The Right of Residence of Third Country Spouses who Became Victims of Domestic Violence in the Scope of Application of the Free Movement Directive – *Legal Analysis of the NA Case*

LAURA GYENEY

Associate Professor, Pázmány Péter Catholic University, Faculty of Law

The NA case focuses on the right to remain in a host Member State for the TCN spouse of a migrant Union citizen who fell victim of domestic violence during their marriage with the Union citizen, but where the abuser had left the member state in question before the dissolution of the marriage. The case reveals gap in the relevant EU framework, while it provides an opportunity to examine the broader question of the relation between supranational citizenship and the rights of TCNs under EU law.

Keywords: free movement of Union citizens, domestic violence, retention of the right of residence by third country family members

1. Introduction

There are an increasing number of cases brought before the European Court of Justice whose facts are regulated by provisions that a priori belong to the competence of the member states, including those which govern the entry and residence rights of third country citizens, however, they are closely related to the right of EU nationals to free movement and residence. To approach the issue from another aspect, the enforcement of *the supranational rights of EU citizens* requires, in certain cases, that the EU law be applied in some highly sensitive areas which are traditionally within the regulatory competence of the member states. Such issues include, for example, the loss of member state citizenship,[1] the area of family law[2] or immigration policy[3]as we will also see in this paper.

The case that is discussed in the paper, i.e. the *NA* case[4] also belongs to the above group as it deals with the right of residence of third country spouses. The reason why it deserves attention is the very subject of it, i.e. the issue of domestic violence which has just recently come to the attention of the Court,[5] but raises serious legal and moral dilemmas.

[1] Case 135/08, *Janko Rottman kontra Freistaat Bayern*, [2010] I-01449.

[2] See the pending *Coman case*, Case 673/16.

[3] Case 34/19, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm).* [2010] I-01177.

[4] Case 115/15, *Secretary of State for the Home Department v NA, not yet reported.*

[5] Kuldip Singh was the first case which focused on the issue of domestic violence. Kuldip Singh judgment, Case 218/14, *Kuldip Singh and Others v Minister for Justice and Equality*, not yet published.

In the focus of the case, there is the issue of the right of residence of third country nationals in the host countries who fell victim to domestic violence during their marriage with EU citizens, but where the abuser had left the member state in question before the dissolution of the marriage. According to the 2004/38/EC Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the EU member states[6] (hereinafter referred to as: the Free Movement Directive) as a general rule, the victim may retain his/her right of residence after the dissolution of the marriage, however, it is not clarified by the directive whether this is so when the abuser, who is an EU citizen, leaves the territory of the host country prior to divorce, thus interrupting the process of the legality of residence. So, in fact, it is the loophole left by the Free Movement Directive that requires legal interpretation from the European Court of Justice.

2. The Issue of Domestic Violence in View of the Free Movement of EU Nationals: the NA Case

2.1. The Facts of the Case and the Application for Preliminary Ruling

A Pakistani national NA married a German national KA in September 2003, then the married couple moved to the United Kingdom in May 2004, where the husband obtained an employee legal status. The relationship of the spouses later deteriorated. NA fell victim to domestic violence several times. In October 2006, KA left the common residence of the married couple, then in December 2006, he also left the host country, i.e. the United Kingdom. The married couple have two daughters, who were born in the territory of the United Kingdom and are German nationals. KA wished to get a divorce from NA through a Talaq pronounced in Karachi, Pakistan in March 2007. It was eventually NA who launched the procedure for the dissolution of the marriage in September 2008, in the United Kingdom. The dissolution of the marriage took binding effect on August 4, 2009. It was NA who was granted custody over the two children. The two daughters had attended school in the United Kingdom since January 2009 and September 2010, respectively. Then NA applied for permanent residence in the United Kingdom, which was rejected with the justification that NA was not authorized to retain her right of residence pursuant to the provisions set out in Section (2), Article 13 of the Free Movement Directive.

The Court of Appeal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

a) In its first question, the Court expected an answer to whether the provisions set out in Point c) of the first subsection of Section (2), Article 13 of the Free Movement Directive should be interpreted as follows: in case a third country national who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, is entitled to retain her right of residence in the host Member State, on the basis of that provision, where the divorce post-dates the departure of the Union citizen spouse from that Member State.

b) In its second and third questions, the point was whether he/she can retain his/her right of residence based on the primary right, as long as he/she is not allowed to retain this right of residence pursuant to

[6] Directive 2004/38/EC (30 April 2004) of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77; Hungarian special edition, chapter 5, volume 5, p. 46).

the Free Movement Directive. Thus, the question sought ascertain whether Article(s) 20 and /or 21 of the Treaty on the Functioning of the European Union, (hereinafter referred to as TFEU) which ensures the EU citizen's legal status and the related right to free movement, should be interpreted in such a way that they confer a right of residence in the host member state on a minor Union citizen who has resided since birth in that Member State but is not a national of that Member State, and on the parent, a third-country national, who has sole custody of that minor.7

c) The fourth question asked by the Court was targeted at the case law on the residence of the family members of ex-EU workers, more precisely, whether the provisions set out in Article 12 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community 8 should be interpreted in such a way that a child and a third-country national parent who has sole custody of the child are entitled to a right of residence in the host Member State, under that provision, in a situation, such as that in the main proceedings, where the other parent is a Union citizen and has worked in that Member State, but has ceased to reside there before the date when the child begins to attend school in that Member State.

2.2. The Legal Context of the Preliminary Ruling

The legal documents on the free movement of EU citizens do not provide any original rights to the non-EU nationals. This means that they can only obtain the right of residence in the territory of a member state in a *derivative* way, through a tie to an EU citizen family member. As is put by Section (2), Article 7 of the Free Movement Directive,"[…] the right of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State […]".[9]

The residence of non-EU citizen family members based on a derivative right, however, may cause several problems. The question arises what happens, for example, if the family ties that serve as the legal grounds for the residence are terminated or perhaps weakened during the residence in the host country, so the married couple gets divorced, or they separate from each other with the intention of a divorce. Of course, it is also possible that the EU citizen spouse simply leaves the territory of the host country prior to the divorce[10], as is well shown by the above-discussed *NA* case as well.

The secondary EU law, including the Free Movement Directive aims to settle the above groups of cases under the titles "Retaining the rights of residence of family members [...]". Thus, it gives a detailed list of the cases in which the family members who earlier used to stay in the country on the basis of a derivative right can retain their rights of residence. Article 13 of the Directive, which is relevant for this case, deals with the issues related to the dissolution of marriage, more precisely, it is Point (c), Section (2) of this Article that touches upon the question of domestic violence. Pursuant to the provision in

[7] As long as the above-mentioned persons are entitled to a right of residence in this member state pursuant to national or international law.

[8] Regulation (EEC) No 1612/68 of the Council of 15 October, 1968 on freedom of movement for workers within the Community OJ L 257, 19.10.1968, pp. 2–12 (DE, FR, IT, NL). This regulation has since been replaced 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 (OJ L 141, 27.5.2011, pp. 1–12).

[9] Article 7(2) of the Free Movement Directive.

[10]This may happen due to the deterioration of the marriage or for a completely different reason as well, for example, the EU citizen spouse takes up employment in another member state.

question, the divorce does not affect the right of residence of the non-member state citizen if "this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting". [11] In these cases, the non-member state citizen may retain his right of residence and may later obtain a permanent right of residence, as long as he fulfills the other criteria set by the directive.

This in itself would not bring up a serious question of interpretation. However, what still makes the interpretation of Article 13 difficult for the Court is Article 12 of the Directive, more precisely, the joint interpretation of these two articles (Articles 12-13). The latter defines rules for the cases of the death of the EU citizen or their departure from the territory of the host country. While, however, Article 12 expressly specifies the retention of the right of residence with regard to the member state citizen family member in the case of the departure of the EU citizen from the member state, it says nothing about the legal consequences of the same with regard to a third country national family member. Also, it basically leaves the question open what will happen if the two factual situations, i.e. the dissolution of the marriage and the circumstance of the prior departure, occur jointly. The directive gives no guidance whatsoever as to this and it does not specify whether either of the two provisions has priority over the other.

However, it is this very issue that is in the focus of the *NA* case, i.e. the retention of the right of residence of an EU national's third country spouse, in case that the EU citizen has left the member state in question with no intention of returning and after his departure, a procedure for the dissolution of marriage has been launched. This question had partially been answered by the Court in its *Kuldip Singh* judgment[12], which preceded the *NA* case.

In this decision, the Court declared that as long as an EU citizen departs from the host member state before the judicial proceedings aimed at the dissolution of marriage commence, this will automatically involve the lapsing of the derivative right of residence of the third country spouse, which thus cannot be retained any more based on the provisions set out in Article 13 of the Directive. However, in the case that we have referred, unlike in the current case, the claimants were always such third country men whose EU citizen spouses had departed from the host country before the divorce case was launched, and no violence whatsoever occurred during the marriage.

In the *NA* case, the Court is seeking an answer to the question what will happen if a third country wife becomes the victim of abuse during the marriage and the EU citizen husband leaves the host member state after committing such violent act but before the dissolution of the marriage. The question arises whether the departure of the EU citizen spouse, at least by taking the content of the above *Singh* judgment into account, will immediately terminate the status of the non-EU citizen as per the Free Movement Directive, even if the circumstance of domestic violence exists, dealing a death blow to the cases of retention of the right of residence as listed in Article 13. All this is asked in light of the fact that in accordance with the Court's earlier case law, the third country citizen will continue to be entitled to the right of residence in case the married couple separates in the host member state. [13]

[11] Point (c), Section (2), Article 13 of the Directive.

[12] Case C-218/14.

[13] It was declared by the Court very early, i.e. in relation to the Diatta case that a third country citizen's permanent separation from their spouse does not affect the right of residence of this person either. Thus, this person may reside in the host member state even after the separation, up to the point when the divorce is declared in a binding decision. C- 267/83, *Aissatou Diatta v Land Berlin*, [1985] 567.

The overall picture is further nuanced by the jurisprudence of the Court regarding third country citizens who raise children who are EU citizens, which expands the right of residence of family members in the territory of the host country to cases that go beyond those listed in the Free Movement Directive. Thus, taking the provisions set out in Regulation No. 1612/68 on the freedom of movement for workers within the Community referred to above into account, it was declared by the Court that the child of a migrant worker has a right of residence if he or she wishes to attend educational courses in the host member State, even if the migrant worker no longer resides or works in that member State. That right of residence extends also to the parent who is the child's primary carer.[14] Furthermore, it was stipulated by the Court that a third country citizen parent who is a primary carer of an EU citizen child is also entitled to the right of residence in the member state where the child resides[15], even if the case does not involve a cross border element[16] (*Zambrano* case).[17] This last conclusion comes from the Court's famous *Zambrano* doctrine, according to which Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.[18]

In light of the above, the *NA* case in question allows the Court to examine the theoretical considerations underlying the rights of residence granted to third country citizens and also, to make an attempt at eliminating the tension that arises from the simultaneous exercise of supranational EU citizen's rights and traditional member state competences in the field of immigration policy.

2.2.1. The Opinion of the Advocate General

In his opinion, Advocate General Wathelet primarily responded to the concept brought up by the Government of the United Kingdom, according to which the second and third questions asked by the referring forum are hypothetical in character, since the right of residence of NA and her children had already been recognized in the United Kingdom based on Article 8 of the European Convention of Human Rights (hereinafter referred to as ECHR).[19] In his response, the Advocate General very rightly pointed out that the referred questions are obviously not hypothetical, as the question whether NA is entitled to receive protection of a higher degree than the one offered by international law, one which is directly based on EU law,[20] will presumably be determined on the basis of the responses given to them.

Then the Advocate General went on to answer the first question, *i.e.* whether NA should be able to prove, in order to be able to retain her right of residence, that her EU citizen spouse was still residing in the host country at the time of the dissolution of their marriage [see Point (a)]. Wathelet began his

[14] C-413/09, *Baumbast and R v Secretary of State for the Home Department***,** [2002] I-07091; C-480/08, *Maria Teixeira kontra London Borough of Lambeth és Secretary of State for the Home Department*, [2010] I-01107.

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

[16] The parents will be entitled to this right even if the child in question never before used the right to free movement.

[17] Case C-34/19.

[18] According to the Court, a refusal to grant a right of residence and also a work permit to a third-country national who has dependent minor children in the Member State where those children are nationals and reside, has such an effect. It must be assumed that a refusal (of a right of residence to such a person) would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents. Similarly, without a work permit such a person would risk not having sufficient resources to provide for himself and his family. That would also result in the children having to leave the territory of the Union.

[19] According to the standpoint taken by the Dutch government, this conclusion makes all the questions hypothetical.

[20] Case C- 115/15. Opinion of Advocate General Wathelet, paras 26-31.

investigation into the issue by analyzing the content of the Court's above-cited *Kuldip Singh* decision.[21] The situation is that in this decision, the fundamental principle was established, i.e. that the right of residence of the family members of an EU citizen who are not the citizens of any member state will cease immediately when the EU citizen to whom the right of residence is related leaves the territory of the host member state. [22]

The Advocate General, not paying any special attention to the problems of the revival of the right, or to the relationship between Articles 12 and 13, in answering the question, focused on Article 13 and the underlying considerations. He declared very simply that any potentially occurring events within the framework of the proceedings aimed at the dissolution of marriage allow the retention of the right of residence of the family members, even despite the above.[23] At this point, he found it important to emphasize that it is not the divorce in itself but the special circumstances described in detail in Section (2), Article 13 of Directive No. 2004/38, thus in the current case, the occurrence of the element of domestic violence as the "root cause" that maintains the right of residence of the family members.[24] Relying on the teleological interpretation, he found that the point of the provision is the very circumstance that the derivative right of residence of an EU citizen is converted into a personal right of residence if certain circumstances that warrant protection, such as domestic violence, exist.[25] This is what is referred to by Preamble (15) of the Directive too, which declares that "[the] family members should be legally safeguarded in the event of […] divorce […]."[26]

The Advocate General also stresses the protective nature of the provision in question when he says that "the loss of the derived right of residence […] could be used as a means of exerting pressure to stop the divorce at a time when the circumstances are in themselves enough to wear the victim down psychologically and, in any event, to engender fear of the perpetrator of the violence." [27]

Finally, stressing his standpoint, he also defines the negative consequences of an interpretation that is contrary to the above, from the aspect of the implementation of a criminal procedure, such as the potential failure to call the abuser to account.[28] Thus, to sum up the above, according to the position taken by the Advocate General, as long as the marriage is dissolved after the occurrence of domestic violence, it is absolutely irrelevant with regard to the retention of the right of residence where the EU citizen spouse resided when the divorce case was launched.

The second and third questions were dealt with jointly by the Advocate General's opinion as well. In the course of this, it had to be answered whether the refusal to grant a right of residence to a minor EU citizen or a third country citizen parent having sole custody over this child runs contrary to Article 20 or Article 21 of the Treaty [see Point (b)]. In answering this question, the Advocate General first of all relied on the Court's earlier *Alokpa* judgment,[29] in which it was established that the non-EU citizen who has sole responsibility for her minor children who are EU citizens may reside in the host member state

[21] Case C-218/14.

[22] Ibid. para 62.

[23] Case C- 115/15. Opinion of Advocate General Wathelet, para 58.

[24] Ibid. paras 54-61.

[25] Ibid. para 75.

[26] Directive, Preamble Point 15.

[27] Case C- 115/15. Opinion of Advocate General Wathelet, para 70.

[28] Ibid. para 72.

[29] C- 86/12, *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* , not yet reported.

with his or her children by virtue of Article 21 of the TFEU, as long as the EU citizen meets the criteria specified in the Free Movement Directive. However, according to the Advocate General's Opinion, it is for the national court to determine whether NA's children meet the criteria laid down in Section (1), Article 7 of the Directive, particularly the requirement to have sufficient financial means.[30] If this criterion is not met, the refusal to grant the right of residence will not breach Article 21 of the TFEU. Then the Advocate General endeavored to examine the referred question from the aspect of the conclusions of the *Alokpa* judgment regarding Article 20 of the TFEU. In the course of this, the Court, taking the *Zambrano* doctrine into account, examined whether it was still possible to grant the right of residence on an exceptional basis if the refusal of such grant would result in the children's having to leave the territory of the European Union, depriving them of the genuine enjoyment of the substance of the rights conferred by virtue of that status.[31]

Although the 'interpretation criterion on the deprivation of the very point of the rights' has been specified since the *Dereci* case,[32] the Advocate General still thinks that the question arises whether the obligation to depart from the territory of the European Union is to be understood *in legal terms* or *in concreto*, *i.e.* with regard to the facts.[33] In his view, the possibility for a third country citizen and his or her EU citizen children to move to the member state according to the citizenship of the children should not exclusively exist "in the abstract".[34] As is very aptly put by Wathelet, NA's children have constructed their citizenship in the United Kingdom,[35] so they cannot reasonably be expected to reside in a member state of which they do not even speak the language, which is otherwise the one according to their citizenship. However, the examination of these factual circumstances is the responsibility of the national court, which may thus mean a threat to the theoretical test of the *Zambrano doctrine*.[36]

In his opinion, Wathelet touched upon the question of taking the provisions on fundamental rights (Article 7 of the EU Charter of Fundamental Rights, Article 8 of the ECHR) into account as well in applying the above provisions. The starting point in the argumentation of the Advocate General was again the Court's statement made on the *Dereci case*, *i.e.* "if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter." [37] Wathelet thinks, however, that we also act under the effect of European Union law when the Court establishes that the refusal to grant the right of residence due to certain criteria is not contrary to

[30] In the course of this, para 27 of the Alokpa judgment, as well as paras 28-30 of the Zu and Chen judgment were cited, according to which the source of the financial means is absolutely irrelevant, so these can also be secured by the third country parents of the affected minor citizens. Case C - 115/15. Opinion of Advocate General Wathelet, para 92.

[31]Ibid. paras 95-96.

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

[33] Case C - 115/15. Opinion of Advocate General Wathelet, para 98.

[34] Ibid, para 114.

[35] Ibid, para 115.

[36] It should be noted here that after the Rendon Marín judgment following the NA case, in its Zambrano test, the Luxembourg Court did not exclude the possibility for a family to move to the country of origin of the EU national child. Although it was indicated by the claimant that he had nothing to do with Poland and that they did not speak Polish, the Court did not conduct an in-depth analysis of the question but what it actually did was that it left it to the court of the member state to decide whether a parent who is in fact a primary carer of his children can be entitled to the derivative right of accompanying his children to Poland, and reside with them in Poland, as the case may be. C-165/14, *Alfredo Rendón Marín v Administración del Estado*, para 79.

[37] Case C-256/11 Dereci EU:C:2011:734, para 72.

the provisions set out by the Treaty. Consequently, if it was already established by court, as happened in the case in question too, that the deportation of an EU citizen would violate Article 8 of the ECHR, the national court does have to take this into account when the test of the 'deprivation of the very point of rights' is considered. [38]

Finally, the Advocate General answered the fourth question [see Point (c)] in the affirmative. He established that Article 12 of Regulation No. 1612/68, must be interpreted as meaning that a child and his or her primary carer enjoy a right of residence in the host Member State where the parent who is a Union citizen and has worked in that Member State has ceased to reside in that Member State before the child enters education there. In his argumentation, he referred to the Court's earlier case law, more precisely, to its *Teixeira*[39] and *Ibrahim*[40] decisions.

2.3. The Court's Considerations on the Questions Submitted for Preliminary Ruling

As regards the first question [see Point (a)], the Court significantly deviated from the content of the opinion of the Advocate General. As a starting point, they used the points declared in the Court's earlier *Singh* judgment,[41] which considerations can also be applied to the current case in the Court's opinion. Thus, in accordance with this, the right of residence of a third country spouse remaining in the host member state will cease to exist when the EU citizen spouse departs from this country. This right cannot be revived by applying for the dissolution of the marriage either, as Article 13 of directive No. 2004/38 only mentions the *retention* of the existing right of residence. Thus, the EU citizen spouse of a non-EU citizen shall stay in the host member state until the court proceedings aimed at the dissolution of the marriage are launched, in order to ensure that this third country citizen retains their right of residence in this member state under Section (2), Article 13 of this directive.[42]

The Court may just as well have stopped at this point in answering the first question, but it still found it necessary to support its position by some further arguments. Thus, in the justification of its judgment, it went on to interpret Section (2) of Article 13 and especially, its Point (c), during which it practically demonstrated the entire repertoire of the interpretation methods. As regards the grammatical interpretation, it pointed out that Section (2) of Article 13 exclusively discusses the retention of the right of residence.[43] Then it stressed the exceptional nature of the provision in question, as the dissolution of the marriage does not involve the loss of the right of residence of third country citizens in the regulated groups of cases, which practice deviates from the general rule. This is so despite the fact that after the dissolution of the marriage, the former citizens do not fulfill the criteria listed in Section (2) of Article

[38] Case C-115/15, Opinion of Advocate General Wathelet, para 124.

[39] According to the reasoning of the judgment, the goal of Article 12 of regulation No. 1612/68 is, particularly, to ensure that the children of a Community worker may commence and, as the case may be, complete their studies in the host member state even if the worker is not employed in the member state in question any more. C- 480/08, para 51.

[40] In the judgment in question, the Court reaffirmed, that as is apparent from the very wording of Article 12 of Regulation No1612/68, the right to equal treatment in respect of access to education is not limited to children of migrant workers. It applies also to children of former migrant workers. C-310/08, *London Borough of Harrow kontra Nimco Hassan Ibrahim and Secretary of State for the Home Department*, [2010] I-01065, para 39.

[41] Case C-218/14.

[42] Case C-115/15 paras 34-35.

[43] Ibid. para 40.

7 of the directive any more, as they are no more the family members of the EU citizens who exercise the right of free movement.[44] The judgment briefly touches upon the contents of Article 12 as well, namely that the legislator did not wish to provide protection to third country family members for the case of the departure of the EU citizen relative from the host member state. As regards the legislator's intention, the judgment, similarly to the Advocate General's opinion, emphasizes the objective of Article 13, which is also stipulated in the preamble, i.e. that it aims to provide special protection for the case of divorce, thus granting a right of residence on a personal basis.[45] This objective is supported by historical data as well when it is pointed out that in the course of the elaboration of the proposed Free Movement Directive,[46] it was an express criterion to provide this special legal protection to those whose right of residence is attached to the family ties established through marriage, with a view to avoiding blackmailing. According to the proposed directive, however, "such protection will only be necessary if the marriage is dissolved with binding effect, considering that the separation does not affect the right of residence of the spouse who is a third country citizen".[47] Placing a rather strong emphasis on this statement, the Court has concluded that protection is only and exclusively subordinated to the dissolution of the marriage. It is after summarizing all this that the Court comes to the ultimate conclusion that a third country family member may only invoke the retention of the right of residence if the EU citizen was residing in the territory of the host country not only at the time of committing the act but also at the time of launching the divorce proceedings.

After answering the first question, the Court went on to examine the fourth question [see Point (c)]. In answering this question, the Court cites the *Teixeira and Ibrahim* cases[48], which also served as a ground for the opinion of the Advocate General, and as a result of which it reaches a conclusion that is in line with the Advocate General's opinion. Thus, the Court stipulates that the children of the ex migrant worker, namely those of KA, who have been residing in the host member state since they were born, are entitled to the right of pursuing studies and also, to the related right of residence. So, the fact whether the previously migrant worker parent resides in the member state in question when his or her child starts pursuing his or her studies, has no relevance whatsoever in this respect. [49]

Then the judgment started to examine the issue of NA's right of residence. The outcome of this examination also agrees with the opinion of the Advocate General, in that the right of residence of the children involves the right of residence of the parent who is a primary carer of the child, in this case, NA's right of residence. In order to support this, the Court cites the *Baumbast and R* case, which is of fundamental significance.[50]

Finally, the Court goes on to jointly examine the second and third questions [see Point (b)]. Contrary to the opinion filed by the Advocate General, it first of all studies the applicability of the *Zambrano doctrine* to the case in question. In the course of this, it repeats what it declared earlier, i.e. that those national measures which involve depriving the EU citizens of the genuine enjoyment of the substance

[44] The Free Movement Directive does not provide the right of entry to and residence in the member states to all third country nationals, only to those who are the family members of an EU citizen who exercises his/her right to free movement through settlement in a member state that is different from the one of which he/she is a national, paras 41-42 of the judgment.

[45] Ibid. para 45.

[46] COM (2001) 257 final.

[47] Case 115/15 paras 46-47.

[48] Case 480/08 and C-310/08.

[49] Case 115/15 para 63.

[50] Ibid. para 65, C-413/99 para 71.

of the rights ensured through this EU citizen's legal status run counter to Article 20 of the TFEU. Also, it stresses the exceptional nature of this criterion, i.e. that it exclusively refers to such situations where the secondary law that refers to the right of residence of third country citizens is not applicable.[51] However, since NA and her children are entitled to residence in the United Kingdom on the basis of the secondary law, including Regulation No. 1612/68, the exceptionality criterion laid down in the *Zambrano* judgment is not met according to the Court.

Then the European Court of Justice goes on to examine the applicability of the freedom of movement and right of residence as specified in Article 21 of the TFEU to the case in question, in the course of which the Court basically follows the line of thought of the Advocate General's opinion. Thus, it stipulates the necessity of meeting the criterion of sufficient financial means required by the Free Movement Directive.[52] However, the Court leaves the examination of this circumstance to the national court.

Finally, the Court cites the principle that is well-known from the case law of the Court and which was also voiced in the Advocate General's opinion, i.e. that the parent who is the primary carer of a minor EU citizen is also entitled to the right of residence with a view to ensuring the efficient exercise of the rights arising from EU citizenship.[53] So, if the criteria required by the directive, primarily those which refer to the need for sufficient financial resources, are met, NA as the parent who is a primary carer of the children may be granted residence in the territory of the host member state pursuant to Article 21 of the TFEU.

2.4. Criticism of the Argumentation

As was also pointed out by Advocate General Wathelet when he examined the acceptability of the question, it is by far not irrelevant with regard to this case whether NA and her children are only provided protection granted by international law,[54] or whether their right of residence is directly based on *EU law*, and if so, on what *legal source* of the latter, since the individual legal sources provide them different ancillary rights,[55] or they do not provide any rights at all.

So, the subject of the case is primarily not the question whether NA continues to be entitled to stay in the territory of the member state but it is rather to find out what the actual legal grounds of her stay are. The situation is that after the divorce, NA applied for the legal status of *permanent residence*, without any success, in light of the current judgment.

The legal status of permanent residence can be obtained by five years of continuous and lawful residence under the Free Movement Directive. The question arises whether this right also extends to those whose residence is ensured only derivatively under this directive. The answer given by Advocate General Wathelet in this respect is clearly affirmative, what is more, according to his position, the fulfillment of the criteria of permanent residence is also possible for NA through exercising several derivative rights

[51] Ibid paras 70-72.

[52] In relation to this, it is declared that this can also come from a third country citizen, i.e. the source of these means is absolutely irrelevant. Case 115/15 paras 76-78.

[53] At this point, the Court quotes the above-cited Chen and Alokpa judgments, case C-86/12 paras 79-80.

[54] Case C–115/15. Opinion of Advocate General Wathelet, para 30.

[55] For example, the use of some social security and non-contributory benefits in addition to residence.

of residence related to different EU citizens. However, it should also be pointed out that this criterion cannot be met in the case of those who are entitled to stay in the territory of the member state on the basis of Regulation (EEC) No. 1612/68 of the Council on freedom of movement for workers within the Community rather than on the basis of the Directive itself, at least pursuant to the Court's *Alarape* decision.[56] This is why it has critical importance whether it is the directive itself or the legislation in question that will serve as the basis for NA's right of residence.

In light of the above, it is unfortunate that according to the Court's decision, NA could exclusively obtain a right of residence in the territory of the host country on the basis of the above referred legislation, in her capacity as a primary carer of her children.[57] Consequently, the third country citizen who does not have a child from his or her marriage,[58] or who does not obtain parental supervisory rights over his or her children, ad absurdum, whose EU citizen spouse forcibly takes their common child from the country in question when the latter departs from the host member state, will basically remain without protection in such a case. Similarly, if the EU citizen spouse happens to have worked in the territory of the host member state as a self employed rather than as an employee earlier, the third country spouse is not eligible to protection under the EU law again, at least pursuant to the content of the Court's *Czop* decision.[59]

In light of the above, the statement of the Court, according to which in order to be able to retain the right of residence of a third country citizen as stipulated in the directive, the EU citizen spouse should be staying in the territory of the host member state when the divorce case is launched, should be examined more thoroughly.

2.4.1. Criticism of the Argumentation of the European Court of Justice regarding the Lapsing of the Right of Residence according to the Directive

The line of thoughts of the European Court of Justice with regard to the lapsing of the right of residence according to the directive is broken at several points, it is erroneous and imperfect. Thus, first of all, and contrary to the statement made by the Court, it is not so obvious that the move of an EU citizen to another member state will simply make the regulation relating to the dissolution of a marriage in the Free Movement Directive, i.e. the contents of Article 13 invalid. The above position taken by the Court

[56] In its judgment, the Court declared that the periods of residence spent by the third country family members of an EU citizen in one of the host member states exclusively pursuant to Article 12 of Regulation No. 1612/68, and without fulfilling the criteria required by directive 2004/38 with regard to obtaining the right of residence, shall not be taken into account in obtaining a permanent right of residence as per the aforementioned directive by these family members. C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*, not yet reported.

[57] Not as a victim of domestic violence, who may retain their right of residence after the divorce pursuant to the directive.

[58] The Court, for example, did not attach any particular significance to the fact that at the time of the divorce, NA was only expecting their second child.

[59] In the Czop judgment, the Court declared that Article 12 of Regulation (EEC) No. 1612/68 of the Council on the freedom of movement for workers within the Community provides the right of residence only to the migrant worker who is a primary carer of his or her child who pursues studies in the host member state, without providing such a right to a self employed who in fact exercises parental supervisory rights over his or her child. C-147/11, *Secretary of State for Work and Pensions v Lucja Czop and Margita Punakova*, not yet reported.

is based on their earlier *Singh* judgment, which decision[60] has received quite a number of critical remarks by the representatives of legal literature. [61]

These critical remarks as we will see it below are primarily targeted at an interpretation of Section (2) of Article 7 offered by the European Court of Justice, which makes the right of residence of the family member dependent on the continuous stay of the EU citizen in the host member state.[62] Similar doubts have emerged with regard to the Court's legal interpretation of Section (2), Article 13 of the Directive. The situation is that the Court artificially connects the terms "commencement of divorce" and "residence in the host member state" mentioned in Point (a), Section (2) of Article 13 in the justification of the Singh judgment, which serves as the basis for the NA decision, from which the mistaken conclusion is easily drawn that the EU national spouse must reside in the host member state until the court proceedings aimed at dissolving the marriage are launched.[63] However, according to the right interpretation of Article 13, the EU national spouse *may reside anywhere* when the divorce case is launched, this in itself exerts no impact at all on the right of residence of the third country spouse.[64] It is this very right that is the subject of the provision in question in the case of the dissolution of a marriage. The situation is that Article 13 is meant to realize one of the major objectives of the law, *i.e.* that the protection of the third country spouse (and at the same time, their right of residence) should be ensured on a personal basis, irrespective of the place of residence of the ex-spouse.[65]

The above is somewhat contradicted by the argument also voiced by the Court, i.e. that Article 12 of the directive keeps quiet about retaining the right of residence of a third country family member in the case of the departure of the EU national and it only provides for the retention of the right of residence in the case of EU nationals. The Court opines that by doing so, the EU legislator essentially meant to refrain

[60] Pursuant to this decision, as long as the EU citizen spouse departs the territory of the host member state before the divorce proceedings are launched, this will involve the lapsing of the right of residence of the third country national spouse in the host member state and this right cannot be revived by an application for the dissolution of marriage either.

[61] Francesca Strumia, *Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others'*, Common Market Law Review (2016), vol. 53, pp. 1373-1394; Steve Peers, *Domestic violence and free movement of EU citizens*. http://*eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html* (28 March 2018).

[62] The situation is that Section (2), Article 7 says that "[…] the right of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State […]". Strumia thinks that by this, the legislator essentially only wishes to specify those family members who are in principle entitled to reside with the EU citizen, at least as long as the other criteria set out in the directive are met. Thus, the terms "accompanying or joining" specified in the provision in question only refer to the commencement of the right of residence, and not to its process. Also, Section (2) of Article 7 does not refer to, at any point, the concept of a third country national who "continuously resides" with an EU citizen.

[63] The point is that Point (a), Section (2) of Article 13 says that "[…] the divorce shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State if prior to initiation of the divorce […], the marriage […] has lasted at least three years, including one year in the host Member State".

According to the right interpretation of the words of the directive, the one-year residence in the host member state may take place at any time during the three years of the relationship, not only in the year preceding the divorce. Thus, just contrary to the Court's decision adopted in the Singh case, this makes one conclude that the EU citizen spouse may reside anywhere at the time of launching the divorce proceedings, this in itself has no impact at all on the right of residence of the third country national spouse.

[64] See Strumia p. 1379.

[65] "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis." Preambles of the Directive, Point 15. This was confirmed by the Court's practice as well, see Ogieriakhi judgment, para 40, C-244/13, Ewaen Fred Ogieriakhi v Minister for Justice and Equality and Others, not yet reported.

from providing special protection to non-EU national family members in the case that the EU national leaves the territory of the host member state.[66] However, the Court acknowledges this purpose of protection for the cases set out in Section (2) of Article 13. In this context, it does refer back to the content of the draft Free Movement Directive, according to which it intends to provide protection to those third country nationals whose right of residence is related to the family tie established by marriage and who can thus be blackmailed with the dissolution of the marriage.[67] According to the draft directive, however, such protection only becomes necessary when a marriage is dissolved with binding effect, since separation does not affect the right of residence of the third country national spouse. Unfortunately, from this, the Court draws the conclusion that ensuring protection is completely subordinated to the dissolution of marriage between the affected spouses. This argumentation, however, is logically wrong, what is more, it is almost absurd.[68] It is a fact that the separation of the parties does not affect the right of residence in each case,[69] as long as the EU national stays in the host member state. However, taking it into account that as a result of the departure of the EU citizen spouse, at least according to the Court's interpretation, the right of residence will cease to exist completely, safeguards will in fact become necessary in such a case. Otherwise the EU citizen may hold their spouse in check by threatening them with departure rather than divorce. The Advocate General also shares this view, as he thinks that the loss of the right of residence may be used as a means to impose pressure, to inflict an emotional trauma on the victim and to cause long-term fear in relation to the abuser. [70] The question arises whether the legislator in fact meant to create this distinction, i.e. that in one case the threat is acceptable, while it is excluded in the other.

2.4.2. The Theoretical Considerations Underlying the Rights Provided to Third Country Nationals

At this point of the analysis, it makes sense to examine the effect, nature and motives of the rights provided to third country citizens on a derivative basis, which may provide some guidance to those who apply the law. There are fundamentally two considerations underlying the rights provided to third country family members. These are primarily aimed at the most efficient possible exercise of rights by EU nationals, i.e. at facilitating the exercise of their free movement and residential rights. This is certified by the Court's jurisprudence of expanded effect, which broad interpretation ensures the right of residence to third country family members beyond the scope of eligible parties specified in the directive,[71] in other cases too. Thus, for example, to a third country national who in fact raises an EU

[66] Case C-115/15 paras 43-44.

[67] COM (2001) 257 final.

[68]Steve Peers, Domestic violence and free movement of EU citizens. http://eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html (28 March 2018).

[69] The effect of the decision adopted by the Court on the Diatta case, i.e. that the spouse does not necessarily have to continuously live together with the EU national in order to become eligible to a residential right on a derivate basis, was further broadened by its judgment adopted in the Ogieriakhi case. In this, the Court declared that with regard to obtaining the permanent right of residence, it is irrelevant whether the married couple did not live together in a certain period of their marriage, or even if they lived with other partners. Thus, this essentially does not require any kind of co-habitation from the parties. This decision of the ECJ was justified by that an interpretation contrary to this would involve the application of a more favorable system in the case of the dissolution of the marriage than in the case of separation, with regard to the affected third country nationals. Case C-115/15 paras 38-42.

[70] See Articles 6,7 and 16 of the Directive.

[71] See Articles 6, 7, 16 of the Directive.

national child while the EU national parent is exercising the right of free movement,[72] or a third country family member who is a primary carer of his or her child with union citizenship,[73] and TCN parent caretakers where no free movement has occurred but the substance of a Union citizen's rights would otherwise be impaired (Zambrano doctrine).[74] As is also explained in the justification of the Iida judgment,[75] it is a common element of the above facts that, although they are regulated by such provisions which are the *a priori competence* of the member states,[76] they are still closely related to the EU nationals' right of free movement.[77] The situation is that the non-recognition of the above rights may interfere with the union citizens' right to free movement by having an adverse effect on the family life of these nationals, which deters or holds them back from exercising their right of entry into the host member state and residence in that member state.[78]

The above consideration may be logically questioned by the departure of the EU national, considering that third country family members do not need residence in the host member state any more in relation to exercising their free movement and family rights. In principle, this may explain the "keeping quiet" of Article 12, including that in the case of the departure of the EU national, the protection of the third country national in the host member state will cease.

However, the other fundamental consideration underlying the provision of rights to third country citizens, which is the requirement of the *protection of personal rights*, should also be mentioned.

The rights of citizens of third countries, which were originally provided on an exclusively derivative basis, should start living an independent life in certain situations. The dissolution of a marriage with an EU national (Article 13) and the rights of residence provided in the case of the death of an EU national (Article 12) are the specific expressions of this very consideration. This means that at this point, the legal institution of EU citizenship penetrates into the areas that traditionally belong to the competence of the member states, which "now requires the member states to regard the third country citizens as one of the members of their community, irrespective of the nature of the family tie, or the exercise of the EU national's free movement rights."[79]

The *NA* case unfortunately falls into the legal loophole between the provisions set out in Article 12 and Article 13, which as we have seen, poses a major challenge to those who apply the law. Furthermore, it seems like the considerations underlying the rights that the third country citizens are entitled to do not provide a clear guidance either, as they point to different directions.

[72] C- 60/00, *Mary Carpenter v Secretary of State for the Home Department*,[2002] I-06279; C- 457/12, Minister *voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, not yet reported.

[73] Case C-200/02.

[74] Case C-34/19.

[75] C-40/11, *Yoshikazu Iida kontra Stadt Ulm*, not yet reported.

[76] Thus, the provisions on the rights of entry and residence of third country citizens.

[77] Ibid para 72.

[78] As early as at the outset of integration, the view was acknowledged that in order to be able to efficiently exercise the rights of the migrant member state citizens, it is critical to provide similar rights of residence and employment to their family members too. See G. Barrett, *Family Matters: European Community Law and Third-Country Family Members*, C.M.L.Rev., 2003 (40), pp. 375–376; Alina Tryfonidou, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, European Law Journal, issue 2009/5, p. 636; Alina Tryfonidou, *Jia or 'Carpenter II': The edge of reason*, European Law Review, 2007 (32), p. 913

[79] See Strumia p. 1384.

The situation is that in the light of ensuring the effective exercise of the rights of the EU nationals as a fundamental consideration, the above standpoint, according to which the third country national spouse does not need protection from the host member state any more in the case of the departure of the EU national, seems entirely justifiable. This assumption, however, can still be challenged in certain cases, as long as the examination of the protection of family life in the context of the rights of free movement can contribute to this.

2.4.3. The Protection of Family Life in the Context of Free Movement

In the EU law, the institution of the *family* receives protection through the idea of *cross-border EU citizenship*, which conception is specifically represented in the rights to free movement. This unique context in which the right to free movement is stressed is one which at the same time allows the narrow or broad interpretation of the concept of family life. The former concept is built on the definition of the *market citizen*, in which a family is acknowledged strictly as the means to ensure free movement, subordinated to the interest of the economically active member state citizen. The above approach of the Court was enforced in a high number of cases when the Court, instead of invoking the fundamental rights, many times disregarding even the opinion of the Advocate General, ensured the protection of family life on *sui generis* EU basis.[80] As compared to this, the *Singh* and *NA* decisions mean a further twist in the above approach to the family concept related to family rights and EU citizenship. [81] Before the above decisions were adopted, it was the *protection of the unity of the family* that served as a *safeguard for free movement*. After the judgments in question, however, it is concerning that in certain cases, only the final dissolution of the family, including the dissolution of the marriage may provide protection to those third country rights which cannot be integrated into the classical framework of free movement. In other words, in the future, the interpretation of Article 13 of the directive by the Court may serve as a kind of *incentive* for the dissolution of the family tie as soon as possible, *i.e.* for the launch of the divorce case before the departure of the EU citizen, thus filling the protection gap with regard to the third country citizens' rights disintegrating from the rights to free movement.

Looking at the issue from another angle, however, it is the very cross-border nature of free movement and EU citizenship that may pave the way for the acceptance of a progressive family model. The Singh and NA cases are excellent examples for showing that the legislations in question do not always provide appropriate protection for the migrant EU citizen and mainly, for the latter's family members left behind in his/her host member state. It is the very cross-border nature of free movement and EU citizenship that may justify a more flexible approach, in which the spouses, in a certain period of their family life, live in geographical separation from each other, in two different member states of the European Union but they keep the unity of their family all through. This is, at least partly,[82] supported by the *Diatta* decision of the European Court of Justice, which does not necessarily require permanent co-habitation with the migrant worker in order to guarantee the exercise of derivative rights any more. This decision of the Court was later confirmed by the *Iida* case, in which it was added that this is so even if the spouse thinks that they would later like to get divorced from each other.[83] In a Europe without borders, more and more

[80] See the above-quoted Baumbast, Zambrano, Alokpa, Zu and Chen judgments.

[81] See Strumia p. 1387.

[82] Considering that the facts of the matter are restricted to one member state in the case in question.

[83] Case C-40/11 para 58. Even if, as the case may be, Mr. Iida did not have the chance to enjoy the advantages offered by the directive, considering that he wished to obtain a right of residence in the member state according to the nationality of his EU national spouse.

people "may be compelled" to take up employment in another member state, far from their spouse, by using their right to free movement. Thus, in light of the above line of thought, the standpoint taken by the Court in the *Singh* and *NA* cases, i.e. that the departure of an EU national spouse will automatically terminate the rights of residence of a third country family member, can be questioned. The departure of an EU national from the host member state may become part of a cross-border family life in pretty much the same way as the EU national's exercise of the right to free movement for the first time, including his/her move to the host member state.

Thus, based on the above approach, the legal consequences of the EU national's departure from the host member state should be reconsidered, even in the case of the occurrence of a "family crisis". Taking into account the aim of effective exercising of the EU national's right to free movement as a fundamental consideration, it is actually possible to have such an interpretation of Articles 12 and 13 of the Directive by the European Court of Justice in which the temporary separation of the family is acknowledged as the means to facilitate free movement, as the case may be, and it is on the basis of this consideration that the family members may be entitled to protection. [84]

In this case, however, a very legitimate question arises: where are the limits of the Court's broad interpretation? Where is the point at which the expanded interpretation of the European Court of Justice may easily transform into the member states' resistance against the institution of free movement? There is nothing that would express this better than those sometimes almost threatening political statements which are targeted at strongly curbing the rights to free movement, or the very fact of Brexit.[85] The potential tensions arising from issues of competence may even act as a logical explanation for the cautious approach taken by the Court in the Singh and NA cases.

The Court's "cautiously progressing" approach, however, forces the affected third country citizens to make a rather bitter choice. 'Get divorced as soon as possible, or leave the host country', as the judgment goes.

This situation is further aggravated by that in the NA case, we are talking not only of an average third country family member whose relationship with her EU national spouse has in the meantime deteriorated. We should always keep in mind that NA became a victim of domestic violence. The situation is that according to the NA decision, as long as a third country spouse would like to get away from domestic violence by breaking the family tie, or the very abuser would like to avoid the potential legal consequences, the non-EU national family member should, as a general rule, face expulsion from the territory of the host member state.

Thus, except for the above-described isolated groups of cases, often there is nothing else that the third country citizen can do but to continue with the relationship, not risking their residence in the host member state and the potential loss of their children.

Discussing the above in light of a specific case, we can see that the claimant of the case in question could retain her right of residence according to the decision if she commenced the divorce proceedings

[84] This may be realized in practice through the joint interpretation of Article 21 of the Treaty ensuring the right of free movement, and the provisions in question, which however, raises quite a number of problems. Thus, the question arises what will happen if the EU national spouse happens to leave for a third country rather than another member state. On the basis of this scenario, the third country family members would obviously not be entitled to any protection.

[85] Thym thinks that by now, free movement has obtained a "symbolic function", it acts as a kind of projection of the currently emerging economic, social and political fears. Daniel Thym, *The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens*, C.M.L.Rev., 2015, Vol. 52, p.18

before her EU national spouse leaves the host member state. However, one wonders what chance there is that a third country mother who is five months pregnant and has an eleven-month-old baby, fleeing domestic violence, will file for divorce in the host member state when she also faces problems of housing and livelihood.

3. Conclusion

In the NA case, we are facing an *exceptional situation*, as the number of such cases when the EU national who commits domestic violence departs from the host member state before the divorce is very low.[86] Even if the number of those affected by the decision is very low, the issue of domestic violence should be taken seriously, especially in the case of the European Union, which is an organization committed to the idea of the rule of law and fundamental rights. What is more, the Commission proposed the European Union to sign the 2011 *Istanbul Convention*,[87] the goal of which document of the Council of Europe is to prevent and eliminate violence against women and domestic violence.[88] Article 59 of the Istanbul Convention requires the provision of the right of residence independently from the spouse, in cases of domestic violence.[89] The situation is that neither the document nor the interpretative explanation thereof contain any reference whatsoever to the above distinction, depending on whether the abuser has or has not departed from the territory of the country in the meantime. But why would it contain such anyway? For the Convention, the place of residence of the abuser is totally irrelevant.[90] The exclusive goal of this, as well as that of the respective Article 13 of the directive, is to provide protection to the victim. The Court will definitely have to take this into account in its future judgments. This is partly why it is very difficult to understand the consideration underlying the *NA* decision, according to which the third country spouse will not need the protection of the host member state after the departure of the EU national spouse, so the right of residence of the former can automatically be terminated. As, however, it has been very rightly pointed out by Advocate General Wathelet, in such cases, the loss of the right of residence of the spouse who is a third country citizen "may be used as a means to impose pressure […], to inflict an emotional trauma on the victim and to cause long-term fear in relation to the abuser." [91] What is more, the Court's interpretation of Article 13 of the Directive essentially deprives the legislation in question of its effectiveness, as it makes the protection dependent exclusively on the intention of the offender to stay in the territory of the host member state.

The reconsideration of the decision is also encouraged by the examination of the protection of family life in the context of the right to free movement. The interpretation of the *NA* case submitted by the Court may act as an incentive for the dissolution of family ties as soon as possible in the future, and therefore for the launching of the divorce case before the departure of the EU national from the territory

[86] Consequently, the number of those third country nationals whose right of residence would thus be retained is presumably insignificant.

[87] www.coe.int/en/web/istanbul-convention/home (28 March 2018).

[88] www.europa.eu/rapid/press-release_IP-16-549_hu.htm (28 March 2018).

[89] "The Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognized by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship." See Article 59 of the Istanbul Convention.

[90] See Steve Peers, *Domestic violence and free movement of EU citizens*. http://*eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html (28 March 2018).*

[91] Case C - 115/15, Opinion of Advocate General Wathelet, para 70.

of the country in question, thus filling the gap of protection with regard to third country national rights emanating from the rights of free movement. However, it is exactly the cross-border nature of free movement and EU citizenship that may justify a more flexible approach. According to this, the departure of the EU citizen from the host member state, including the temporary separation of the family members does not necessarily have to result in the lapsing of the right of residence of the third country spouse. This secondary movement may become a part of cross-border family life just like the exercise of the rights of free movement for the first time.[92] Of course, the question arises where the boundaries of expanded interpretation are. We should realize that the judges are not in an easy situation when they have to provide guidance to those who apply the laws in the buffer zone of immigration policy, which is traditionally a member state competence, on the one hand, and supranational EU rights, on the other hand. What is more, they have to do all this in the midst of a crisis period that gravely affects Europe, in which the very institution of free movement was also jeopardized. [93] The *NA* case was not the first time when the complex issues of the relationship between the EU nationals residing on the basis of their original right and the third country nationals residing on the basis of a derivative right are in the focus of attention, allowing the Court to settle those competence issues which have caused tension for a long time. [94] The situation is that there is an increasing number of cases before the Luxembourg forum whose facts are regulated by provisions that *a priori* belong to *the competence of the member states,* thus those that regulate *the right of entry and residence of third country nationals*, however, they are still closely related to the right of EU citizens to free movement and residence. One of the critical steps in this respect was the Court's judgment adopted in the *Zambrano* case. During this case, the Court reached such a high level of the protection of the EU citizens' rights derived from Article 20 of the TFEU in which it ensures family reunification rights to the third country parents of EU citizens in a purely member state situation, giving an undoubtedly spectacular example for how judges can develop the law. In its less generous case law following the *Zambrano* decision, the Court, however, also made it clear that the protection provided on the basis of Article 20 of the TFEU may only be applied in highly exceptional cases. Thus, basically only in the case of such *EU* minors who reside in their country of origin with their third country parents, without ever having exercised their right to free movement.[95] In the NA case, this was obviously not the case, as opposed to the subsequent *Rendon Marin* and *CS cases*[96], in which the Court examined the derivative right of residence of third country parents with a criminal record based on Article 20 of the TFEU. In the above cases, the EU national children have been residing in the member state of which they were nationals since they were born. In these decisions, the Court now clearly confirmed that in the case of EU nationals residing in the host member state, it is first of all always Article 21 of the Treaty that ensures the right of free movement that can be invoked and it is only then that Article 20 underlying the *Zambrano* test can be applied. The Court's decision adopted in the NA case is an excellent example for this. The situation is that it is declared by the Court crystal clearly that in relation to the case in question, what should primarily be investigated into is whether the EU citizen and their third country relative may obtain a right of residence under secondary law. From all

[92] This is, at least partially, supported by the Diatta decision of the European Court of Justice, which does not necessarily require permanent co-habitation with the migrant worker in order to guarantee the exercise of derivative rights.

[93] Laura Gyeney, *The limits of Member State solidarity*, in Marcel Szabó (ed.): *Hungarian Yearbook of International and European Law*, The Hague: Eleven International Publishing, 2016. p. 434.

[94] The Court is more and more often accused of too intensively interfering with the area of immigration policy, namely into the regulation of the third country nationals' right of entry and residence, which is a national competence, in its jurisprudence under the pretext of the effective exercise of the rights arising from EU citizenship, C- 127/08, Blaise Baheten Metock és társai kontra Minister for Justice, Equality and Law Reform, [2008] I-06241, para 67.

[95] Case C-165/14 para 74.

[96] C-304/14, Secretary of State for the Home Department v CS, not yet reported.

this, it becomes absolutely clear that the protection provided on the basis of Article 20 of the TFEU may only act as a last resort, even if we are talking about a mother who fell victim to domestic violence. In light of the above, the NA decision adopted by the Court is to be carefully considered, especially in contrast with the Court's decisions adopted in the *Rendon Marin* and *CS* cases. Based on all this, it seems like a criminal enjoys a higher level of protection[97], according to the current status of EU law than a mother who fell victim to domestic violence.

[97] In the Cs case, the Court decided that the member state may take an expulsion measure in exceptional circumstances based on public policy and public security considerations, however, this has very strict criteria and this can only happen after a very thorough consideration of the existing interests, among others, considerations of fundamental rights.

The high-level protection provided by the Zambrano doctrine is referred to by Article 7 of the Charter of Fundamental Rights of the European Union ensuring the protection of family life, as well as Section 24(2), which safeguards the best interests of the child, what is more, the relevant Strasbourg practice, including the reference of the Court to the Jeunesse v. the Netherlands judgment, both in the Rendon Marin (para 66) and the Cs (para 36) judgments.