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Family Members and the Citizens' Rights Directive

Broadening the Scope of the Principle of Effective Judicial Protection

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8.1 INTRODUCTION

Directive 2004/38/EC[1] (CRD) coalesced in one single legislative Act, the regulation of the right to free movement and residence of European Union (EU) citizens and their family members set out in the primary provisions of EU law[2] and removed the 'sector-by-sector, piecemeal approach'[3] to this right that had theretofore prevailed.[4] This measure shares with its predecessors the underlying principle that the right of residence and free movement of EU citizens would not be effective unless extended to their close family members

[1] 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 (hereinafter CRD) [2004] OJ L158/77.

[2] See Articles 45 and 20(2)(a) TFEU and Article 45(1) of the EU Charter of Fundamental Rights.

[3] Recital 4, Preamble to the CRD.

[4] See Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2 (repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1) and other measures (repealed by the CRD) such as Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L257/13; Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L172/14; Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59. On the issue of restrictions to the right of entry and residence, Directive 64/221/EEC [1964] OJ L142/24 (repealed by the CRD) was the immediate predecessor of the CRD.

because, otherwise, EU citizens would be seriously discouraged from exercising their free movement rights.[5]

The academic literature has discussed in great detail the *substantive* dimension of the rights provided in the CRD and its evolution through the case law.[6] However, this chapter will look at something different, namely, at the *enforcement* of these rights by members of the 'family' of the EU citizen – both 'core' members and 'extended' family members according to the division created by the Directive[7] – and, in particular, at how the Court of Justice of the EU (CJEU) has applied the principle of effective judicial protection to these situations.

It is, of course, understood that whenever a substantive right exists, there should be an effective remedy that allows for its enforcement. The principle of effective judicial protection has been present in EU law through the case law of the CJEU[8] and is now entrenched in primary EU legislation through Article 47 of the EU Charter of Fundamental Human Rights and Article 19 of the Treaty on European Union (TEU).[9] In most areas of EU law, this principle has been interpreted in relation to the enforcement of substantive EU rights by the *primary* holders of these rights[10] – that is, Union citizens. However, the CRD adds a different and interesting dimension to this landscape by also addressing the rights that family members *derive* from mobile EU citizens. From a legal perspective, these family members are therefore not considered as entities in

[5] As Advocate General Sharpston eloquently expressed it in her Opinion in Case C-34/09 *Ruiz Zambrano* EU:C:2010:560, para 128: '... when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families. The family unit, depending on circumstances, may be composed solely of EU citizens, or of EU citizens and third country nationals, closely linked to one another. If family members are not treated in the same way as the EU citizen exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning.'

[6] See, among others, C. Barnard, *The Substantive Law of the EU* (Oxford University Press 2022), 336–375; E. Guild, S. Peers, and J. Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2019). On family reunification, see C. Berneri, *Family Reunification in the EU* (Hart Publishing 2017). See also Chapter 7 by Michael Bogdan.

[7] See Section 8.2 on the different status of these two types of family members.

[8] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, para 18; Case 222/86 *Unectef v Heylens and others* EU:C:1987:442, para 14; Case C-97/91 *Oleificio Borelli v Commission* EU:C:1992:491, para 14.

[9] Thus, Article 47 of the EU Charter of Fundamental Rights requires the effective protection of EU rights and Article 19 TEU obliges Member States to provide remedies to ensure effective legal protection in areas covered by EU law. Article 19 TEU is very relevant in our field of study because most restrictions of the rights to free movement – such as for instance expulsion decisions – will derive from the actions of national authorities and claimants will be natural persons who will bring proceedings to challenge these restrictions before the national courts.

[10] This terminology has been used before in the academic literature and in the case law of the Court. See G. Barrett, 'Family matters: European community law and third country family members' (2003) 40 Common Market Law Review 369, 370–371.

their own right – unless they are also primary holders of EU rights as EU citizens – but as *deriving* any legal protection under EU law from the EU citizen entitled to free movement rights. This translates into a degree of remoteness and uncertainty insofar as the safeguard of their rights is concerned because these are contingent on the vicissitudes of fortune experienced by the primary holder of the EU rights. The unpredictability that flows from the subsidiary nature of the rights of family members is true both in relation to 'core' and 'extended' family members but, in relation to the latter, is further compounded by the fact that the CRD, as we shall see, imposes vaguer obligations on Member States than in relation to the former. Consequently, the precariousness of the substantive rights of family members means that the effective judicial protection of these rights – when established – becomes a matter of essential concern not only in assessing critically the level of protection offered by the CRD but also in considering the overall position of family members under EU law.

In a collection that seeks to explore the role of the family in EU law, this chapter aims to contribute an examination of how the guarantee of effective judicial protection has taken hold in the interpretation of the provisions of the CRD when applied to family members of an EU citizen. To this end, it will examine first the legal system of protection, both substantive and procedural, articulated by the CRD and then will analyse the evolution of the principle of effective judicial protection in relation to the family members of EU citizens. In particular, it will argue that the procedural safeguards included in the CRD to protect EU citizens and their families from restrictions on their right to entry or reside in a host Member State have been increasingly interpreted with primary and direct reference to the principle of effective judicial protection as configured in Article 47 of the Charter. This has enabled the Court to draw from a richer and broader body of case law and to bolster the protection offered by that principle rather than, as it had been historically the case, using the principle to *infuse* the interpretation of those guarantees within the narrow parameters of the CRD itself – or of Directive 64/221,[11] its immediate predecessor. Ultimately, the effect of this shift has been that a higher standard of protection has emerged in the case law.

8.2 THE LEGAL SYSTEM OF PROTECTION ARTICULATED IN THE CITIZENS' RIGHTS DIRECTIVE

The CRD provides that certain family members of an EU citizen, as defined in Article 2(2) CRD, are full beneficiaries of the protection of the Directive

[11] See n 4.

when they accompany or join the EU citizen.[12] These 'core' family members are: the spouse of the Union citizen; the partner with whom the Union citizen has contracted a registered partnership in a Member State – if the legislation of the host Member State treats registered partnerships as equivalent to marriage; the direct descendants who are under the age of twenty-one or are dependants and those of the spouse or partner; the dependent direct relatives in the ascending line and those of the spouse or partner.[13] The protection that they receive encompasses the right to free movement and residence and other related rights such as entitlement to take up employment or self-employment in the host State[14] and the right to equal treatment,[15] as well as the application of substantive and procedural safeguards against restrictions of the right to entry to and expulsions from a host State on grounds of public policy, public security, and public health.[16]

By contrast, according to Article 3(2) CRD, the rights of entry and residence of *other* family members and of the partner with whom the EU citizen has durable relationship, duly attested, only have to be 'facilitated' by the host Member State.[17] In its glorious open-endedness, the use of the term 'facilitated'[18] has predictably yielded an interesting body of case law in relation to this 'extended family members' that has clarified the content of this 'facilitation' obligation.[19]

[12] Article 3(1) CRD.

[13] There is an exception in relation to EU citizens who are students in Article 7(4) CRD. This narrows the circle of 'family members' to their spouse, the registered partner in the sense of Article 2(2) CRD, and dependent children in relation to the right to reside in a host Member State for more than three months.

[14] Article 23 CRD.

[15] Article 24 CRD. See also Article 10 of Regulation 492/2011 (n 4), which sets out the right to educational, apprenticeship, and vocational courses for workers' children.

[16] Articles 27–33 CRD.

[17] Article 3(2) CRD.

[18] In this respect, see Recital 6 of the Preamble to the CRD, which provides: 'In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.'

[19] See Case C-83/11 *Secretary of State for the Home Department v Rahman* EU:C:2012:519, paras 18–26. As Advocate General Bobek lucidly summarised in his Opinion in Case C-89/17 *Banger* EU:C:2018:225, the decision in *Rahman* developed three dimensions of the 'facilitation regime' in Article 3(2) CRD: '(i) the absence of an automatic right of entry and residence; (ii) the obligation to enact a facilitation regime according to national law for which

We therefore see that the CRD bifurcates the protection given to the 'family' of an EU citizen into two categories: 'core' family members and 'extended' family members. The dividing line between these two groups is ultimately one that separates the *automatic* entitlement to the rights in the Directive (for those listed in Article 2(2) CRD) from the *discretionary* grant of these rights by the host Member State (for those listed in Article 3(2) CRD) – although an obligation falls on this State to grant the latter group of family members 'a certain advantage' over other third-country nationals.[20] In other words, while the circle of 'core' family members drawn by Article 2(2) CRD is slightly wider than the one in Regulation 1612/68, one of its predecessors,[21] the family unit deserving of full protection by the CRD still seems to be mostly based on 'legal marriage, biological links and economic dependency'.[22] The case law of the CJEU has developed the key notions of 'spouse',[23] 'direct descendants and dependent ascendants',[24] and 'other family members'[25] in the context of the right to entry and residence under EU law, as well as its application to some internal situations on the basis of primary EU law.[26] However, the two-pronged approach to the family of the EU citizen entrenched in the legislative framework of the CRD has remained.

The system put in place by the CRD seeks to regulate in more detail than the Treaties the substantive rights that pertain to EU citizens and their family members. In relation to family members, whose position is not explicitly regulated in the primary Treaty provisions, the Directive develops their right of departure from[27] and entry to[28] a Member State; the conditions for their right to reside in a host Member State[29] for up to three

Member States enjoy a margin of discretion and (iii) the fact that that discretion is not unlimited', at para 51 of his Opinion and see also paras 52–60.

[20] *Secretary of State for the Home Department v Rahman* (n 19), para 21.

[21] See n 4.

[22] See E. Caracciolo di Torella and A. Masselot, 'Under construction: EU family law' (2004) 29 European Law Review 32, 38), referring to the model of family that emerged from Regulation 1612/68. See also Chapter 2 by Alina Tryfonidou.

[23] Case C-673/16 *Coman and others* EU:C:2018:385, paras 48–50.

[24] Case C-1/05 *Jia v Migrationsverket* EU:C:2007:1, paras 34–37; Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008, para 68; Case C-129/81 *SM* EU:C:2019:248, paras 44–73.

[25] *Secretary of State for the Home Department v Rahman* (n 19) paras 27–40.

[26] Case C-34/09 *Ruiz Zambrano* EU:C:2011:124.

[27] Article 4(1) CRD.

[28] Article 5(1) CRD.

[29] In this respect, the case law has also determined the right to residence can also be granted to family members in the Member State where the EU citizen is a national if this EU citizen carries out an economic activity with a cross-border element (like the regular provision of services across a frontier or travelling daily to work in another Member State) if the refusal to

months,[30] for more than three months,[31] upon the death or departure of the Union citizen or divorce,[32] and their right to permanent residence.[33] Furthermore, it also outlines related rights such as the right to take up employment and self-employment[34] and the right to equal treatment.[35]

It is evident that, in the system of legal protection set out by the CRD, the rights of entry to and residence in a host Member State occupy a central position. For the purposes of this chapter, it is equally important to note that these are not absolute rights, but subject to limitations imposed by the Treaty and secondary legislation. These limitations apply to the mobile EU citizen who is the primary holder of these rights, but they can also inherently affect their family members, whose rights to entry and residence are, as we saw earlier, dependent on those of the EU citizen, particularly when they are third-country nationals.[36]

Treaty-based limitations include those on grounds of public policy, public security, and public health.[37] The Directive adds some further restrictions to the right to reside on other grounds, notably where a temporary right to residence comes to an end because an EU citizen or a family member no longer satisfies the conditions set out for that temporary right in Articles 6 and

grant that right of residence would discourage the EU citizens from exercising their rights to free movement (see Case C-60/00 *Carpenter* EU:C:2002:4340 and Case C-457/12 *S v Minister voor Immigratie* EU:C:2014:136, where the Court reached this conclusion through the interpretation of the primary Treaty provisions - Articles 49 and 45 TFEU respectively).

[30] Article 6(1) CRD.

[31] Article 7(1)(d) and 7(2) CRD. Articles 9 and 10 regulate those administrative formalities and the issue of residence cards for family members who are third-country nationals.

[32] Articles 12 and 13 CRD.

[33] Article 16(2) CRD.

[34] Article 23 CRD.

[35] Article 24(1) CRD. This right to equal treatment extends to entitlement to social assistance – but see the limitation provided in Article 24(2) CRD and the line of case law that excludes family members of workers and self-employed EU citizens from it (Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto* EU:C:2016:114 at para 44) – as well as the right to schooling of children of migrant workers, provided in Article 10 of Regulation 492/2011 (n 4).

[36] As the Court has explained, 'the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are not autonomous rights of those nationals, but rights derived from those enjoyed by a Union citizen': Case C-836/18 *Subdelegación del Gobierno en Ciudad Real v RH* EU:C:2020:119, para 38. By contrast, family members who are themselves EU nationals may enjoy the protection of EU law as primary holders of EU rights as well as being derivative beneficiaries of that protection.

[37] See Article 45(3) TFEU (workers); Article 52 TFEU (self-employed); Article 62 TFEU (services); Article 21 (1) TFEU (citizenship).

7 CRD.[38] These apply, for instance, to non-economically active EU citizens (unless they have acquired the right to permanent residence) who lack sufficient resources in the sense that they might become an unreasonable burden on the social assistance system of the host Member State or do not have comprehensive sickness insurance coverage.[39] More specifically, while the Directive gives 'core' family members a general right to reside in a host Member State in the event of the death or departure of the Union citizen or in the event of divorce, annulment, or termination of a registered partnership, it also places some important limitations on the retention of this right, which are more severe in the case of family members who are third-country nationals.[40] Additionally, Article 35 CRD allows the refusal, termination, or withdrawal of rights under the CRD in cases of abuse of rights or fraud, such as marriages of convenience. All these limitations can lead to situations where an EU citizen and their family members might be deprived of their right of entry and residence, something, which as acknowledged in the preamble to the Directive 'can seriously harm persons, who having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State'.[41]

It is therefore unsurprising that the CRD should develop the conditions pertaining to these restrictions in quite some detail. In particular, Chapter VI of the Directive contains an array of substantive principles[42] and procedural safeguards that Member States must respect when restricting the rights of entry and residence on grounds of public policy, public security, and public health. The latter include the right of mobile EU citizens and their family members to be notified of decisions depriving them of their right to entry or residence (Article 30 CRD) and the right to access to judicial and, where appropriate, to administrative redress procedures and the right to appeal against decisions taken against them (Article 31 CRD). These central provisions are supplemented by Articles 32 and 33 CRD, which cover, respectively, limitations on the use of exclusion bans and the prohibition of automatically using expulsion

[38] Case C-94/18 *Chenchooliah v Minister for Justice and Equality* EU:C:2019:6930, para 74.

[39] See Article 14(1) CRD in relation to the right to reside in the territory of a host Member State for up to three months and Article 7(1)(b) in relation to the right to residence for more than three months and less than five years.

[40] See the conditions imposed on family members who are themselves EU citizens in the case of death or departure of the Union citizen or in the event of divorce before they can acquire the right to permanent residence (Article 12(1) CRD) and 13(1) CRD) and those more restrictive conditions imposed on family members who are third-country nationals that find themselves on the same situation (see Article 12(2) and (3) CRD and Article 13(2) CRD).

[41] Recital 23, Preamble to the CRD.

[42] See Articles 27–29 CRD, which have generated a very abundant body of case law.

as a criminal penalty. Likewise, Article 15 of the CRD extends, by analogy, those procedural safeguards to cases where the right to residence is restricted on other grounds,[43] as does Article 35 CRD in relation to situations involving an abuse of rights.

While the substantive principles contained in Articles 27–29 CRD reflect the principle frequently emphasised by the Court, that derogations to free movement are to be interpreted strictly,[44] the procedural safeguards in Articles 30–31 CRD have now been increasingly interpreted by the Court by primary reference to the right to an effective remedy enshrined in Article 47 of the EU Charter in situations where mobile EU citizens and their family members are expelled or refused entry to a host Member State.[45] It is, therefore, in this context that the right to effective judicial protection of family members of EU citizens has come strongly to the fore. In the sections that follow, we will consider the interpretation of this right in relation to both 'core' and 'extended' family members of EU citizens.

8.3 THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION OF FAMILY MEMBERS UNDER THE CITIZENS' RIGHTS DIRECTIVE

The CRD shored up and extended the procedural guarantees provided in Articles 6–8 of Directive 64/221[46] – the original Directive that regulated restrictions to free movement. Recitals 25 and 26 of the CRD neatly illustrate this by making it clear, respectively, that procedural safeguards of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State should ensure a high level of protection of these rights and that judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State. This stance has been robustly endorsed by the CJEU, when applying Articles 30 and 31 CRD, with the result that the principle of effective judicial protection has begun to emerge strongly in some cases as the *primary* and *explicit* guide in the

[43] See further, *Chenchooliah v Minister for Justice and Equality* (n 38) where the Court clarified at paras 81–82 that the expression 'by analogy' was to be interpreted as meaning that while the same essential safeguards would apply where the right to free movement was restricted on other grounds, some specific safeguards contained in those provisions (Article 30(2), the third indent of Article 31(2), and Article 31(4) CRD) were, by nature, confined exclusively to expulsions based on grounds of public policy, public security, and public health.

[44] Case 36/75 *Rutili v Ministre de l'intérieur* EU:C:1975:137, para 27.

[45] Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363, para 50.

[46] See n 4 and further, Barnard (n 6) 490–494, and Guild, Peers, and Tomkin (n 6) 291–304.

interpretation of these provisions rather than taking a more implicit role by pervading the application of the specific procedural guarantees set out in the Directive.

In the following sections, we will explore both this phenomenon and its extension to the rights of family members under the CRD. To this end, we will first consider some examples of how the principle was used in earlier case law under Directive 64/221[47] and then we will look at more recent case law that illustrates neatly the shift described above.

8.3.1 *The Procedural Guarantees against Decisions Refusing Entry and Expulsion Decisions in the Earlier Case Law: The Underlying Force of the Principle of Effective Judicial Protection*

As indicated above, Directive 64/221[48] laid down a significantly lower level of procedural protection than the CRD in cases of refusals to entry or expulsion decisions against EU citizens and their families. Article 8 of Directive 64/221 provided that EU mobile citizens and their family members had the right to the '*same legal remedies*' in relation to expulsion orders or denials of entry to a host Member State as were available to nationals of a host State in respect of acts of the administration. This implied the possibility that such remedies might either be unavailable or not be entirely effective in a particular situation. Article 9 of Directive 64/221 attempted to address some of the deficiencies in Article 8. Thus, it provided in Article 9(1) that: (a) where no right of appeal to a court of law were available, or (b) available only in respect of the legal validity of the decision or (c) where an appeal would not have suspensory effect, a person concerned by an expulsion decision could at least exercise their right to defence before a competent authority which was not the same as the authority that adopted the restrictive measures. The object of Article 9 of the Directive was, in the words of the Court, 'to ensure a *minimum* procedural safeguard'[49] for persons affected in the three situations provided in Article 9(1).

On the one hand, these provisions were clearly imbued by the spirit of securing that those subject to restrictive measures should have access to a legal remedy. On the other, as we have just seen, they ultimately reflected access only to *adequate* legal remedies[50] rather than fully satisfying the requirements

[47] See n 4.
[48] Ibid.
[49] Case 98/79 *Pecastaing v Belgian State* EU:C:1980:69, para 15.
[50] In fact, Recital 3 of the Preamble to Directive 64/221 (n 4) provided that 'nationals of other Member States should have adequate legal remedies available to them in respect of decisions of administration in such matters'.

of the principle of effective judicial protection by guaranteeing both access to *judicial* redress and the right to an *effective*, and not just adequate, remedy. As Advocate Ruiz-Jarabo Colomer argued in his Opinion in *ex parte Shingara*,[51] such limitations, while perhaps acceptable at the time when this early Directive was adopted, were soon no longer consistent with the parameters of the principle of effective judicial protection which began to be developed by the Court in its general body of case law and was later consolidated in Article 47 of the Charter.

It is therefore unsurprising that, while the wording of Articles 8 and 9 of Directive 64/221 remained unchanged until eventually superseded by the higher standards of protection ushered by Articles 30 and 31 CRD, the case law interpreting those provisions not only clarified their scope but also embodied a drive towards higher levels of procedural protection. Thus, cases like *Royer*[52] and *ex parte Shingara*,[53] fostered an alignment of the case law within the specific framework of Directive 64/221 with the evolution of the general case law on national remedies to ensure the maximum latitude and effectiveness possible of the remedies provided within the somewhat restrictive parameters of the Directive. Those cases interpreted the meaning of the entitlement of persons subject to a restrictive measure to the 'same legal remedies' as nationals of the host State had in relation to restrictive measures adopted by the administration.

In *Royer*,[54] the Court held that a decision ordering the expulsion of an EU citizen or their family members could not be executed, except in duly justified cases of urgency, until the combined set of remedies provided in Articles 8 and 9 had been exhausted. In turn, in *ex parte Shingara*,[55] the Court took the view that the guarantees applicable to the three situations detailed in Article 9(1) in relation to expulsion decisions also applied to the application of Article 9(2) covering refusals to issue a first residence permit or ordering expulsion before the issue of a first permit.[56] This approach continued in *ex parte Yiadom*,[57] where the national authorities of a host Member State argued that the default

[51] Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-65/95 *The Queen v Secretary of State for the Home Department, ex parte Shingara* EU:C:1996:451, paras 70–103.

[52] Case 48/75 *Royer* EU:C:1976:57.

[53] Case C-65/95 *The Queen v Secretary of State for the Home Department, ex parte Shingara* EU:C:1997:300.

[54] *Royer* (n 52).

[55] *The Queen v Secretary of State for the Home Department, ex parte Shingara* (n 53).

[56] Ibid, paras 33–37.

[57] Case C-357/98 *The Queen v Secretary of State for the Home Department, ex parte Yiadom* EU:C:2000:604.

procedural guarantees provided in Article 9(1) and (2) did not apply to a situation where an EU citizen had been granted temporary admission to a host Member State. They averred that this was outside the scope of Article 9(1) and (2), which *literally* covered expulsion decisions, those refusing the renewal of a residence permit, those refusing the issue of a first residence permit, and those ordering expulsion before the issue of a first residence permit. The Court, however, held that in the light of the general principles interpreting the Directive, an EU citizen who had been temporarily admitted to the territory of a Member State should be entitled to the procedural safeguards in Article 9.[58] While the Court did not explicitly invoke the principle of effective judicial protection in these cases and appeared to draw its interpretation from the principles emanating within the narrow confines of the Directive, it is clear that the spirit of that principle guided the conclusions reached.[59] By contrast, the Opinions of some Advocates General at the time were more vocal both in acknowledging the emergence and growing influence of the principle of effective judicial protection in the general body of case law and also in supporting the *explicit* extension of the full guarantees embodied in that principle to the restrictions of free movement contemplated in Directive 64/221.[60]

In some of the earlier cases following the entry into force of the CRD, the principle of effective judicial protection continued to underline the interpretation followed by the Court, greatly facilitated by the higher level of procedural protection entrenched in Articles 30–33 CRD. Nonetheless, allusions to that principle still seemed to be mostly cautious and indirect. For instance, in some cases calling for the interpretation of the procedural safeguards attached to the legality of national administrative prohibitions on leaving the territory of Member States, the Court used Article 32 CRD and applied the traditional combination of the principles of procedural autonomy, effectiveness, and non-discrimination, thus consolidating a pattern of interpretation drawn within the narrow confines of the CRD itself.[61] In a few cases, the right to an effective judicial remedy began to be expressly mentioned.[62]

[58] Ibid, para 38.

[59] In some of the later cases interpreting Directive 64/221 (n 4), there were, however, some direct references to the principle of effective judicial protection (see Case C-459/99 *MRAX* EU:C:2002:461, para 101).

[60] See the Opinion of Advocate Ruiz-Jarabo Colomer in *The Queen v Secretary of State for the Home Department, ex parte Shingara* (n 51).

[61] Case C-249/11 *Byankov* EU:C:2012:608, paras 67–82. By contrast, see the Opinion of Advocate General Mengozzi in the same case (EU:C:2012:380, para 32), where he made a direct reference to the right to an effective remedy as underlying the guarantees in the CRD.

[62] Case C-430/10 *Gaydarov* EU:C:2011:749, para 41.

To sum up, a consideration of the historical case law under Directive 64/221 –which offered only a minimum standard of legislative procedural protection – and of the cases decided in the early years after the CRD was adopted, reveals the growing but still mostly implicit influence of the principle of effective judicial protection. Against that backdrop, and as we shall see in the next section, more recent cases have reflected an open shift towards the explicit priority of that principle in interpreting the procedural guarantees accorded to EU citizens and to their family members.

8.3.2 *The Emergence of the Principle of Effective Judicial Protection as a Primary Interpretative Guide*

The rise to prominence of the principle of effective judicial protection as primary interpretative tool in this area mirrors recent developments in other areas of EU law, where Article 47 of the Charter, either alone[63] or in conjunction with Article 19(1) TEU,[64] has taken centre stage in influencing the shape of national remedies.[65] In the context of the CRD, *ZZ v Secretary of State for the Home Department*[66] provides a clear example of the use of Article 47 of the Charter in this way. The case concerned the interpretation of Article 30(2) CRD, which stipulates that those affected by a decision restricting the right of entry or residence 'must be informed, precisely and in full of the public policy, public security or public health grounds on which the decision taken in their case is based *unless* this is contrary to the interests of State security [emphasis added]'. On the facts of the case, an EU citizen, who had resided lawfully in the UK for fifteen years – and hence acquired the right of

[63] See, for instance, Case C-205/15 *DGRFP v Toma and Biroul* EU:C:2016:499; Case C-231/15 *Prezes Urzędu Komunikacji Elektronicznej* EU:C:2016:769; Joined Cases C-439/14 and C-488/14 *Star Storage* EU:C:2016:688; Case C-169/14 *Sánchez Morcillo v Banco Bilbao Vizcaya* EU:C:2014:2099, and Case C-437/13 *Unitrading Ltd v Staatssecretaris van Financiën* EU:C:2014:2318.

[64] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117; Joined Cases C-518/18, C-624/18, and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982.

[65] In this sense, there has been an argument that the standards of protection derived from applying Article 47 of the Charter seem more stringent than those emanating from the application of the principles of effectiveness and non-discrimination (see K. Gutman, 'The essence of the fundamental right to an effective remedy and to a fair trial in the case law of the Court of Justice of the European Union: The best is yet to come?' (2019) 20 German Law Journal 884, 895 and the literature cited therein).

[66] *ZZ v Secretary of State for the Home Department* (n 45).

permanent residence in the UK[67] – was subject to an expulsion measure on grounds of public security, without having been informed of the grounds justifying this measure, either in detail or in summary form. This was because, in accordance with national law, the disclosure of this information was deemed to be contrary to the interests of State security. The national court considering the appeal against the exclusion order made a reference to the Court of Justice asking whether the principle of effective judicial protection required that the Union citizen should be at least informed in this situation of the essence of the grounds against him.

Although the national court referred to the principle of effective judicial protection 'set out in Article 30(2)' of the CRD,[68] the Court used Article 47 of the Charter instead as the primary interpretative source. This is significant because it enabled it to draw from a wider body of case law than that limited to a piecemeal interpretation of the provisions in the CRD. An insular and literal interpretation of the letter of Article 30(2) CRD would have probably justified the complete refusal to disclose the grounds for expulsion for reasons of State security. However, a longstanding line of case law of the Court set out that the right to an effective remedy included the right of the person concerned to know the reasons upon which a decision had been taken against them.[69] The Court approached the ZZ case in the light of this line of case law and weighed the interests of State security on the one hand and the right to an effective remedy of EU citizens on the other.

Ultimately, the balance struck by the Court emphasised the power of Article 47 of the Charter. The Court explained that this provision imposes a duty on the national court in these circumstances to ensure, first, that the refusal to disclose the information in full to the EU citizen concerned is *strictly necessary* and, second, that the EU citizen is, in any event, informed of the *essence* of the grounds justifying the expulsion while taking into account 'the necessary confidentiality of the evidence'.[70] In other words, the Court firmly highlighted the importance of the rights of the defence even in cases where the interests of State security were at stake. The extent of the duty imposed on national courts to comply with those requirements cannot be underestimated. It reflects a high level of intrusion of the principle of

[67] See Article 16(1) CRD and the special protection against expulsion for those who have acquired the right to permanent residence in Article 28 (2) and (3) CRD.

[68] *ZZ v Secretary of State for the Home Department* (n 45), para 34.

[69] See Case C-372/09 *Peñarroja Fa* EU:C:2011:156, para 63, and – in the context of the CRD – Case C-430/10 *Gaydarov* (n 62), para 41.

[70] *ZZ v Secretary of State for the Home Department* (n 45), para 68.

effective judicial protection on decisions of national competent authorities either refusing entry or restricting the right to residence of mobile Union citizens and their families.

8.3.3 *The Expansion of the Reach of the Principle of Effective Judicial Protection to Cover 'Extended' Family Members under the CRD*

As seen in the previous section, the decision in ZZ[71] highlighted the use of Article 47 of the Charter as the primary source to give effect to the principle of effective judicial protection when applied to the interpretation of the specific procedural guarantees in the CRD. The claimant in that case was an EU national married to a British national – at a time when the UK was still a Member State of the EU – and hence was entitled to the protection of the CRD both as a primary holder of the substantive rights and, derivatively, as a 'core' family member under the CRD. The decision, therefore, made it clear that the enhanced protection offered by Article 47 clearly extended both to EU nationals and to those family members in Article 2(2) CRD. The entitlement to the right to an effective remedy to family members under the CRD is also justified by Recital 31 to the Directive, which provides that the Directive 'respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Human Rights of the European Union'. It follows from this that 'core' family members are automatically included in that protection given their position as full beneficiaries of the CRD.

However, the issue of whether the *same* protection would be afforded to the 'extended' family members set out in Article 3(2) CRD, whose claim to the enjoyment of the substantive rights under the CRD is much less certain, remained unresolved. The decision in *Banger*[72] shed light on that question. There, Ms Banger, a South African national, and her partner, a UK national, had lived in the Netherlands, where Ms Banger was issued with a residence permit. When the couple moved to the UK, the competent authorities declined to provide Ms Banger with a residence permit on the basis that the UK was her partner's *home* Member State and that the domestic legislation transposing Article 3(2) CRD only applied to extended family members of Union citizens *from other Member States*. The national court made a

[71] *ZZ v Secretary of State for the Home Department* (n 45).

[72] Case C-89/17 *Banger* EU:C:2018:570, paras 45–50. The need to clarify this arose because some provisions of the CRD expressly mention extended family members (such as Article 10 CRD) but others do not. On the possible rules of interpretation of this dimension of the CRD, see Guild, Peers, and Tomkin (n 6) 82–86.

preliminary reference to the Court of Justice that covered the interpretation of both substantive and procedural rights under the CRD.

On the substantive issues, the national court essentially asked whether the principles established by the ruling of the Court in *Singh*[73] or in the CRD itself could be understood to protect the position of extended family members of an EU citizen who having exercised their right to free movement in another Member State returns to their *home* Member State. The Court of Justice relied primarily on a teleological interpretation of Article 21(1) TFEU to derive an obligation on a Member State to *facilitate* the provision of residence permit for a third-country national who is the unregistered partner of an EU national returning to their *home* Member State.[74]

On the procedural front, the national court raised the very important question of the scope of judicial protection required by EU law for 'extended' family members. This was a point not covered by the CRD. Under the law of England and Wales, Ms Banger did not have the right to appeal against the decision of the national competent authority, with judicial review being the only remedy available to her. Ms Banger contended that the system of judicial review under national law did not allow for a full review of the facts in question. By contrast, had she been a 'core' family member she would have had the right to appeal, with the opportunity of a fuller judicial scrutiny. In essence, the key issue was whether the judicial protection safeguards contained in Articles 15 and 31 CRD applied to 'extended' family members of the mobile EU citizen in the same manner as they applied to 'core' family members, which are the natural beneficiaries of the full protection of the CRD.

In his leading Opinion, Advocate General Bobek considered the complexion of the right to an effective judicial remedy for extended family members in the light of two converging interpretative sources. These were, first, the provisions of the CRD itself and, second, the requirements emanating from Article 47 of the Charter and from the classical remedial principles of effectiveness and non-discrimination.[75] In the application of the former, he acknowledged that a literal interpretation of Article 15 CRD meant that only 'core' family members would be clearly protected but that such textual interpretation was transparently contrary to the spirit of the CRD because the refusal of a residence card to extended family members could be construed as a 'restriction to free movement rights of the Union citizen himself'.[76]

[73] Case C-370/90 *Singh* EU:C:1992:296.
[74] *Banger* (n 72), paras 27–35.
[75] Ibid, para 82.
[76] Ibid, para 88.

However, it was the use of Article 47 of the Charter[77] that provided him with a solid platform to conclude that, even if the CRD did not explicitly apply the relevant procedural safeguards to extended family members, that provision required not only access to judicial redress but also a full judicial scrutiny of the broad discretion granted to Member States under Article 3(2) CRD. Advocate General Bobek concluded that it was ultimately for the national court to ascertain whether the national system of judicial review did satisfy those requirements.

The judgment of the Court, while terser in its reasoning than the Opinion of the Advocate General, reached the conclusion that the provisions of the CRD had to be interpreted in the light of Article 47 of the Charter and that this meant that a national court should be able to ascertain whether a decision refusing a residence permit to an extended family member is based on a sufficiently solid factual basis and is compliant with procedural safeguards, which would include the obligation of the national competent authority to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.[78]

The decision in *Banger* thus demonstrated that 'extended' family members were entitled to the procedural protection offered by the CRD, a result that was achieved through the primary application of the principle of effective judicial protection enshrined in Article 47 of the Charter to the interpretation of Articles 31 and 15 CRD.

8.4 CONCLUSIONS

The principle of effective judicial protection, first recognised in the case law of the CJEU, acquired ultimate visibility by taking its place among the provisions of the EU Charter of Fundamental Rights which, by its own admission, aims to 'strengthen the protection of fundamental rights'.[79] While this principle has remained intertwined with the traditional remedial principles of national procedural autonomy, effectiveness, and non-discrimination,[80] the use of Article 47 of the Charter as an interpretative platform in

[77] Ibid, para 48.
[78] Ibid, paras 51–52.
[79] See Recital 4 of the Preamble to the Charter.
[80] Commentators have highlighted the broader scope of the principle contained in Article 47 of the Charter. See, S. Prechal and R. Widdershoven, 'Redefining the relationship between "Rewe-effectiveness" and effective judicial protection' (2011) 4 Review of European Administrative Law 41, 50.

cases concerning the legality of national procedural rules has become commonplace in the case law on national remedies. Of course, this seems a natural evolutionary step considering the proclamation of the Charter as a solemn political declaration at the time of the Treaty of Nice and its subsequent entry into force with the Treaty of Lisbon. However, the direct allusion to Article 47 of the Charter has represented much more than a cosmetic change. This is because it has yielded a body of case law that has bolstered the potential of this principle, offering a broader range of protection to those whose substantive rights under EU law might have been infringed.[81]

This chapter has sought to argue that the approach in the general case law on national remedies has recently found a reflection in the specific appraisal by the CJEU of the procedural rights of family members of mobile EU citizens under the CRD. Both the CRD and the measures preceding it have taken as a starting point for the entitlement to free movement rights – and for the assessment of the legality of any restrictions to them – the notion that family members are not entities on their own right but merely recipients of derivative rights. Against that unpromising backdrop, the case law of the CJEU has neatly illustrated both a teleological approach to the configuration of the substantive rights to free movement of family members[82] and a rise to prominence of the principle of effective judicial protection as the primary interpretative tool shaping the procedural guarantees available in cases where the rights to entry and residence have been restricted.

The case law interpreting the minimum standard of procedural protection offered by Directive 64/221, as well as the early case law considering the more generous ones contained in the CRD, mostly reflected an approach wedded to the insular confines of those pieces of legislation which was progressively infused by the need to ensure the maximum effectiveness of the available remedies. However, cases like ZZ[83] and *Banger*[84] exemplified a much bolder leap by using Article 47 of the Charter to deploy the full force of the principle of effective judicial protection in cases where even the more generous parameters of the CRD might not have allowed for the protection sought by the EU citizen and their family members. This is significant on three counts. First, because it means that the case law in this area is no longer out of step with the evolution of the general body of case law on national remedies given that it confirms a shift towards the primary interpretative role of Article 47 of the

[81] See n 63.
[82] See Section 8.2.
[83] ZZ *v Secretary of State for the Home Department* (n 45).
[84] *Banger* (n 72).

Charter in securing the right to an effective remedy under EU Law. Second, because, in this context, the force of Article 47 of the Charter is applied to the construction of procedural guarantees articulated by *EU secondary legislation*. Until now, much of the case law illustrating the potent effect of that provision has referred to scenarios where the effectiveness of *national* procedural rules has been at stake.[85] This move thus neatly reflects the two-pronged effect of Article 47 on both national and EU-derived remedies. Finally, and more importantly for the purposes of this collection, the approach of the Court in this area does much to address, at the level of enforcement of EU rights, the uncertain position of 'core' and, particularly, 'extended' family members under the CRD. Such a trend should be welcomed so that the commitment of the EU to the rights to free movement and family life is fully realised.

[85] That said, Article 47 of the Charter has also been used in the context of the interpretation of the conditions applying to the centralised system of EU remedies provided in the TFEU. There, the Court has in some areas shown a reluctance to go beyond the letter of the Treaties to give full effect to the principle. This is, for example, the case in relation to the case law interpreting the standing requirements of private parties under Article 263(4) TFEU (see Case C-583/11 *Inuit Tapiriit Kanatami and others v European Parliament and Council* EU:C:2013:625, para 98). However, in other areas, the employ of Article 47 of the Charter has filled some gaps in the system of legal protection provided in the Treaties (see Case T-461/08 *Evropaïki Dynamiki v European Investment Bank* EU:T:2011:494, para 118). Furthermore, recent EU harmonising legislation in the field of remedies like Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, also shows the explicit influence of Article 47 of the Charter (see Recitals 4–5 of the Preamble to the Directive).