's identity;<sup>22</sup> and, thirdly, cases that concern the right to respect for family life.<sup>23</sup> In sum, fundamental rights – and more precisely EU Charter rights and principles – operate in varying situations within EU law.

On the relationship between the right to family life and the horizontal provisions of the Charter, this right applies following Article 51 of the Charter to the actions of the EU institutions, and to the Member States, 'when implementing Union law'.<sup>24</sup> When falling within the scope of EU law, a

particular by the Charter of Fundamental Rights of the European Union.' See also Case C-127/08 *Metock* EU:C:2008:449.

<sup>20</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1. See Case C-400/10 *PPU McB* EU:C:2010:582.

<sup>21</sup> Case C-34/09 *Ruiz Zambrano* EU:C:2011:124 is an ideal example apart from the fact that, surprisingly, the EU Charter is not applied in the case. In more recent cases, the CJEU is using the EU Charter also in the citizenship realm; see analysis in Section 6.4. Similar reasoning is also applied in relation to Article 19 TEU in the context of the rule of law, such as Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, and Case C-619/18 *Commission v Poland* (Independence of the Supreme Court) EU:C:2019:531.

<sup>22</sup> See, for example, Case C-208/09 *Sayn-Wittgenstein* EU:C:2010:806; Case C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291.

<sup>23</sup> See N. Nic Shuibhne, 'The right to move and reside: Disentangling the dual dynamics of fundamental rights in EU citizenship law' in S. Douglas-Scott and N. Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) 105.

<sup>24</sup> Case C-617/10 *Åkerberg Fransson* EU:C:2013:105. In the case, the Court noted that it had no competence to examine the compatibility of national law with the Charter, if it was 'lying outside the scope of European Union law'. However, if the national legislation was falling within the 'scope of European Union law', the Court explained that that would not constitute a scenario where fundamental rights would not be applicable, since 'applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter' (see paras 20 and 21).

situation involving the application of Article 7 of the Charter should pay particular consideration to the non-absolute nature of the right to family life and to its close relationship to Article 8 ECHR.

The very substance of a fundamental right, such as the right to family life, is very much linked to the extent of the acceptable limitations to that right under Article 52(1) of the Charter. It should be highlighted that EU fundamental rights are not only limited or balanced against each other, they may, and very often do, act in a complementary way. A case in point is Article 47 of the Charter that is often linked with a substantive fundamental right.<sup>25</sup> Article 52 (1) of the Charter is a specific limitation clause, to be applied ‘horizontally’ throughout the Charter.<sup>26</sup>

Importantly, the EU right to family life is also a corresponding right to Article 8 ECHR following Article 52(3) of the Charter and the explanations to the Charter.<sup>27</sup> In Article 52(3) of the Charter, we find a *homogeneity*-type clause,<sup>28</sup> which states that insofar as the Charter contains rights, which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as laid down in the ECHR. However, the same provision also states that this shall not prevent Union law from providing more extensive protection. Even if many attempts were made during the drafting of the Charter to include a direct reference to the case law of the European Court of Human Rights (ECtHR), no such reference is found in the Charter.<sup>29</sup> However, as held by Groussot and Gill-Pedro, by giving the Charter binding force as primary EU law, the EU is committing to protecting rights guaranteed by ECHR, where an equivalent is found in the Charter. This means, in their

<sup>25</sup> Joined Cases C-245/19 and C-246/19 *État luxembourgeois contre B* EU:C:2020:795, para 52: ‘In the present instance, however, the three fundamental rights involved are not liable to be at odds with each other but are complementary in their application. The effectiveness of the protection that Article 47 of the Charter is intended to confer on the holder of the right guaranteed thereby cannot be expressed or assessed other than in relation to substantive rights, such as those referred to in Articles 7 and 8 of the Charter.’

<sup>26</sup> Article 52(1) of the Charter states: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

<sup>27</sup> Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

<sup>28</sup> Opinion of Advocate General Kokott in Case C-110/10 *Solvay v Commission* EU:C:2011:257, para 95.

<sup>29</sup> X. Groussot and E. Gill-Pedro, ‘Old and new human rights in Europe – The scope of EU rights versus that of ECHR rights’ in E. Brems and J. Gerards (eds), *Shaping the Rights in ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 247.

view, protecting the rights ‘as defined by the ECtHR’.<sup>30</sup> Article 52(3) of the Charter will also have to be read, applied, and interpreted in light of Article 53 of the Charter. Indeed, in the *Explanations to the Charter*, the following is stated regarding Article 7:

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word ‘correspondence’ has been replaced by ‘communications’. In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR . . . .<sup>31</sup>

This view on the substantive scope of Article 7 of the Charter and its strong link with Article 8 ECHR was also clearly confirmed by the CJEU in the *O. and S.* case, where the Court described Article 7 of the Charter as ‘containing rights corresponding to those guaranteed by Article 8(1) [ECHR]’.<sup>32</sup> Similarly, in *Carpenter*, which was delivered prior to the entry into force of the EU Charter, the Court relied solely on Article 8 ECHR.

### 6.3 PROTECTION OF FAMILY LIFE IN THE CHARTER AND THE CASE LAW OF THE COURT

The protection of family life in the Charter appears in Article 7, but the scope of protection of the right is also related to Article 9 on the right to marry, Article 21 on non-discrimination, Article 24 on the best interests of the child, and Article 33 on the right to family and professional life.

The latter Article, while mentioned in case law, has not had any effect on expanding the protection of family life in EU law. Specifically, Article 33(1) refers to the protection of family under EU law ‘as a unit to be protected in its own right, rather than exploited in the pursuit of other goals’.<sup>33</sup> Despite the potential of the provision as argued by Costello,<sup>34</sup> Article 33(1) of the Charter has only been invoked in disputes related to EU staff benefits and the Court has not elaborated on its scope of protection and relation to Article 7 of the

<sup>30</sup> Ibid 250.

<sup>31</sup> Explanations relating to the Charter of Fundamental Rights (n 27).

<sup>32</sup> Joined Cases C-356/11 and C-357/11 *O. and S.* EU:C:2012:776, para 76.

<sup>33</sup> C. McGlynn, ‘Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo’ (2001) 26 *European Law Review* 582, 587.

<sup>34</sup> C. Costello, ‘Article 33 Family and Professional Life’ in S. Peers, T. Hervey, and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 917.

Charter.<sup>35</sup> Article 33(2) of the Charter refers to the right to reconciliation of family and professional life. In essence, this provision refers to existing entitlements under secondary law.<sup>36</sup> Accordingly, the relevant case law refers to the right protected under Article 33(2) of the Charter next to secondary law which gives expression to it.<sup>37</sup> Nevertheless, the right has not been used as a basis for expanding reconciliation policies and extending the protection of families.<sup>38</sup>

Contrary to the mere reference of Article 33 in case law, the Court has elaborated a lot more on the relation of Article 7 with Articles 21 and 24 of the Charter to extend the protection offered by EU law to queer families. Specifically, the case law on queer families had been developed with reference to the importance of the principle of non-discrimination even before the adoption of the Charter.<sup>39</sup> No use has yet been made of Article 9 on the right to marry, as the Court has held that the civil status of marriage and all the benefits that are connected to it are part of the competence of the Member States.<sup>40</sup> However, when Member States exercise their competence, they should comply with the principle of non-discrimination.<sup>41</sup> This line of reasoning is still present in the Court's case law even after the adoption of the Charter.

In the early case of *K.B.*, the Court took a progressive approach to the right to marry of trans individuals, by linking the protection of the right to family life to non-discrimination.<sup>42</sup> The case concerned the pension rights of the trans partner of a worker, *K.B.*, a cis woman, who was in a relationship with a trans man who could not officially register his gender reassignment. As a result, they were unable to marry, which meant that *K.B.*'s partner was not entitled to her widower's pension. The protection of the right of trans people to marry was ensured in this case by reference to Article 12 ECHR and the *Goodwin v the*

<sup>35</sup> Case T-131/20 *IR v Commission* EU:T:2020:381; Case T-484/18 *XB v ECB* EU:T:2020:90; Case T-517/16 *Janoha and others v Commission* EU:T:2018:874.

<sup>36</sup> C. McGlynn, 'Reclaiming a feminist vision: The reconciliation of paid work and family life in European Union law and policy' (2001) 7 *Columbia Journal of European Law* 262.

<sup>37</sup> Case C-149/10 *Chatzi* EU:C:2010:534, para 37; Case C-222/14 *Maistrellis* EU:C:2015:473, para 39; Case C-174/16 *H* EU:C:2017:637, para 32; Case C-129/20 *Caisse pour l'avenir des enfants (Emploi à la naissance)* EU:C:2021:140, para 44.

<sup>38</sup> For arguments as to how this could be done, see Costello (n 34) 919–924.

<sup>39</sup> A model that is privileged by both political and judicial institutions: S. Choudhry, 'Right to Respect for Private and Family Life (Family Life Aspects)' in S. Peers, T. Hervey, and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 207; McGlynn (n 33) 586. See Case C-267/06 *Maruko* EU:C:2008:179, para 59 analysed below.

<sup>40</sup> *Maruko* (n 39); Case C-443/15 *Parris* EU:C:2016:897, para 59; Case C-673/16 *Coman and others* EU:C:2018:385, para 37.

<sup>41</sup> *Maruko* (n 39), para 59; Case C-443/15 *Parris* EU:C:2016:897, para 58.

<sup>42</sup> Case C-117/01 *K.B.* EU:C:2004:7.



UK case of the Strasbourg Court.<sup>43</sup> More specifically, the CJEU held that this case gave rise to inequality of treatment, not in relation to the enjoyment of EU rights, but with respect to the necessary precondition thereof, which is the capacity to marry.<sup>44</sup> By extrapolating the ECtHR standards of protection to the EU legal order, the Court found that the relevant national legislation, which precluded K.B. and her trans partner from marrying and, thus, benefitting from widower's pension, was both in breach of Article 12 ECHR and EU law.<sup>45</sup>

While *K.B.* added a significant layer of protection for trans rights,<sup>46</sup> a more restrictive approach was taken in relation to same-sex couples in *Grant*<sup>47</sup> and *D and Sweden v Council*.<sup>48</sup> The former case, in particular, has been criticised for the 'lack of any real commitment to fundamental rights'.<sup>49</sup> Ms Grant was a worker who claimed a travel concession for her same-sex partner. Her employer refused to grant this benefit on the ground that such concessions were only provided to unmarried partners of opposite sex. The Court had to address the question of whether such refusal constituted discrimination prohibited by EU law.<sup>50</sup> The Court referred to the ECtHR case law of the time, which excluded same-sex relationships from protection under Articles 8 and 12 ECHR to justify the unequal treatment suffered by Ms Grant by her employer.<sup>51</sup>

*D and Sweden v Council*, too, concerned a worker, who claimed household allowance under the Council Staff Regulations. The benefit was granted to D's married colleagues but was denied to him because his registered same-sex partnership was not considered equivalent to a marriage. Even though the Charter was not binding at the time, Advocate General Mischo took Article 9 into account in his Opinion, and pointed to its inherent limitations. Specifically, he highlighted that the explanations to the Charter are clear in that 'Article 9 neither prohibits nor requires the grant of the status of marriage to relationships between persons of the same sex'.<sup>52</sup> To the Advocate General,

<sup>43</sup> *Ibid*, para 33; *Christine Goodwin v the United Kingdom*, Application no 28957/95.

<sup>44</sup> *K.B.* (n 42), para 30.

<sup>45</sup> *Ibid*, para 36.

<sup>46</sup> In line with Case C-13/94 *P v S and Cornwall County Council* EU:C:1996:170, para 94.

<sup>47</sup> Case C-249/96 *Grant* EU:C:1998:63.

<sup>48</sup> Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* EU:C:2001:304.

<sup>49</sup> See McGlynn (n 1) 142.

<sup>50</sup> Under Article 119 EC Treaty on equal pay and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19.

<sup>51</sup> *Grant* (n 47), paras 33–34.

<sup>52</sup> Opinion of Advocate General Mischo in Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* EU:C:2001:113, para 97.

this confirmed the difference in treatment between marriage and same-sex partnerships.

The Court followed the Opinion of the Advocate General by affirming that marriage should be taken to imply a relationship ‘within the traditional meaning of the term’.<sup>53</sup> What is more, the Court confirmed the decision of the Court of First Instance, which had held that long-term same-sex relationships are not covered by the right to private life under Article 8 ECHR.<sup>54</sup> Even though there was no legal possibility for D to contract a marriage at the time, the Court found that the situations of marriage and same-sex partnership were not comparable, thus confirming the finding in *Grant*.<sup>55</sup> As a result, D could not claim a violation of the principle of equal treatment.<sup>56</sup>

In *Maruko*, the Court took a different approach from *D and Sweden v Council* finding that same-sex partnerships and marriage could be treated as comparable.<sup>57</sup> Maruko was in life partnership with a person of the same sex. After the partner’s death, he claimed widower’s pension, but his claim was rejected because the two had not been married. The Court did not examine the case under the prism of the right to private life or the right to marry. It confirmed that issues of civil status and the benefits connected to it are matters of national competence.<sup>58</sup> However, the Court reminded that, in the exercise of such competence, Member States need to comply with non-discrimination provisions. Of relevance to the resolution of the case under a non-discrimination lens was also the fact that national law established same-sex partnership and provided for gradual equivalence of marriage and partnership in relation to social security rights.<sup>59</sup>

The next development for same sex couples came with *Coman*.<sup>60</sup> In this case, the referring court made explicit reference to Article 9 of the Charter as relevant for the adjudication of the case.<sup>61</sup> However, Advocate General Wathelet pointed out that Article 9 becomes irrelevant by virtue of the explanations to the Charter.<sup>62</sup> These limit the scope of protection that the Union can

<sup>53</sup> *D and Sweden v Council* (n 48), para 11.

<sup>54</sup> *Ibid*, paras 14 and 60.

<sup>55</sup> *Ibid*, para 51.

<sup>56</sup> *Ibid*, paras 51–52.

<sup>57</sup> *Maruko* (n 39).

<sup>58</sup> *Ibid*, para 59.

<sup>59</sup> *Ibid*, paras 67–69.

<sup>60</sup> *Coman and others* (n 40). See also Chapter 9 by Geoffrey Willems.

<sup>61</sup> *Coman and others* (n 40), para 17.

<sup>62</sup> Opinion of Advocate General Wathelet in Case C-673/16 *Coman and others* EU:C:2018:2, para 43.

offer and confirm – as does the case law – that the Member States are entirely free to arrange issues related to marital status.

Hence, what defined *Coman* was the protection offered by Article 7 of the Charter. The connection of Article 7 of the Charter with free movement and the right to non-discrimination necessitated the recognition of same sex unions for the purposes of exercising free movement rights under EU law. Contrary to the Advocate General, the Court did not make an explicit reference to the link between Articles 7 and 21 of the Charter. Instead, it referred to the evolution of ECtHR case law<sup>63</sup> and proceeded to declare that same-sex relationships do fall within the notion of private and family life.<sup>64</sup> The Court eventually resolved the case by connecting the protection of private and family life under Article 7 of the Charter to the effective exercise of free movement rights.<sup>65</sup> The case has been celebrated in scholarship for many reasons.<sup>66</sup> Among these is the fact that it provided ‘a federal path for the recognition of the marriage status for the purposes of residence in the EU countries still hanging behind institutionalization of same-sex unions’.<sup>67</sup> Contrary to previous case law which revolved around employment benefits, this case was central in extending the reach of EU fundamental rights protection through a free movement rationale.

The issue of protection of queer families returned to the Court’s docket in the *V.M.A.* case, which concerned the cross-border recognition of same-sex parenthood.<sup>68</sup> In that case, we see more clearly the impossibility of using Article 9 of the Charter as a tool to advance a broader conception of family life under EU law. Advocates General Wathelet and Mischo are proven right in their Opinions on earlier cases that it must be impossible for the Court to use Articles 9 and 7 of the Charter as tools to expand protection of queer families under EU law.<sup>69</sup> Instead, Article 9 can be used to reinforce national restrictive

<sup>63</sup> *Orlandi and Others v Italy*, Application no 26431/12, and *Vallianatos and Others v Greece* [GC], Application nos 29381/09 and 32684/09.

<sup>64</sup> *Coman and others* (n 40), para 50.

<sup>65</sup> *Ibid.*, paras 47–51.

<sup>66</sup> A. Tryfonidou, ‘The ECJ recognises the right of same-sex spouses to move freely between EU Member States: The *Coman* Ruling’ (2019) 44 *European Law Review* 663; D. V. Kochenov and U. Belavusau, ‘After the celebration: Marriage equality in EU law post-*Coman* in eight questions and some further thoughts’ (2020) 27 *Maastricht Journal of European and Comparative Law* 549.

<sup>67</sup> D. Kochenov and U. Belavusau, ‘Same-sex spouses: More free movement, but what about marriage? *Coman*’ (2020) 57 *Common Market Law Review* 227, 239.

<sup>68</sup> Case C-490/20 *V.M.A. v Stolichna obshtina, rayon ‘Pancharevo’* EU:C:2021:1008. See also Chapter 9 by Geoffrey Willems.

<sup>69</sup> Opinion of Advocate General Mischo in *D and Sweden v Council* (n 52) ECLI:EU:C:2001:113, and Opinion of Advocate General Wathelet in *Coman and others* (n 62).

conceptions of family. Specifically, in *V.M.A.*, the referring court invoked Article 4(2) TEU in conjunction with Article 9 of the Charter as a potential basis for justifying national competence on the conception of family and parentage. The Court confirmed once again that EU law, and the Charter in particular, cannot affect the discretion of Member States in the recognition of same sex marriage or parenthood in purely internal situations.<sup>70</sup> Avoiding unnecessary engagement with Article 9 of the Charter, the Court had recourse to Articles 7 and 24 to establish the protection of queer families and the cross-border recognition of same-sex parenthood as means to ensure the effective exercise of the free movement rights enjoyed under Article 21 TFEU.<sup>71</sup>

In this context, it is important to reflect on the two central issues which characterise the relation between Articles 7 and 9 of the Charter and the protection of queer families: competence and the link with free movement. First, in all of the cases discussed, the Court expressly stated that the civil status of marriage and the benefits tied thereto fall under Member States' competence. A similar reasoning, albeit from the premise of human rights law, has been followed by the ECtHR. The ECtHR has held that Article 12 ECHR does not impose an obligation to grant same-sex couples the right to marry.<sup>72</sup> Member States are entirely free to choose whether they allow same-sex marriage or not, the conditions under which they regulate same-sex unions, and whether they recognise them as equivalent to marriage or not. This is in line with the localist conception of sovereignty in US federalism, which maintains that marriage should be regulated at local level as it promotes 'a shared moral vision of the good family life'.<sup>73</sup> Further, it confirms the danger that Weiler pointed in the early 2000s regarding the risk that Charter regresses the status quo: 'each time an innovative concept were argued before the European Court, it would be pointed out that a proposal to that effect was considered in the drafting of the Charter and failed. It would be much harder for the Court to crystallise a Community right when such was considered and rejected by a political constituent assembly.'<sup>74</sup> The categorical nature of the

<sup>70</sup> Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008, paras 51–52.

<sup>71</sup> See also Order of the Court in Case C-2/21 *Rzecznik Praw Obywatelskich* EU:C:2022:502 which repeated the Court's reasoning in *V.M.A.*

<sup>72</sup> This obligation cannot derive from either Article 12 alone or from Article 14 in conjunction with Article 8. See *Schalk and Kopf v Austria*, Application no 30141/04; *Chapin and Charpentier v France*, Application no 49183/07.

<sup>73</sup> See A. Dailey, 'Federalism and families' (1995) 143 *University of Pennsylvania Law Review* 1787, 1790.

<sup>74</sup> J. Weiler, 'Editorial: Does the European Union truly need a Charter of Rights?' (2000) 6 *European Law Journal* 95.

explanations on Article 9 of the Charter precludes the possibility of ever using it to extend the protection of queer families.

This brings us to the second issue of links with free movement. Unable to use the substantive provisions of the Charter, the Court extends the protection of the right to family life by emphasising the need for effective exercise of free movement rights. After ascertaining that EU law does not affect Member State competence on marital issues, the Court reminds that the Member States should exercise their competence in compliance with the principle of non-discrimination and the free movement provisions. In essence, the Court extends the protection provided by the Charter to queer families by using the effective exercise of free movement rights as a ‘trump card’.<sup>75</sup> The effective exercise of free movement rights enjoyed not only by workers, but also by EU citizens under Article 21 TFEU has also been behind the extensive protection of family life. The more specific way in which this takes place and the reluctance of the Court to refer to the Charter when extending such protection will be analysed in the following section.

#### 6.4 FAMILY RIGHTS AND EU CITIZENSHIP

Family rights have often been discussed in EU law within the study of the citizenship case law, which has created a ‘bundle of rights’.<sup>76</sup> The relationship between the issue of citizenship and fundamental rights has never been simple.<sup>77</sup> Following *Martínez Sala*,<sup>78</sup> the CJEU started to progressively

<sup>75</sup> A. Loxa, ‘Analysis: “Cross-border recognition of parenthood for rainbow families”’ (*EU Law Live*, 14 December 2021) <<https://eulawlive.com/analysis-cross-border-recognition-of-parenthood-for-rainbow-families-by-alezini-loxa/>>. See also A. Tryfonidou, ‘The ECJ recognises the right of rainbow families to move freely between EU Member States: The V.M.A. ruling’ (2022) 47 *European Law Review* 534, on the gaps that remain following VMA.

<sup>76</sup> The term ‘bundle of rights’ refers to the sociological understanding of citizenship suggested by T. H. Marshall, according to whom citizenship is a process of accumulation of bundles of civil, political, and social rights by people: see T. H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge University Press 1950). This understanding of citizenship has been taken on by different scholars to conceptualise what the EU citizenship status could imply: see C. Schönberger, ‘European citizenship as federal citizenship, some citizenship lessons of comparative federalism’ (2007) 19 *European Review of Public Law* 63. See also R. Koslowski, ‘A constructive approach to understanding the European Union as a federal polity’ (1999) 4 *Journal of European Public Policy* 561.

<sup>77</sup> See S. Adam and P. Van Elsuwege, ‘EU citizenship and the European federal challenge through the prism of family reunification’ in D. Kochenov (ed), *EU Citizenship and Federalism – The Role of Rights* (Cambridge University Press 2017) 443. Most EU citizenship cases are linked to family reunification; see, for example, Case C-578/08 *Chakroun* EU: C:2010:117, paras 61–64.

<sup>78</sup> Case C-85/06 *Martínez Sala v Freistaat Bayern* EU:C:1998:217.

develop case law tying citizenship and EU fundamental rights, in particular the right to family life protected by Article 8 ECHR, through the general principles of EU law.

Moreover, the Court has on many instances employed Article 24 of the Charter on the rights of the child, thereby extending the protection of family life under EU law. In the early stages of the Court's case law, the protection of children's rights 'remain[ed] parasitic on the migrant; rights [were] granted to children instrumentally in order to ensure economic success'.<sup>79</sup> However, as noted by McGlynn, the Charter marked an evolution in the EU legal order 'from the instrumentalism which characterizes the fields of free movement, to the protectionism of policies on violence and trafficking, to a recognition of children's independence and autonomy'.<sup>80</sup> Children were no longer seen as potential 'consumers' or 'appendages to economic actors'.<sup>81</sup> Instead the Court's case law elevated them to 'persons of their own right'.<sup>82</sup>

Initially, the Court was reluctant to use the Charter as the legal basis of protection of the rights of children holding an EU citizenship. Instead, the protection of children as autonomous bearers of rights was based on the citizenship provisions. In the seminal ruling in *Chen*,<sup>83</sup> the Court adjudicated that the protection of the best interests of the Union child can be the basis of a derivative residence right for the child's third-country national parent. This conclusion was made by reference to the need for an effective enjoyment of the rights conferred by Union citizenship to children. The Charter was not applicable at the time of adjudication and the principle of the best interests of the child was not referred to by the Court.

In a similar vein, *Ruiz Zambrano* confirmed the protection of children's rights and the reluctance of the Court to employ the Charter.<sup>84</sup> In this case, the national court invoked the Charter as a basis for review of the national legislation at stake.<sup>85</sup> Advocate General Sharpston similarly suggested that the relevant questions be examined from a human rights angle by reference to the right to family life and the Charter.<sup>86</sup> However, the Court failed to take Article 24 of the Charter into account in its decision, demonstrating a 'lack of

<sup>79</sup> See McGlynn (n 1) 49. Indicatively Case 76/72 *Michel S. v Fonds national de reclassement social des handicapés* EU:C:1973:46; Case C-308/89 *Di Leo v Land Berlin* EU:C:1990:400.

<sup>80</sup> McGlynn (n 1) 67.

<sup>81</sup> McGlynn (n 33) 584.

<sup>82</sup> McGlynn (n 1) 74.

<sup>83</sup> Case C-200/02 *Zhu and Chen* EU:C:2004:639; McGlynn (n 1) 56.

<sup>84</sup> *Ruiz Zambrano* (n 21).

<sup>85</sup> *Ibid*, para 35.

<sup>86</sup> Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano* EU:C:2010:560, paras 151–177.

confidence in human rights arguments'.<sup>87</sup> Instead, once more, it ensured the protection of Union children as autonomous bearers of rights under the citizenship provisions by reference to Article 20 TFEU and the 'substance of rights' test. The ruling in *Ruiz Zambrano* is very progressive, but the reasoning of the CJEU is minimal and excludes any reference to the application of the Charter and EU fundamental rights. In this ruling, we see a 'constitutional challenge'<sup>88</sup> posed by the extension to fundamental rights in the citizenship case law which confirms Iglesias Sanchez' suggestion that 'the intersection between European citizenship and fundamental rights is extremely complex to articulate without pushing the contours of one of them beyond the carefully built-up constitutional balances, since their underlying rationales give rise to significant tensions and difficulties when assessing the possible ways forward'.<sup>89</sup>

Generally, post-*Zambrano* case law reflects and confirms the *malaise* of the Court to use the Charter in parallel with citizenship provisions.<sup>90</sup> Yet, following *Rendón Marín*,<sup>91</sup> new developments may herald a new era in the intersection between EU citizenship and EU fundamental rights. In *Rendón Marín*, the CJEU applied a 'slightly looser test' in its interpretation of Article 20 TFEU by relying on the concept of dependency and the EU Charter.<sup>92</sup> The case concerned a third-country national from Colombia with a criminal record. As a father, Mr Rendón Marín was responsible for the primary care of two children, one of Polish and the other of Spanish nationality, who were both schooled in Spain. The Court had to assess the refusal of a residence permit by the Spanish authorities based on reasons of public policy and public security having the possible consequence for Mr Rendón Marín moving back to Colombia. Was the effectiveness of the two children's EU citizenship in danger here? For the Court, the situation at issue was capable of resulting in their deprivation of the genuine enjoyment of the substance of rights conferred by the status of Union citizenship. For that, the Court found that the case fell within the scope of EU law.<sup>93</sup> Relatedly, the assessment of Mr Rendón Marín's situation should take into account the right to respect

<sup>87</sup> McGlynn (n 1) 73.

<sup>88</sup> J. Snell, 'Do fundamental rights determine the scope of EU law?' (2018) 43 *European Law Review* 475.

<sup>89</sup> S. Iglesias Sanchez, 'Fundamental rights and citizenship of the Union at a crossroads: A promising alliance or a dangerous liaison?' (2014) *European Law Journal* 107.

<sup>90</sup> See Case C-86/12 *Alokpa and Moudoulou* EU:C:2013:645; Case C-115/15 *NA EU*: C:2016:487.

<sup>91</sup> Case C-165/14 *Rendón Marín* EU:C:2016:675.

<sup>92</sup> D. Ferri and G. Martinico, 'Revisiting the Ruiz Zambrano doctrine and exploring the potential for its extensive application' (2021) 27 *European Public Law* 685.

<sup>93</sup> *Rendón Marín* (n 91), para 80.

for private and family life (Article 7 of the Charter), read in conjunction with the obligation to take into consideration the child's best interests under Article 24(2) of the Charter.<sup>94</sup> The interpretation of the CJEU on Article 20 TFEU follows a logic borrowed from the free movement case law, the Court first evaluating the potential breach of EU primary law like in *Dassonville*,<sup>95</sup> and thereafter assessing the restriction to primary law in light of the Charter and EU fundamental rights like in *Carpenter*.

After *Rendón Marín*, the crucial question was whether the interpretation of Article 20 TFEU in light of the Charter would be applied consistently in cases with similar factual situations. The CJEU provided a clear positive answer in two Grand Chamber cases: *Chavez-Vilchez*<sup>96</sup> and *KA*.<sup>97</sup> *Chavez Vilchez* concerned third-country national mothers of children with EU nationality who had applied for social assistance and child benefits in the Netherlands. Their applications were refused because the mothers had no residence rights at the time. The national court inquired whether the mothers can derive a right of residence from Article 20 TFEU.<sup>98</sup> In his Opinion, Advocate General Szpunar took the principle of the best interests of the child as a starting point.<sup>99</sup> Contrary to the Opinion of the Advocate General, however, the Court based the rights of irregular migrants who were parents of Union children on the 'genuine enjoyment of the substance of rights conferred by Article 20 TFEU' test. In this test, the Court deferred the resolution of the case to the national courts and pointed out that an assessment of the genuine enjoyment test should take place in connection to the right to respect for family life under Article 7 of the Charter and the obligation to take into account the best interests of the child under Article 24(2) of the Charter.<sup>100</sup> This highlighted the importance of fundamental rights protection as procedural limits to Member State action.

In *KA*, the Belgian courts asked the CJEU about the compatibility of national provisions and administrative practice with Article 20 TFEU and the Return Directive.<sup>101</sup> These provisions made it possible for immigration

<sup>94</sup> *Ibid*, para 81.

<sup>95</sup> Case 8/74 *Dassonville* EU:C:1974:82.

<sup>96</sup> Case C-133/15 *Chavez-Vilchez and others* EU:C:2017:354.

<sup>97</sup> Case C-82/16 *K.A. and others* EU:C:2018:308.

<sup>98</sup> *Ibid*, para 39.

<sup>99</sup> Opinion of Advocate General Szpunar in Case C-133/15 *Chavez-Vilchez and others* EU:C:2016:659, para 42.

<sup>100</sup> *Chavez-Vilchez and others* (n 96), para 70.

<sup>101</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.



authorities to refuse to examine applications for family reunification made by TCNs based on existing entry bans, and lead to the impossibility to determine on a case-by-case basis the relationship of dependency between an EU citizen and their TCN family member. Following the Opinion of Advocate General Sharpston,<sup>102</sup> the Court considered that Article 20 TFEU precludes a national practice that consists of not examining an application for residence for the purposes of family reunification by a TCN family member of a Union citizen who is a national of that Member State and who has never exercised his/her right to freedom of movement.<sup>103</sup> In assessing the existence of a relationship of dependency capable of justifying a derived right of residence under Article 20 TFEU, the national authority must take account Articles 7 and Article 24(2) of the Charter.<sup>104</sup> The Court also elaborated on the concept of dependency by delineating a clear line between situations involving minor and adult EU citizens. For the Court, in situations where the EU citizen is an adult, dependency is conceivable ‘only in exceptional circumstances’ where the separation of the EU citizen and the TCN family member is not possible.<sup>105</sup> Overall, KA constitutes an important addition to the case law because it clarified the concept of dependency in the use of the ‘substance of rights test’ and the evaluation of a potential breach of the effectiveness of EU citizenship by national authorities.

New positive developments on the right to family life can also be seen in relation to the interpretation of Article 21 TFEU. The *Lounes* case is of particular interest, although it does not explicitly mention Article 7 of the Charter.<sup>106</sup> In this case, the Court had to decide whether a Spanish national, Ms Ormazabal, who moved to the UK and became a British citizen, while keeping her Spanish nationality, could be treated in the same way as a person in a purely domestic situation. The CJEU refused to follow this path, which would have undermined the effectiveness of Article 21(1) TFEU,<sup>107</sup> and considered that a dual national who has exercised her freedom to move to a Member State other than her Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU.<sup>108</sup> In doing so, the Court underlined in a clear fashion that the

<sup>102</sup> *K.A. and others* (n 97), para 76.

<sup>103</sup> *Ibid*, para 62.

<sup>104</sup> *Ibid*, para 76.

<sup>105</sup> *Ibid*.

<sup>106</sup> See Case C-165/16 *Toufik Lounes* EU:C:2017:862. Mr Lounes, an Algerian national, had married Ms Ormazabal in London four years after his illegal entry to the UK.

<sup>107</sup> *Ibid*, para 53.

<sup>108</sup> *Ibid*, para 51.

rights which Member State nationals enjoy under that provision include the right to lead a normal family life in the host Member State together with their family members.<sup>109</sup> Although this paragraph does not expressly refer to Article 7 of the Charter, it is this specific provision that the Court has in mind when it mentions the right to lead a normal family life.<sup>110</sup> As put by Réveillère, ‘the Court is attaching the right to lead a normal family life to Article 21 TFEU, as it has attached the right not to suffer discrimination on grounds of nationality to Article 20 TFEU in *Martínez Sala*’.<sup>111</sup> *Lounes* clarifies the sibylline language of the star case *Baumbast*, where it was stated more than twenty years ago that Article 21 TFEU can be legitimately restricted only if the restriction is proportionate and in accordance with the general principles of EU law.<sup>112</sup>

*Lounes*, *Chavez-Vilchez* and *KA* are central for interpreting Articles 20 and 21 TFEU in light of the Charter and, thus, understanding and viewing EU fundamental rights and the Charter as they should be – instruments of EU primary law that should be used consistently for interpreting not only EU secondary legislation but also Treaty provisions having a primary rank.<sup>113</sup> The situation had become unclear following the *Ruiz Zambrano* ruling, but the most recent cases of the CJEU demonstrate a new ambitious judicial strategy of the CJEU in its use of EU fundamental rights.<sup>114</sup>

## 6.5 CONCLUSION

The Court’s case law from recent years has shown substantive and positive developments in the protection of family life which are noticeable particularly due to the increasing use of the Charter. However, it also follows from our analysis that the Court has always been very careful in its use of the Charter to extend the protection of family rights under EU law. The citizenship case law has provided a good illustration of the ‘hiding effect’ of EU family rights in relation to the ‘substance of rights test’ and Article 20 TFEU. The Court has in many cases avoided explicit reference to Charter provisions on the protection

<sup>109</sup> *Ibid.*, para 52.

<sup>110</sup> *Ibid.*, in particular, para 56, which refers to *Metock* (n 19), para 62. *Metock* makes reference to *Carpenter* (n 4) and *MRAX* (n 3) that are discussed in the introduction of this chapter.

<sup>111</sup> V. Réveillère, ‘Family rights for naturalized EU citizens: *Lounes*’ (2018) 55 *Common Market Law Review* 1855.

<sup>112</sup> Case C-413/99 *Baumbast* EU:C:2002:493, paras 72 and 94. According to para 72: ‘Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case law, are recognised by Community law.’

<sup>113</sup> In that respect, see also Case C-817/19 *Ligue des droits humains* EU:C:2022:491, paras 86–87.

<sup>114</sup> See also Case C-181/19 *JD* EU:C:2020:794.

of family life. Instead, it has reinforced the protection of the right to family life by embedding it to the ‘substance of rights’ to be enjoyed by EU citizens. The same holds true in relation to the timid use of Article 9 of the Charter, which has now been stripped of all potential in the litigation on same-sex partnerships. From a general perspective, it seems difficult to deny that family rights are closely associated to the exclusive competence of the Member States and their most profound moral values and constitutional identities. This makes the penetration of the progressive Charter rights very difficult at the national level. In this area, localism and subsidiarity are high on the agenda of the Member States.