

One Big Happy ‘European Family’? An External Perspective

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5.1 INTRODUCTION

Since the early days of European integration, the European Union (EU) has been concluding association agreements (AAs) with countries in its neighbourhood.¹ In addition to EU citizens who derive rights and obligations directly from the EU Treaties, an increasing number of non-EU citizens have been granted similar free movement rights in the internal market which places them in between the categories of ‘citizens’ and ‘foreigners’.² A situation both similar and different has been created by Brexit which altered the EU’s territorial scope and removed EU citizenship status from United Kingdom (UK) citizens.

The fact that non-EU member states, undertakings, and individuals are directly affected by the EU legal space raises questions as to what parameters, beyond the formal criteria, can distinguish between EU Member States and non-Member States, individuals holding citizenship of the respective countries,³ and families.⁴ With a focus on Turkish, European Economic Area

¹ The first in line were the Agreement establishing an association between the European Economic Community and Greece [1963] OJ L26/294, and the Agreement establishing an association between the European Economic Community and Turkey [1964] OJ L217/3685.

² D. Thym and M. H. Zoetewij-Turhan, ‘Introduction: Free movement between membership and partnership’ in D. Thym and M. H. Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements* (Brill 2015) 2.

³ For studies on ‘European individuals’, see, for example: L. Azoulai, ‘Transfiguring European citizenship: From Member State Territory to Union Territory, in EU citizenship and federalism: The role of rights’ in D. Kochenov (ed), *EU Citizenship and Federalism* (Cambridge University Press 2015); M.-L. Öberg, ‘From EU citizens to third country nationals: The legacy of *Polydor*’ (2016) 22 *European Public Law* 97. For an analysis of the ‘peoples of Europe’, see Editorial Comments, ‘Who are the “peoples of Europe”?’ (2023) 60 *Common Market Law Review* 305.

⁴ Thym and Zoetewij-Turhan (n 2) 2.

(EEA), and Brexit (UK and EU) families, the chapter attempts to answer the principal question of whether the families of third-country nationals (TCNs) who exercise their free movement within the Union enjoy a similar level of recognition as do the families of EU citizens. There is no clear definition of what or who constitute an 'EU family'.⁵ For the purposes of this chapter, the 'EU family' is understood as composed of an EU citizen and their family members of any nationality, who enjoy rights under EU primary and secondary law, including free movement, non-discrimination, and political citizenship rights under the EU Treaties and the right to private and family life under the EU Charter of Fundamental Rights (EU Charter) and the European Convention on Human Rights (ECHR); whose integration capability in the host Member State society is assumed; and whose family life stability is protected by the host society.

In EU free movement law, families are the natural corollaries of the freely moving individual and contribute to the achievement of the internal market. Family life is supported by the rights of family reunification and of EU citizenship, as well as EU anti-discrimination law and social policy regulations. Whereas citizenship status is restricted to the nationals of EU Member States, the rights enjoyed by EU citizens, with the exception of political rights, are not exclusive and can be granted to TCNs, including as direct right holders.⁶ However, in the case of AAs providing such rights to non-EU citizens, the scope of the rights is conditioned by the less ambitious aims of AAs as compared to the EU Treaties. This affects the situation of the non-EU families making use of the rights granted by AAs in the EU as well as the perception of the role of 'family' in the construction of the internal market. Unveiling the relevance accorded to family relationships in the external dimension of EU integration – as compared to integration within the EU – enables a deeper understanding not only of the individual conditions of freely moving families but also of the significance of the 'family' in the European integration process.

Section 5.2 discusses the role played by families in EU integration: initially, as facilitators and enablers of free movement and, later, as anchored in the

⁵ See further Chapter 4 by Ségolène Barbou des Places.

⁶ Kochenov and van den Brink have identified five categories of such persons, including TCN long-term residents in the EU under Directive 2003/109/EC, and TCNs benefitting from the agreements their country of origin has concluded with the EU whereby the individuals receive enforceable rights, including the EEC-Turkey AA, the EEA Agreement, and the Withdrawal Agreement: D. Kochenov and M. van den Brink, 'Pretending there is no Union: Non-derivative *Quasi*-citizenship rights of third-country nationals in the EU' in D. Thym and M. H. Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements* (Brill 2015) 68.

fundamental status of EU citizenship. Section 5.3 explores the situation of Turkish families in the EU through the lens of ‘conditional’, ‘qualifying’, and ‘associated’ family statuses. Section 5.4, in contrast, explores the situation of EEA families as ‘equivalent’ families in relation to the EU families. Section 5.5 delves into integration as an objective under EU law and a qualifying tool vis-à-vis TCN families. Section 5.6 deals with the special case of Brexit families in the mixed EU–non-EU setting where the ‘integration-family rights’-axis is reversed. In Section 5.7, the chapter concludes that whereas a clear distinction can be made between EU families and some non-EU families, and the perception of the role of the family in the EU’s external instruments varies, the concept of the ‘EU family’ is, nevertheless, inherently flexible and open for conversion from the status of ‘non-EU family’ to ‘EU family’.

5.2 FAMILY RIGHTS AS COROLLARY TO FREE MOVEMENT IN THE INTERNAL MARKET

The freely moving individual has been accompanied by family members since the early days of the European Economic Community (EEC). The right to free movement of workers provided residence rights in the host Member State for the worker’s spouse, descendants under the age of twenty-one or dependent on the worker parent, and the dependent relatives in the ascending line of any nationality; the spouse and dependent ascendants and descendants were allowed to take up employment in the host Member State.⁷ The ancillary residence rights of family members were regarded as an auxiliary to achieving the free movement of workers and, thereby, realising the internal market.⁸ Due to the Member States’ immigration concerns, however, this process of liberalisation was not unlimited vis-à-vis family reunification with TCN family members.⁹

The scope of the rights of the ‘EU family’ in another Member State depends on whether the freely moving EU citizen’s family members are Union citizens or not. TCN family members are ‘derivative addressees of EU law’: their rights are based on their relationship with the primary addressee of EU law.¹⁰ For the family to come into the scope of EU law, the primary

⁷ Article 10(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2. See also C. Berneri, *Family Reunification in the EU* (Hart Publishing 2017) 7.

⁸ G. Barrett, ‘Family matters: European community law and third country national family members’ (2003) 40 *Common Market Law Review* 369, 375–376.

⁹ Berneri (n 7).

¹⁰ Barrett (n 8) 371. See also Chapter 8 by Albertina Albors-Llorens.

addressee – the EU citizen – must hold an 'activity or status' that makes the application of EU law relevant.¹¹

The introduction of EU citizenship with the Maastricht Treaty in 1993 solidified EU integration: by directly linking citizens to the EU, the Union could now foster the creation of an 'EU identity' distinct both from the Member States and from third countries.¹² For families in the EU, EU citizenship changed the playing field profoundly. The initial foundation of economic interests embraced by the establishment of the internal market was replaced by a rights-based and more general approach to the fundamental freedoms.¹³ Article 21(1) of the Treaty on the Functioning of the EU (TFEU) grants EU citizens a 'right to move and reside freely within the territory of the Member States', including rights that are 'self-standing', that is, rights which persist in the absence of a cross-border element and protect potential future movement.¹⁴ EU citizenship grants wide protection to EU citizens' family members regardless of whether the latter themselves have exercised free movement within the EU.¹⁵ As a complement, citizenship rights have been further substantiated by EU family law measures facilitating free movement and creating a 'common judicial area'.¹⁶

EU citizenship embodies a process in which political rights have been strengthened, integration deepened, and a common identity built among the peoples of the EU. This process is reflected in the Spanish memorandum 'Towards a European Citizenship', which states that an EU citizen is 'not just a privileged foreigner but also a fundamental actor in the life of the European institutions'.¹⁷ By means of comparison, family members of any nationality supporting an EU citizen in exercising their free movement rights in another Member State equally assume the role of fundamental actors facilitating the use of free movement rights,¹⁸ and are, thus, not merely foreigners privileged with the possibility to reside in the Union. By analogy, the achievement of the aims of AAs which grant free movement rights to TCNs is facilitated by family members who enable a TCN to exercise those rights. Since TCNs are not EU citizens, however, the question of whether the rights of non-EU families

¹¹ Barrett (n 8) 377.

¹² Conclusions, Fontainebleau European Council of 25–26 June 1984, 6 Bulletin of the European Communities (1984).

¹³ Barrett (n 8) 418.

¹⁴ Berneri (n 7) 4 and 93.

¹⁵ *Ibid* 88.

¹⁶ R. Lamont, 'Not a European family: Implications of Brexit for international family law' (2017) 29 *Child and Family Law Quarterly* 267, 270.

¹⁷ 'Towards a European citizenship', Europe Documents No 1653, 2 October 1990.

¹⁸ Case C-60/00 *Carpenter* EU:C:2002:434.

warrant alignment with those enjoyed by EU citizens is contingent on whether a deeper notion of European identity and purpose in relation to the internal market and the European integration project can be assigned to TCN families.

5.3 THE ‘CONDITIONAL’, ‘QUALIFYING’, AND ‘ASSOCIATED’ TURKISH FAMILY

The profundity of the aims of opening up the internal market to participation by non-Member States, which in some cases includes the free movement of workers, varies from one (usually) AA to another, from mostly economic exchanges in the 1963 AA concluded between the EEC and Turkey (EEC-Turkey AA)¹⁹ to deep cooperation in the area of the internal market and beyond as an alternative to membership in the EEA Agreement.²⁰ The variation among the aims of AAs resembles the development of free movement rights in the EU, from market integration to beyond.²¹

The EEC-Turkey AA set out to ‘promote the continuous and balanced strengthening of trade and economic relations between the Parties by, among others, establishing a customs union covering all trade in goods’,²² and ‘progressively securing freedom of movement for workers’.²³ Despite the long duration of the agreement, the latter has not yet been fully attained.²⁴ In terms of residency and other related rights, a Turkish worker’s family in the EU is, compared to an EU family, a ‘step-by-step qualifying family’. Pursuant to Decision 1/80 of the Association Council²⁵ which complements the AA with more specific rules on free movement, Turkish workers gain access to the labour market as well as some associated residence rights. However, it is within Member State competence to lay down rules for the first entry and residence of Turkish workers and their family members.²⁶

Similarly to the EU families’ free movement rights being subject to certain conditions, the right of Turkish workers to free access to employment and other related rights within the scope of the Decision can be limited on

¹⁹ See n 1.

²⁰ Agreement on the European Economic Area [1994] OJ L1/3.

²¹ F. Wollenschläger, ‘A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration’ (2011) 17 *European Law Journal* 1, 34.

²² Article 2 EEC-Turkey AA.

²³ Article 12 EEC-Turkey AA.

²⁴ Case C-81/13 *United Kingdom v Council* EU:C:2014:2449, para 57.

²⁵ Decision 1/80 of the Association Council of 19 September 1980.

²⁶ Barrett (n 8) 416–417.

grounds of public policy, public security, or public health,²⁷ whereas the limitation must be 'indispensable to safeguard that interest'.²⁸ As a general rule, a Turkish worker's family members do not enjoy self-standing rights in the host Member State. The purpose of their right of residence is limited to ensuring family unity²⁹ in order not to 'discourage' the Turkish worker from exploiting the possibility to work in an EU Member State.³⁰ With the duration of their legal residence in the host Member State, the rights of the family members of a Turkish worker to take up employment in the host Member State gradually increase. Family members gain access to the employment market after three years of lawful residence upon 'authorisation' to join a Turkish worker in a Member State subject to, during the first five years, priority given to workers from the EU.³¹ Differently from the children of EU citizens, the possibility of the children of Turkish workers to join their parents in the host Member State is subject to conditions established by the Member State.³² However, after one of their parents has been legally employed in a Member State for at least three years, the situation of Turkish children who have completed a course of vocational training in the host Member State becomes more advantageous than that of other family members. They may take up employment without being subjected to any additional time restrictions.³³

The situation of Turkish children has been called an 'association citizenship' – a status sharing similarities with EU citizenship 'while at the same time maintaining distinct limitations and some prerogatives'.³⁴ In *Derin*, the Court of Justice of the EU (CJEU) concluded that there are 'significant differences between the respective legal situations' of the children of Turkish workers and EU citizens.³⁵ Yet, the fact that the 'significant differences' are not only to the detriment of the Turkish children render the situations 'ultimately incomparable'.³⁶

Overall, the Turkish family is an 'association family'. Similarly to AAs, which cover a large variety of aims and mechanisms some of which replicate

²⁷ Article 14 of Decision 1/80.

²⁸ Case C-371/08 *Ziebell* EU:C:2011:809, para 86.

²⁹ Case C-351/95 *Kadiman* EU:C:1997:205, paras 34–36.

³⁰ J. Beqiraj and F. Ippolito, 'Conceptualizing an 'association citizenship' for children of Turkish workers' in D. Thym and M. H. Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements* (Brill 2015) 279.

³¹ Article 7 of Decision 1/80.

³² See further in Section 5.5.

³³ Article 7 of Decision 1/80.

³⁴ Beqiraj and Ippolito (n 30) 278.

³⁵ Case C-325/05 *Derin* EU:C:2007:442.

³⁶ Beqiraj and Ippolito (n 30) 292.

EU law and others not,³⁷ the legal situation of a Turkish family in terms of residency and access to the labour market comes close to that of an EU family but cannot be equated thereto. This owes largely to the humble aims of the EEC-Turkey AA as compared to the EU Treaties. The differences between the EEC-Turkey AA and other agreements, such as the EEA Agreement, became particularly explicit in judgments in the three cases *United Kingdom v Council*, which provided the CJEU with the opportunity to compare – and contrast – the objectives of the EEA Agreement,³⁸ the Agreement between the European Community (EC) and Switzerland on the Free Movement of Persons,³⁹ and the EEC-Turkey AA,⁴⁰ respectively. The judgments elucidate the differences in objectives and context of the agreements in question which, in accordance with the so-called *Polydor*-doctrine,⁴¹ impact the interpretation of the substantive provisions of the agreements, especially those which are worded identically to EU *acquis*.

In comparison with the other two agreements,⁴² the CJEU stated that the objectives of the EEC-Turkey AA are narrower than the fullest possible realisation of the free movement of persons, stating merely the wish of the contracting parties to secure between them the freedom of movement for workers in progressive stages.⁴³ As established in cases such as *Demirkan*⁴⁴ and *Ziebell*,⁴⁵ no general freedom of movement including for long-term residents equivalent to EU citizenship is in place between the EU and Turkey. Neither is the freedom of movement for workers as established in the EU applicable to the EEC-Turkey AA.⁴⁶ Such interpretations are not supported by the ‘exclusively economic’⁴⁷ character of the AA.⁴⁸ The differences in aims between the EEC-Turkey AA and the EU Treaties uphold the fundamental distinction between the rights provided to Turkish workers and their families as compared to their EU counterparts.

³⁷ See, for example, M.-L. Öberg, ‘Internal market *acquis* as a tool in EU external relations: From integration to disintegration’ (2020) 47 *Legal Issues of Economic Integration* 151.

³⁸ Case C-431/11 *United Kingdom v Council* EU:C:2013:589.

³⁹ Case C-656/11 *United Kingdom v Council* EU:C:2014:97.

⁴⁰ Case C-81/13 *United Kingdom v Council* (n 24).

⁴¹ See Öberg (n 3).

⁴² See further in Section 5.4.

⁴³ Case C-81/13 *United Kingdom v Council* (n 24), paras 43 and 45.

⁴⁴ Case C-221/11 *Demirkan* EU:C:2013:583.

⁴⁵ Case C-371/08 *Ziebell* (n 28).

⁴⁶ Case C-81/13 *United Kingdom v Council* (n 24), para 50.

⁴⁷ S. Ganty, ‘Silence is not (always) golden: A criticism of the ECJ’s approach towards integration conditions for family reunification’ (2021) 23 *European Journal of Migration and Law* 176, 186.

⁴⁸ Kochenov and van den Brink (n 6) 97.

Despite the numerous limitations, the Turkish family is nevertheless not a forever qualifying family in the EU. In *Er*, the CJEU asserted that once a person has satisfied the conditions set out in Decision No 1/80, the Member States cannot adopt measures that would defeat the person's ability to exercise the rights arising therefrom.⁴⁹ After the conditions have been satisfied and regardless of whether the Turkish family constitutes a burden on the social security system, the Turkish family has 'qualified' into the host Member State. This 'qualification' is also exemplified by Article 7(2) of Decision 1/80 whereby the child of a Turkish worker retains the right to take up employment in the host Member State even after their worker parent has left either employment or the host Member State altogether.⁵⁰ Article 14, furthermore, precludes automatic expulsion of Turkish nationals following a criminal conviction.⁵¹

Once in the process of qualifying or having already qualified, the Turkish family is also a 'protected family'. First, in respect of decisions concerning the granting and renewing of residence permits and expulsion decisions, the EU standards of protection of fundamental rights apply,⁵² including the right to respect for private and family life by virtue of Article 7 of the EU Charter and Article 8(1) ECHR. Second, the 'standstill' clause in Article 41(1) of the EEC-Turkey AA provides stability for the family situation of Turkish families. The standstill clause precludes the Member States when regulating Turkish nationals' first entry from adopting new restrictions to their establishment and residence in their territories compared to what applied at the time when the Additional Protocol entered into force.⁵³ This means that even though the situation of Turkish workers and their family members in the EU is not comparable to that of EEA European Free Trade Association (EFTA) nationals as discussed in the next section, their legal situation is stable and foreseeable over time.

5.4 THE 'EQUIVALENT' EEA FAMILY

The EEA Agreement, which entered into force in 1994, provides more comprehensive free movement rights to TCNs than any other AA. The

⁴⁹ Case C-453/07 *Er* EU:C:2008:524.

⁵⁰ *Beqiraj and Ippolito* (n 30) 284.

⁵¹ Case C-373/03 *Aydinli* EU:C:2005:434, para 12.

⁵² Case C-256/11 *Dereci* EU:C:2011:734.

⁵³ Additional Protocol, signed in Brussels on 23 November 1970 and annexed to the Agreement establishing an Association between the European Economic Community and Turkey [1977] OJ L361/60.

general objective of the EEA Agreement is to create a ‘homogeneous European Economic Area’ based on equal conditions of competition and respect for the same rules in view of promoting ‘continuous and balanced strengthening of trade and economic relations’.⁵⁴ As specified by the CJEU in *Council v UK*,⁵⁵ the EEA Agreement shall provide ‘for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States’.⁵⁶

The EEA Agreement covers nearly the entire spectrum of the internal market, including the free movement of persons.⁵⁷ Directive 2004/38,⁵⁸ which complements the Treaty provisions governing the free movement of persons by, inter alia, setting out the limitations and conditions attached to the rights to free movement enjoyed by Union citizens, has been incorporated in the EEA Agreement.⁵⁹ By means of the Directive, the right of residence in the territory of the EEA is granted to workers holding the nationality of an EU Member State as well as Iceland, Liechtenstein, and Norway, their family members, students, pensioners, and persons with sufficient financial resources.

Save for Articles 20 and 21 TFEU, which are not incorporated in the EEA Agreement, the scope of free movement rights under the EEA Agreement with the applicable exceptions is equivalent to the free movement of EU citizens in the EU, including the coordination of social security systems. For example, the CJEU has deemed that the aims of the EEA Agreement as well as ‘the level of integration already attained’⁶⁰ support extending the scope of Regulation 883/2004⁶¹ to the EEA and thereby ensuring the same social conditions for the exercise of the free movement rights for EU citizens and EEA EFTA States’ nationals alike.⁶² A clear distinction is made with regard to

⁵⁴ Article 1(1) EEA Agreement.

⁵⁵ Case C-431/11 *United Kingdom v Council* (n 38), recalling Case C-452/01 *Ospelt and Schlössle Weissenberg* EU:C:2003:493, para 29.

⁵⁶ Case C-431/11 *United Kingdom v Council* (n 38), para 50.

⁵⁷ Articles 28 and 29 EEA Agreement.

⁵⁸ 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. The Directive is applicable in the EEA with certain terminological modifications as EU citizenship does not apply to the EEA EFTA States.

⁵⁹ EEA Joint Committee, decision of 7 December 2007 no 158/2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement.

⁶⁰ Case C-431/11 *United Kingdom v Council* (n 38), para 57.

⁶¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

⁶² *Ibid.*, paras 50 and 58.

Turkey.⁶³ The fact that the Regulation does not apply to Turkish workers has profound consequences for the conditions under which the latter can exercise their free movement in the EU. To Turkish workers, instead, Decision No 3/80 of the Association Council⁶⁴ applies, providing only limited rights.⁶⁵

Similarly to the EU, free movement in the EEA is 'to be exercised under objective conditions of freedom and dignity' and also to be 'granted to their family members, irrespective of nationality'.⁶⁶ Similarly to the case of Turkey, the right of residence of family members – either EU citizens in the EEA EFTA States or EEA EFTA State nationals in the EU – is a derived right dependent upon the EEA citizen who is the primary rights holder and intended not to 'discourage' the primary rights holder with family ties from exercising free movement.⁶⁷ In certain cases, such as divorce or when the Union citizen dies or leaves the host EEA state, a family member's right to reside may become autonomous.⁶⁸

In terms of free movement rights, the situation of EEA families is largely comparable to EU families. This owes to the extensive aims of the EEA Agreement, the broad catalogue of free movement and corollary rights provided therein, as well as the generous, homogeneity-driven case law of the EFTA Court.⁶⁹ In a string of significant case law, the EFTA Court has gone to lengths to grant Directive 2004/38 in the EEA the same effect as in the EU, despite the different citizenship contexts.

The first case in the sequence, *Clauder*, concerned the family reunification of a German citizen who had been a long-time resident in Liechtenstein, with his wife, also a German citizen.⁷⁰ Both of them being non-economically active (pensioners), the reunification was claimed to cause an additional burden on the host state's social assistance system. The issues at hand were the right to free movement and the right to family life. The EFTA Court confirmed the right of EEA nationals to move and reside freely within the territory of the EEA states regardless of economic activity, thereby protecting the right to family life as the necessary corollary to the right to free movement. In the following judgment in *Gunnarsson*, the EFTA Court confirmed the

⁶³ Case C-81/13 *United Kingdom v Council* (n 24), para 57.

⁶⁴ Decision No 3/80 adopted by the Association Council on 19 September 1980.

⁶⁵ Case C-81/13 *United Kingdom v Council* (n 24), para 24.

⁶⁶ Recital 5, Preamble to Directive 2004/38/EC (n 58).

⁶⁷ Case C-86/12 *Alokpa and Moudoulou* EU:C:2013:645, para 22.

⁶⁸ Recital 15, Preamble and Articles 12, 13 and 18 of Directive 2004/38/EC (n 58).

⁶⁹ See C. Tobler, 'Free movement of persons in the EU v. in the EEA: Of effect-related homogeneity and a reversed Polydor Principle' (2018) 3 *European Papers* 1429.

⁷⁰ Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216.

equivalence of the scope of free movement rights in the EEA with the free movement right of Union citizens irrespective of economic activity.⁷¹

The EFTA Court has been criticised for stretching the scope of rights granted to EEA nationals too far, going beyond the level of corresponding rights and obligations under EU law.⁷² Nevertheless, with *Jabbi*,⁷³ the EFTA Court continued the line of homogeneity-securing case law. In the case, the EFTA Court bypassed the CJEU's interpretation in *O. and B.* of Directive 2004/38.⁷⁴ In *O. and B.*, the CJEU interpreted Directive 2004/38 as not providing a derived right of residence to a family member of a Union citizen returning to their Member State of origin because in the EU context, Article 21(1) TFEU is instead applicable. This is, however, different with regard to the EEA. Via the controversial techniques of 'effect-related homogeneity',⁷⁵ or 'reverse *Polydor* principle',⁷⁶ the EFTA Court found that Directive 2004/38 shall be applied by analogy to a situation where an economically non-active EEA citizen returns with their TCN spouse to the EEA citizen's home country. In *Jabbi*, the same result was achieved, in essence, as in *O. and B.* but by different – and controversial – interpretational means. Whether all of the examples mentioned above will be upheld by the CJEU in the EU-pillar of the EEA is left to be seen. At this point, the interpretation of the EU's free movement rules in the EEA, especially by the EFTA Court, essentially follows the essence of the CJEU's ruling in *Metock*,⁷⁷ in which the Court established the 'protection of the family life' of Member State nationals as a necessary corollary to 'eliminat[ing] obstacles to the exercise of the fundamental freedoms' provided by the Treaties – an aim that goes beyond achieving economic aims by means of the free movement of workers. It is, thus, possible to say that the objectives and substantial provisions of the EEA Agreement regarding the extension of the EU internal market to the EEA EFTA States as well as their subsequent interpretation strongly uphold homogeneity in the situation of EEA families as compared to EU families.

⁷¹ Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254.

⁷² Advokatfirmaet Simonsen Vogt Wiig AS, 'Legal study on Norway's obligations under the EU Citizenship Directive 2004/38/EC' (4 January 2016) 139. <www.udi.no/globalassets/global/forskning-fou_i/annet/norways-obligations-eu-citizenship-directive.pdf>

⁷³ Case E-28/15 *Yankuba Jabbi v The Norwegian Government* [2016] EFTA Ct. Rep. 575, para 77.

⁷⁴ Case C-456/12 *O. and B.* EU:C:2014:135. The EFTA Court gave an equivalent ruling in Case E-4/19 *Campbell v The Norwegian Government* [2020] EFTA Ct. Rep. 21.

⁷⁵ C. Burke and Ó. Í. Hannesson, 'Citizenship by the backdoor? *Gunnarsson*' (2015) 52 *Common Market Law Review* 1111.

⁷⁶ Tobler (n 69).

⁷⁷ Case C-127/08 *Metock* EU:C:2008:449, para 56.

5.5 THE 'INTEGRATED FAMILY'?

The free movement of persons in the EU frequently collides with the interests of the Member States, including with regard to economic, social, and identity-related matters. Within the EU, tensions in the internal market concerning the free movement of persons are exemplified, for instance, by the transitional arrangements that restrict the free movement of workers from new Member States for a limited period of time, as well as the conditions that apply to the free movement of persons such as engagement in work or studies, or possession of sufficient funds. In the context of the free movement of persons, immigration concerns are considered but predominantly for the purpose of protecting the national social welfare systems. In the context of external migration, the conflict between the aim of enabling the free movement of workers and family reunification, on the one hand, and control over migration, integration, and the protection of national identity, on the other, is significantly more pronounced.⁷⁸

The EU is set out to constitute a space unifying differences between peoples, societies, and states on the basis of shared values, which are reflected in the terminology of integration in EU law: 'belonging, membership, common values and solidarity'.⁷⁹ With the notable exception of developed countries including the EEA EFTA States and Switzerland, the assumption of a shared basis of common values does not apply to non-Member States nor to their nationals who can be subject to civic integration requirements in the EU.⁸⁰ Civic integration requirements are a perfect exemplification of the tensions inherent to family reunification. Whereas the economic development of the Union calls for the free movement of workers including from outside the EU, the introduction of civic integration requirements assumes that the cultural differences between the third country and the EU are significant and that the integration of TCNs into the EU Member States' societies necessitates additional conditionality.

Traditionally, integration has been an issue determined by national laws controlling access to citizenship and, thereby, distinguishing the 'perfect

⁷⁸ P. Dąbrowska-Kłosińska, 'The right to family reunion vs integration conditions for third-country nationals' (2018) 20 *European Journal of Migration and Law* 251.

⁷⁹ S. Barbou des Places, 'The integrated person in EU law' in L. Azoulai, S. Barbou des Places, and E. Pataut (eds), *Constructing the person in EU law: Rights, roles, identities* (Hart Publishing 2016) 196.

⁸⁰ S. Carrera and A. Wiesbrock, 'Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy', CEPS 2009.

citizens' from the 'foreigners'.⁸¹ Integration has entered the realm of EU law as a result of the 'Europeanisation of immigration policy', which gives EU the role of controlling integration⁸² via, for example, residency and family reunification rights. The increasing attention to integration in the EU is accentuated by the creation in 2019 of the alarmistic-sounding post of a Commissioner and Commission vice-president for 'Protecting our European Way of Life'.

The aim of family reunification is to facilitate family life as well as help ensure the family's integration in the host Member State subject to restrictions laid down in law but is, as previously mentioned, not unconditional. Directive 2003/86 allows the Member States to reject an application of family reunification on grounds of public policy, public security, or public health.⁸³ Furthermore, a Member State may, while considering the child's best interests, set up additional requirements for 'overriding reasons in the public interest' regarding the family reunification of a TCN worker parent with minor-age children; the requirements include the consideration of ensuring successful integration, that the parent worker (1) has resided in the Member State for less than two years; (2) has an appropriate dwelling; (3) has sufficient income to support for themselves and their family; and (4) complies with integration-related measures established by the Member State.⁸⁴

Under certain conditions, Member States are permitted under Article 15(3) of Directive 2003/109 to establish integration requirements, such as those of civic integration for TCNs under national law.⁸⁵ When the conditions set by one Member State are met, the requirements are automatically satisfied within the entire EU.⁸⁶ 'Once' a TCN is integrated in one Member State, he or she is, thus, 'always' integrated in the entire EU notwithstanding the fact that integration is ultimately a matter of degree rather than absolute quantity.⁸⁷

⁸¹ S. Carrera, *In Search of the Perfect Citizen?* (Martinus Nijhoff 2009) 440–441. For criticism on how integration requirements perpetuate prejudices, see D. Kochenov, 'Mevrouw de Jong Gaat Eten: EU citizenship and the culture of prejudice' EUI Working Paper RSCAS 2011/06 <<https://cadmus.eui.eu/handle/1814/15774>>, 7.

⁸² Carrera (n 81) 441.

⁸³ Article 6(1) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

⁸⁴ See a summary of legislation and CJEU case law in Case C-379/20 Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice by Østre Landsret (Eastern High Court, Denmark), lodged on 11 August 2020, para 15.

⁸⁵ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

⁸⁶ Editorial Comments (n 3) 306.

⁸⁷ Barbou des Places (n 79) 189.

The CJEU has interpreted the lawfulness of the Member States' integration requirements on multiple occasions, often in the context of the EEC-Turkey AA. In *Dogan*, the CJEU considered the compatibility of a German requirement of basic language skills as a precondition for family reunification with the standstill clause in the EEC-Turkey AA. The Court recognised that the grounds put forward by the German government – the prevention of forced marriages and the promotion of integration – can constitute overriding reasons in the public interest but that German law goes beyond what is necessary to attain the objective as the dismissal of the application is automatic and does not allow for consideration of the specific circumstances of individual cases.⁸⁸

Another case, *Genç*,⁸⁹ concerned a Danish rule restricting the reunification in Denmark of TCN children above the age of fifteen with their sponsor parent, a TCN worker, after two years of legal residency unless justified by 'particularly compelling reasons', including 'regard for family unity'.⁹⁰ The rationale behind the Danish rule is to prevent granting residence rights to minor-age children who have had most of their upbringing and schooling in their country of origin and whose chances of successful integration in the Danish society are, therefore, low. Because of the lack of individual assessment of the applicants' integration potential on the basis of 'sufficiently precise, objective and non-discriminatory criteria',⁹¹ the Court deemed the rule to breach the standstill clause in the EEC-Turkey AA. The focus of the national rule is on the individual with little integration potential rather than on the family as a whole. In the absence of a possibility of family reunification with minor children, however, the entire family may be less likely to integrate fully into the host Member State society. In *Genç*, the Court upheld the standstill clause and, thereby, the function of families as supporting elements of integration in the host society.

In the more recent case *B*,⁹² the Court considered whether the age limit of fifteen years below which the child of a Turkish worker residing legally in the host Member State may apply for family reunification constitutes a 'new restriction' prohibited by the standstill clause in the EEC-Turkey AA, and, if so, whether it could be justified by the objective of ensuring successful integration of the TCN which could constitute an overriding reason in the public interest. In this case, the Court decided that since practice did not provide evidence of the Danish authorities 'systematically refusing' applications for family reunification from children aged fifteen and above, the

⁸⁸ Case C-138/13 *Dogan* EU:C:2014:2066.

⁸⁹ Case C-14/09 *Genç* EU:C:2010:57.

⁹⁰ Para 9(13) of the Law on aliens (Udlændingeloven).

⁹¹ *Genç* (n 89), para 66.

⁹² Case C-379/20 *B v Udlændingenævnet* EU:C:2021:660, para 18.

provision did violate the standstill clause but could be justified on legitimate grounds and was proportional to the aim pursued. A careful consideration of individual cases, thus, justifies restrictive national rules on family reunification. It is also implied that the supporting role of family members in achieving the aims of free movement of workers can be subject to the integration potential of individual family members. Family members with potential integration difficulties, such as a spouse with insufficient command of the official language of the Member State in question, or a child considered too old to successfully acquire the language, values, and professional or academic skills, are not considered to have the prospects of being able to sufficiently contribute to the Member State's society and labour market. They are not regarded as supporting the integration of the Turkish worker in the host Member State and, thereby, helping achieve the predominantly economic aims of the EEC-Turkey AA to a degree that would outweigh the potential costs for the host society.

Another important question to consider is whether, and to what extent, TCN families can maintain connections to and be successfully integrated in more than one country. In *A*, the Court held that the relationships that individuals can have with different countries, including EU Member States and third countries, are 'not mutually exclusive' and that the attachment of a third country (in this case Turkish) national to their country of origin cannot determine their prospects of integration.⁹³ A national provision based on a contrary claim was thus not considered suitable for achieving the aim of integration in the host society.⁹⁴ The question of an individual's attachment to more than one Member State is equally relevant in a purely EU or even national context,⁹⁵ with less at stake in terms of free movement rights than the effect of the distribution of rights.⁹⁶ Only in exceptional circumstances such as expulsion does it become acutely pertinent to establish a Member State to which the individual is primarily integrated.⁹⁷ Directive 2004/38 exemplifies the correlation between integration and rights. A similar correlation in the form of time scales, which indicate certain rights becoming available, applies to the qualifying periods of the family members of Turkish workers in an EU Member State's labour market.

It is generally accepted that EU citizens have connections to and are integrated in different Member States. Free movement, which has the effect

⁹³ Case C-89/18 *A v Udlændinge- og Integrationsministeriet* EU:C:2019:580, para 39.

⁹⁴ *Ibid*, para 42.

⁹⁵ Ganty (n 47) 178.

⁹⁶ See *Barbou des Places* (n 79) 183.

⁹⁷ *Ibid*, 182–183.

of leading to integration in different Member States, is strongly encouraged. Initially, participation in the labour force of the host Member State's society and contributing thereto in the form of paying taxes constituted a test of integration.⁹⁸ However, the emergence of a specific 'objective' of integration in EU law whereby rights are expected lead to the integration of an individual in the host Member State⁹⁹ has marked a departure from the economic foundation of free movement rights.¹⁰⁰ It is, thus, relevant in the EU's external and internal contexts alike.

The possibilities of family reunification and the independent rights of the Turkish workers' family members are limited by the predominantly economic rationale of the EEC-Turkey AA. Against the backdrop of the long period of stagnation in the Turkish EU accession process, there are currently no indications of a sudden deepening of the relationship between the EU and Turkey that would warrant a new impetus for the free movement of Turkish workers in the EU and the accompanying rights of family members.

The overall situation of Turkish workers and their families in the EU is comparable to long-term guests at a hotel. Turkish families are provided entry into the EU, but their key cards open the door to one room only – the one Member State in which the long-term residency under Directive 2003/109 is granted. The Turkish family is not considered part of the family (the 'collectively constituted society in a deeper sense')¹⁰¹ and cannot move themselves freely in the entire house ('the EU's full territory in a geographical sense').¹⁰² Yet the Turkish family is welcome to contribute to the society by participating in the labour force and demonstrating willingness and capability of integration into the society, upon the formal achievement of which – the acquisition of citizenship of an EU Member State by any of the family members – it can become a genuine 'EU family'.

5.6 THE 'REMOVED' BREXIT FAMILIES

Brexit has brought about a dramatic change in the status of EU families in the UK, and British families in the EU. Solving the situation of the families

⁹⁸ Case C-542/09 *Commission v The Netherlands* EU:C:2012:346, para 65.

⁹⁹ *Barbou des Places* (n 79) 181.

¹⁰⁰ Recital 4, Preamble to Council Directive 2003/109/EC (n 86) provides that 'The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty.'

¹⁰¹ Editorial Comments (n 3) 306.

¹⁰² *Ibid.*

finding themselves on the ‘other’ (but – importantly – not ‘wrong’) side of the EU-UK border was one of the priorities in the countless rounds of withdrawal negotiations. The importance of families in the midst of the Brexit turmoil is reflected in the Preamble to the Withdrawal Agreement, which recognises the necessity ‘to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights’ before the end of the transition period.¹⁰³ The fact that the EU’s AAs scarcely mention families highlights the significance of families (duly defined) in the unusual legal relationship between the EU and the UK as a former Member State.

Brexit families are distinct from the Turkish and the EEA families in that the emphasis in the comparison of their legal situation with that of EU families is on the differences rather than similarities. Putting an end to the free movement of persons was one of the main arguments in the Brexit debate that ended in the UK leaving the Union.¹⁰⁴ Yet, citizenship rights have been extended to individuals and families directly affected by Brexit with certain important distinctions. In the context of Brexit families, it is pertinent to ask how the former or sustained connection to the EU affects their legal situation.

Article 9(a) of the Withdrawal Agreement provides a broad definition of family members. A Brexit family is comprised of persons ‘irrespective of their nationality’ who are ‘family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC’ or other persons ‘whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence’.

As a former Member State, the relationship of the UK with the EU is substantially different from both Turkey and the EEA EFTA States. The focus in the Brexit process and in the reconstruction of a legal and political relationship post-Brexit has not (yet) been on strengthening ties, but rather on finding a satisfactory solution to protecting the individuals and families affected by the UK’s withdrawal and enabling them to maintain the

¹⁰³ Recital 6, Preamble to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384/1.

¹⁰⁴ See, for example, A. Łazowski, ‘When *Cives Europae* became bargaining chips: Free movement of persons in the Brexit negotiations’ (2018) 18 ERA Forum 469.

relationships and ties of integration to their states of residence and origin, as well as to their habitual lives, families, communities, and identities.¹⁰⁵

The Withdrawal Agreement contains provisions on EU citizens who have exercised their right to reside in the UK, UK citizens who have exercised that right in the EU before the end of transition period, as well as their family members including children born or adopted in the future.¹⁰⁶ Article 13 allows continued residence rights in the UK for EU nationals, EU national family members, and TCN family members, based indirectly on Directive 2004/38 and conditional upon participation in the labour force, being a student, having sufficient funds, or being a family member of a worker – hence, belonging to a qualified category.

More severely affected by Brexit are vulnerable persons falling outside of the qualified categories, such as family members with insecure career paths or working periods intertwined with periods of absence from the labour market.¹⁰⁷ These and other categories of people who, within the EU, would have been caught by the safety net of EU citizenship and the limited manifestation of financial solidarity are, in the post-Brexit reality, left without protection.¹⁰⁸

Under Article 15(3) of the Withdrawal Agreement, five years of legal residency grants EU and UK citizens and their family members a right to permanent residency on the conditions provided by EU free movement law; periods before as well as after the transition period shall be included. Under Directive 2004/38, the status of permanent residency can be lost after two years of absence from the host state whereas the Withdrawal Agreement allows for a five-year period of absence.¹⁰⁹ The status is not lost if either the EU or UK citizens or their family members change status, with the exception of family members whose rights of residence depend on the primary right holder after the end of the transition period and who cannot become primary right holders.¹¹⁰ This is a significant difference from Turkish workers who lose

¹⁰⁵ According to Spaventa, since UK citizens have built lives in the EU, as former EU citizens they should be treated at least as favourably as former family members: E. Spaventa 'Mice or horses? British citizens in the EU 27 after Brexit as "former EU citizens"' (2019) 44 *European Law Review* 589.

¹⁰⁶ Articles 10(1)(a) and 10(1)(e) of the Withdrawal Agreement.

¹⁰⁷ M. Dougan, 'So long, farewell, aufwiederssehen, goodbye: The UK's withdrawal package' (2020) 57 *Common Market Law Review* 631.

¹⁰⁸ C. O'Brien, 'Between the devil and the deep blue sea: Vulnerable EU citizens cast adrift in the UK post-Brexit' (2021) 58 *Common Market Law Review* 431, 439; For further examples, see Dougan, *ibid* 671–674.

¹⁰⁹ Article 15(1) of the Withdrawal Agreement.

¹¹⁰ Article 17(1) of the Withdrawal Agreement.

residency rights upon leaving the host Member State for a significant, but undefined, period of time without a valid reason such as maternity leave or sickness.¹¹¹ Whereas efforts have, thus, been made to ensure stability in their residence situation, Brexit has disrupted the previously relatively unbureaucratic life of EU-UK families. The Withdrawal Agreement provides a possibility for the respective host States to require EU or UK citizens and their family members to apply for a new residence status – the ‘settled status’ – which entails rights under the Agreement,¹¹² but which has also been subject to severe criticism.¹¹³

In stark contrast to the limitations applying to the family members of Turkish workers, the family members of EU or UK citizens holding the right of residence or permanent residence in the UK or the EU, respectively, enjoy an unconditional right to take up employment or self-employment in the host State.¹¹⁴ In situations where a family is separated by the primary carer of the children of an EU or UK worker leaving the host State, certain stability is ensured for the remaining family members. The children retain a right of residency until they reach the age of majority, or longer if the child continues their studies and needs ‘the presence and care of the primary carer’,¹¹⁵ hence not disrupting the daily lives of the family members.

Under EU law, the divided but not necessarily broken family receives special attention. By virtue of EU citizenship, individuals as well as families enjoy the freedom to choose how and where to conduct their family life. This is, for example, reflected in Regulation 883/2004, which enables the payment of family benefits and tax credits by the host Member State for the EU workers’ children residing abroad.¹¹⁶ The Regulation also applies in the EEA. The EU family can choose to be spread out across the Union, and beyond. The EU family has the freedom not to cohabit but to nevertheless function as an economic and social family unit, and also to reunite at will. By the powerful statement of the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, there are no ‘second-class workers in the EU’, and no ‘second-class children’.¹¹⁷ The payment of family benefits by a Member

¹¹¹ Article 6 of Decision 1/80.

¹¹² Article 18(1) of the Withdrawal Agreement.

¹¹³ See O’Brien (n 108).

¹¹⁴ Article 24(2) of the Withdrawal Agreement.

¹¹⁵ *Ibid.*

¹¹⁶ For statistics, see S. Kennedy, ‘Child Benefit and Child Tax Credit for children resident in other EEA countries’ Research Briefing, SN06561 <<https://commonslibrary.parliament.uk/research-briefings/sno6561/>>.

¹¹⁷ European Commission, ‘Indexation of family benefits: Commission opens infringement procedure against Austria’ Press release, IP/19/462 (24 January 2019) <ec.europa.eu/commission/presscorner/detail/en/IP_19_463>.

State for children residing in another Member State reaffirms the status of a family that does not cohabit on a daily, weekly, or even a monthly basis. Not bringing a family along to the host Member State constitutes, if it represents the choice of the family, an alternative means of supporting free movement in the EU.¹¹⁸ If the family members of an individual exercising their free movement right did not wish to or could not move from their Member State of origin, considering the family as a unit only if sharing a household on a permanent basis would obstruct the freely moving individual. The flexible approach to the physical location of individual family members offers space for individual considerations of the best interests of the family.

Brexit families are, overall, 'removed' families – not necessarily due to their rights gained under EU (citizenship) law but, potentially, due to their identity as 'EU families'. Differently from the Turkish and the EEA families, the Brexit families have a sustained and genuine connection to the EU, either via citizenship or place of residence, but the maintained rights of individuals and family members are not intended to reinforce integration, specifically. Instead, the sustained connection to the host State society via rights of residency and taking up employment as well as access to the social security systems serve the purpose of maintaining pre-existing family relationships. The rationale of the derived rights of family members in the cases of the Turkish and the EEA families to support the achievement of economic or further integration aims, respectively, is, thus, reversed in the case of Brexit.

5.7 CONCLUSION

On the basis of the expansion of EU integration beyond the Union's borders providing free movement rights to many groups other than EU citizens and accompanying rights to their family members, is it possible to conclude that an all-encompassing 'European family' is about to emerge? The examples of Turkish, EEA, and Brexit families indicate large variations in the situations and scope of rights of family members of freely moving workers based on whether the respective non-Member State's cooperation with the EU is based on predominantly economic rationales, guided by the aim of achieving deeper integration, or focused on maintaining a former status. However, the boundaries

¹¹⁸ In contrast, the CJEU interpreted Directive 2004/38 as not granting a right to long-term residence in Germany to a Japanese citizen whose wife had moved to Austria together with their child, and from whom he is now separated: Case C-40/11 *Iida* EU:C:2012:691. See also A. Tryfonidou, '(Further) signs of a turn of the tide in the CJEU's citizenship jurisprudence: Case C-40/11, *Iida*, Judgment of 8 November 2012' (2013) 20 *Maastricht Journal of European and Comparative Law* 302; and Chapter 2 by Alina Tryfonidou.

between 'EU families' and their 'non-EU' counterparts are more or less opaque depending on the legal arrangement. The mutually strong efforts on behalf of the EU as well as the EEA EFTA States and, in particular, the EFTA Court are leading to increasingly homogeneous conditions for the purpose of exercising free movement rights by EU and EEA families. Furthermore, over time, as witnessed by the 'qualifying' Turkish families, the dissimilarities between the rights of EU and non-EU families become less distinct. This is different in the case of Brexit families whose family status is conserved with a focus not on deepening but on maintaining rights previously enjoyed.

As noted above, to appreciate whether the conditions of non-EU families in the EU should warrant alignment with the situation of EU families, it is necessary to consider the extent to which TCNs carry a deeper notion of European identity and purpose. In the EU, TCN workers and, indirectly, their families contribute to achieving both the core aim of the EU integration project – the creation of the internal market – and its expansion to non-Member States. The role of the freely moving workers and their families is instrumental to achieving the latter. Furthermore, there is no reason to assume that a TCN individual cannot foster a sense of belonging and identity towards an EU Member State to a level comparable to an EU citizen exercising their right to free movement. Brexit constitutes a distinctive example of truly mixed identities across the EU–UK borders.

It is important to bear in mind that differently from an 'individual' or 'citizen', the concept of an 'EU family' or a 'non-EU family' is inherently flexible. A 'non-EU family', too, is a flexible category in that a family is to certain extent autonomous from its country of origin. One or more members of a family can make use of free movement rights, take up work in an EU Member State, become a permanent resident, and, eventually, assume that Member State's citizenship, thereby becoming an EU citizen and granting the entire family the status of an 'EU family'. During this process, on the individual level, the economic rationale of a TCN to work in the EU is replaced by a level of identity with the host society and integration therein. The 'EU family' is, thus, a concept less closely tied to the processes of membership, accession, and withdrawal from the EU and per definition more open to welcoming new members.