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A RIGHT OF AN ILLEGALLY RESIDING THIRD-COUNTRY NATIONAL TO STAY IN THE EUROPEAN UNION ON THE GROUNDS OF THE PROTECTION OF THE FAMILY LIFE

Master thesis

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VILNIUS 2012

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INTRODUCTION

The Thesis is related to families composed of *illegally* residing third-country nationals (TCNs) and *static* European Union (EU) citizens. We will try to find out whether *illegally* residing TCNs by not being able to get a residence permit under national laws may receive it by relying on EU law in order to ensure the protection of their family life. Neither directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States nor directive 2003/86/EC on the rights to family reunification can be applied to them[1]. However those legal instruments might not be the only ones that could create a possibility for *illegally* residing TCNs to stay in the Member States (MS). The Charter of Fundamental Rights of the European Union (the Charter) envisages the protection of the family life, directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals requires to take due account to the interests of the child and the family, finally EU citizenship is capable of protecting family members (*illegal* immigrants) of minor EU citizens– the case-law of the European Union Court of Justice (EUCJ) proves this[2]. Moreover even though the European Convention on Human Rights (ECHR) – from which the EUCJ draws inspiration – does not envisage an obligation for the States to allow for foreigners to reside in their desired country, according to the European Court of Human Rights (ECtHR) exceptional circumstances may determine the need to allow for *illegally* residing TCNs to stay. Therefore by using general provisions of primary EU law, the norms of the Charter, the rules of EU secondary law, the case-law of the ECtHR and of the EUCJ we will try to prove that TCN family members of EU citizens despite their illegal presence may be allowed to stay in the EU on the grounds of the protection of the family life.

Relevance of the topic. *Illegally* residing TCNs apply to national courts and try to prove that they have a right to stay in the EU on the basis of the protection of their family life. *Zambrano* and *Dereci* cases[3] left a lot of unanswered (or answered in a controversial way) questions. Those rulings do not give precise and incontrovertible answers when the citizenship rights apply or may a TCN rely on the single ground – protection of family life – and demand a residence permit. These are the problems of today and they must be solved as quickly as possible because new cases show that even more problematic issues originate in the MS (in case *O., S. v. Maahanmuuttovirasto* the national court asks may the TCN's right to reside in the MS depend on EU citizenship of his stepchild and in case *Yoshikazu Iida v. Stadt Ulm* the national court asks whether a TCN may demand a residence right relying on the EU citizenship of his daughter even though his daughter lives in the other MS than that

[1] In order to apply directive 2004/38/EC two conditions must be met: a TCN must be a family member of the EU citizen *and* that TCN should accompany or join the EU citizen who moves to or resides in a Member State other than that of which he is a national. Directive 2003/86/EC cannot be applied to TCN family members of EU citizens.
[2] Case C-34/09 Reference for a preliminary ruling: Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2011].
[3] These cases concern illegally residing third-country nationals and their right to stay in the European Union on the grounds of both family rights and EU citizenship of their children.

in which the TCN lives[4]). Until the previous ambiguities are solved the latter will only lead to more confusion. We will try to critically analyze interpretations made by the EUCJ in *Zambrano and Dereci cases* and we will try to provide the legal opinion how those certain rights should be applied.

Originality of the topic. The majority of scholars write about the legal status and the volume of legal immigrants' rights and obligations. Lyra Jakulevičienė and Laurynas Biekša have analyzed problems related to transposition and implementation of the norms of family reunification directive[5], Karolis Žibas tried to reveal immigration tendencies of TCNs in Lithuania[6], Anja Wiesbrock analyzed movement rights of TCNs[7], Iseult Honohan provided arguments for and against family reunification[8]. However, not much attention has been given to *illegally* residing TCNs. It seems that the fact that not much attention is being paid to the rights of *illegally* residing TCNs presupposes that their rights are being negated. This Thesis is novel because we will try to prove the things which the MS have always tried to impugn: *illegally* residing TCNs have rights which must be guaranteed for family sake.

Utility of the topic. When the EUCJ analyzes cases concerning TCN's residence and family rights it provides arguments which it does not motivate properly; its case-law lacks consistency and clarity and sometimes it seems that the EUCJ applies insufficient criteria. Moreover even though the Charter states that the protection of the family life should not be less than the protection guaranteed by the Strasbourg Court, there is a possibility that the EUCJ, by not taking into account the criteria formulated by the ECtHR, has not ensured (in certain cases related to *illegally* residing TCNs) the necessary protection. Furthermore Member States are confused, they do not know how and when to apply the criteria formulated by different European Courts. Obviously there is a need to systemize the criteria which *are* and *can* be applied to *illegally* residing TCNs in the context of their family life.

Sources. We will base our arguments on the primary and secondary law of the EU. We will use international treaties and national laws in order to reveal relevant definitions, we will use the case-law of the EUCJ in order to prove the statements or critique the existing interpretations. We will rely on the case-law of the ECtHR in order to compare practices of different European Courts and to provide relevant criteria which could be used in EU law.

Problems of the research. *Illegally* residing TCNs constantly rely on family rights and require for residence rights however the EUCJ has never provided a clear answer *if it has a competence* to act in the area of family rights, *what additional link is (if?) needed*, whether *cross-border movement is the*

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[4] Opinion of Advocate General Bot in joined cases 356 and 357/11 O., S. v. Maahanmuuttovirasto and Opinion of Advocate General Trestenjak in Case C-40/11 Yoshikazu Iida v. Stadt Ulm [2012].

[5] Lyra Jakulevičienė, Laurynas Biekša „Šeimos susijungimo direktyvos perkėlimo į Lietuvos teisę ir įgyvendinimo problemos" (*Socialinių mokslų studijos 2009, 2(2), p. 175-191*).

[6] Karolis Žibas „Trečiųjų šalių piliečių imigracijos į Lietuvą tendencijos (2004-2008)" (Socialinių tyrimų instituto etninių tyrimų centras, etniškumo studijos, 2009/2).

[7] Anja Wiesbrock 'Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion' (*European Law Review, Vol. 35, No. 4, 2010, pp. 455-475. Westlaw International).*

[8] Iseult Honohan "Reconsidering the claim to family reunification in migration" (*Political Studies, Vol. 57, No. 4, 2009, pp. 768-787*).

only way to activate application of EU law. TCNs also rely on citizenship norms however *currently* the EUCJ grants residence rights only for those (but not for all of them) *illegally* residing TCNs whose *minor children* have EU citizenship. Judgments of the EUCJ seem to be contestable and the grounds afforded by the EUCJ – insufficient. So we will try to scrutinize the following problems: 1) could *illegally* residing TCNs stay in the EU on the grounds of the protection of their family life?; 2) on what legal grounds of EU law illegally residing TCNs could rely on in order to be allowed to remain?

Object of the research: a right of an *illegally* residing TCN to stay in the European Union.

Objective and tasks. **Objective of the research** – after conducting analysis of the primary and secondary EU law, the case-law of the EUCJ and the case-law of the ECtHR to find out whether *illegally* residing third-country nationals have a right to stay in the European Union on the basis of family relationships and to ascertain whether the protection afforded to them is adequate.

The tasks of the research:

1) to define the concepts of 'family' and 'respect for family life';
2) to prove that there are legal grounds in EU law for *illegally* residing TCNs to stay in the European Union on the basis of the protection of their family life;
3) to prove that *illegally* residing TCNs may acquire residence permits relying on the provisions of the Charter, secondary EU law and on EU citizenship status of their family members;
4) to analyze the criteria used by the EUCJ and the ECtHR in cases concerning TCNs' right to remain in the State on the grounds of the protection of the family life and to prove that the criteria applied by the EUCJ are not sufficient to ensure adequate protection of family life.

Hypothesis – EU law envisages the protection of the family life for *illegally* residing third-country nationals but the EUCJ by applying insufficient criteria unduly narrows such a protection.

Methods that will be used: 1) descriptive-analytical method; 2) systematic method; 3) comparative method; 4) analysis of legal documents; 5) analysis of scientific literature; 6) expert survey method; 7) statistical method.

Keywords: citizenship of the European Union; family rights; family relationships; illegal immigration; protection of the family life; residence; third-country nationals.

The structure of the Thesis. The Thesis is comprised of three parts. In the first part we will analyze how the EU may protect family rights taking into account the fact that it has no competence in human rights' area and we will try to find out what family members are being protected in the EU. In the second part we will scrutinize the problems and try to prove that *illegally* residing TCNs have a possibility to stay and get residence rights in the EU on the grounds of the protection of their family life. In the third part we will try to demonstrate that the protection of the family life of *illegally* residing TCNs is not sufficient therefore we will propose a set of criteria which could be applied in the EU to *illegally* residing TCNs in order to ensure adequate protection of their family life.

1. THE PROTECTION OF THE FAMILY LIFE IN THE EUROPEAN UNION

1.1 The European Union's Competence to Protect Family Rights

According to the Treaty on European Union (TEU) the EU may act in accordance with a principle of conferral, which means that it may act "[…] only within the limits of the competences conferred upon it by the MS […]" (Article 5 TEU). If the EU does not have a competence in particular area, it cannot act. Family rights do not belong to any of the EU's competences: neither exclusive nor shared. The EU also has no competence to support, coordinate or supplement the actions of the MS in this particular area[9]. However, the case-law of the EUCJ reveals that the EUCJ has protected family rights notwithstanding the fact that the EU has no competence in family rights' area. Therefore, it is unclear whether the EU may protect family rights or not. The majority of scholars tend to argue that the EU cannot protect human rights. Advocate general Kokot thinks that protection of family rights falls within the jurisdiction of the national courts and the ECtHR[10]. It means that MS have a primary obligation to ensure respect and protection of family life and that the ECtHR should develop human rights because it was specifically designed to do that. Other scholars emphasize the fact that there was no need for human rights protection as the treaty was of economic and trade nature[11]. Others note that despite the fact that the EUCJ mentions that human rights have to be protected the Court really protects the commercial goals of the common market but not the rights[12]. There is an opinion that national courts do not want to accept that the EU may protect human rights because the protection guaranteed by the EUCJ is too high[13]. Obviously the question whether the EU may protect human rights and so family rights is very complicated. Scholars are not willing to address the ability to protect human rights to the EU. On the other hand the answer whether the EU may protect human rights depends on their perceptions, therefore to rely only on them would be precarious. Apparently provisions of the EU Treaties and the case-law of the EUCJ should provide the real answer.

"There was no mention of human rights in the ECSC, Euratom or EEC Treaty in the 1950s and the Court was initially reluctant to entertain rights-based claims against EU law"[14]. However, everything has changed after the ruling in *Stauder case*[15] where the EUCJ acknowledged that respect for fundamental rights forms a part of general principles of EU law. In *Internationale*

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[9] Consolidated version of the Treaty on the functioning of the European Union (*Official Journal of the European Union, 30.3.2010, C 83-47)*, Articles 2 - 6.
[10] Peter Van Elsuwege 'Court of Justice of the European Union, European Union Citizenship and the Purely Internal Rule Revisited, Decision of 5 May 2011, Case C-439/09 Shirley McCarthy v. Secretary of State for the Home Department' (*European Constitutional Law Review, 7, 2011, pp. 308-324*), p. 310.
[11] Helen Toner 'Partnership Rights, Free Movement, and EU Law', Oxford; Portland (Or.): Hart Publishing, 2004, p. 124.
[12] Niamh Nic Shuibhne 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (*European Law Review, Vol. 34, No. 2, 2009, pp. 230-256. Westlaw International)*, p. 233.
[13] Lucia Serena Rossi 'How Fundamental Are Fundamental Principles? Primacy and Fundamental Rights After Lisbon' (*Yearbook of European Law, 2008; Vol. 27, pp. 65-87. Oxford Journals*), p. 83.
[14] Paul Craig and Gráinne de Bùrca 'EU law: Text, Cases and Materials', Oxford: Oxford University Press, 2011, 5th edition, p. 389.
[15] Case C-29/69, Reference for a preliminary ruling: Erich Stauder v. City of Ulm-Sozialamt [1969].

Handelsgesellschaft case[16] the Court further highlighted that fundamental rights are protected by the Court of Justice. *Nold case*[17] proved that international human rights agreements and common constitutional traditions are two primary sources of 'inspiration' in order to protect human rights. The present cases do not make references to common constitutional traditions or general principles anymore. But they state very clearly that "[…] the right to respect for family life […] is among the fundamental rights which […] are protected in Community law"[18]. So it is obvious from the case-law of the EUCJ that competence is not in itself the only way for the EU to act in particular area – other grounds may also empower the EU to protect human rights. A good example of this: Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States as it is directly related to family rights. Even though the EU did not have a competence in this area, the EU institutions managed to adopt this directive by relying on the norms related to citizenship rights and non-discrimination on grounds of nationality.

Stauder, Nold and other cases changed the Member States' perception about the protection of human rights as the Member States have incorporated new attitudes towards human rights in the reform treaties. The Maastricht Treaty[19] brought the following novelties: Article 6(2) stated that "the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law". It also envisaged the respect for fundamental rights in the area of common foreign and security policy and justice and home affairs. Amsterdam Treaty[20] also introduced some new provisions: Article 6(1) of the EU Treaty stated that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the MS". It also envisaged that States which want to become members of the EU have to achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (Article 49). Those provisions undoubtedly show that human rights became important for the Member States because they have started to see protection of human rights as one of EU's goals.

The Lisbon Treaty also gave some indications that the EU should be perceived as more than economic Union. Article 2 TEU impliedly states that protection of human rights is seen by the EU as the value. Article 6 TEU sets an objective to accede to the ECHR. Article 21 TEU states that "The *Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement*, and which it seeks to advance in the wider world: […], the

[16] Case C-11/70, Reference for a preliminary ruling: Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel [1970].
[17] Case C-4/73 J. Nold, Kohlen- und BaustoffgroBhandlung v. Commission of the European Communities [1974].
[18] Case C-540/03 European Parliament v. Council of the European Union [2006], point 52.
[19] European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5.
[20] European Union, *Treaty on European Union (Consolidated Version), Treaty of Amsterdam*, 10 November 1997, Official Journal of the European Communities C 340/145.

universality and indivisibility of *human rights and fundamental freedoms* […]" (emphasis added). The latter provisions notably show that the EU became more than economic Union: the EU not only seeks but it is able to become a party to the ECHR therefore it is evident that human rights inspired the EU's development[21]. Article 7 TEU proves that MS may be 'punished' for not respecting human rights: The Council may suspend certain rights of the MS for that. Moreover, the EU established bodies [European Ombudsmen, European Parliament's Committee on Petition, European Union Agency for Fundamental Rights (FRA) etc. – author's note] and procedures [fundamental rights check-list[22] - author's note] to ensure that the EU itself respects fundamental rights; it set a verification procedure in order to check whether MS implement EU law correctly; EU law provides for harmonization in certain fields of fundamental rights protection [data protection, consumer protection – author's note][23].

The German Constitutional Court admitted that as long as human rights are adequately protected by the EUCJ it would no longer control the compatibility of EU law with German fundamental rights. Moreover, "[…] in the *Banana case* the same Court stated that its control would only apply if the EU protection of fundamental rights no longer functioned […]"[24] – it is apparent evidence that the MS accept that the EU has a power to act in the area of human rights. The fact that the MS decided to give for the Charter a binding effect and the same legal status as the Treaties themselves (Article 6 TEU) also confirms this statement as provisions of the Charter are addressed not only to the MS but foremost to the EU's institutions, bodies, offices, agencies[25]. Moreover, there are many cases where national courts applied to the EUCJ in order to get the answer if particular behaviour of national institutions infringed family rights and the Court considered whether family rights have been violated or not.

Provisions of the EU Treaties and other legal documents together with the institutional framework of the EU clearly show that the scholars were probably not right: the EU is able protect human rights. However, we could not say that the EU has a human rights competence to do that because such competence is not enrolled in the EU Treaties. As advocate general Sharpston rightly observed: "The desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence"[26]. However, nobody could deny the fact that the EU may act even if it has no competence in that particular area – *case C-329/11* and *Schempp case* prove that when a particular

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[21] There were no provisions in earlier European Union Treaties stating that the EU 'shall accede to the ECHR'.
[22] Israel De Jesus Butler 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practise of the European Commission' (*European Law Review, Vol. 37, No. 4, 2012, pp. 397-418. Westlaw International)*, p. 402.
[23] European Union Agency for Fundamental Rights 'Fundamental Rights: Challenges and Achievements in 2011', Annual report 2011, p. 16.
[24] Lucia Serena Rossi 'How Fundamental Are Fundamental Principles? Primacy and Fundamental Rights After Lisbon' (*Yearbook of European Law, 2008; Vol. 27, pp. 65-87. Oxford Journals*), p. 67.
[25] Charter of Fundamental Rights of the European Union (*Official Journal of the European Union, 30.3.2010, C 83-389)*, Article 51(1).
[26] Opinion of Advocate General Sharpston in Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2010], point 162.

area belongs to the competence of the MS, that area of law may still be influenced by EU law[27]. The EUCJ by relying on common constitutional traditions of the MS and international treaties had acted in the area of human rights though this competence did not belong to the EU. Therefore, it seems that even though the EU does not have a competence in this area it must still have something.

It would be hard to say that the EU has only a right to protect human rights. Human rights check-list and the ability to apply to the EUCJ if the requesting institution thinks that the legal act of the EU infringes fundamental rights[28] prove that the EU has something more than a simple right. It would also be a little bit risky to propose that the EU has a duty to protect human rights as the EU is not a party to various international treaties obliging to protect fundamental rights. The Treaties of the EU do not even set imperative norms which would require protecting human rights (there are no such words as *must, ought to, obliged to* etc.). The best solution would be to say that the EU has *a sui generis power* to protect human rights as this power is *unique*: it derived from the general principles of EU law, common constitutional traditions of the MS, international treaties, the case-law of the European Courts and the values and objectives of the EU. However, after the Charter was granted the legal binding force human rights cannot be seen as only a part of general principles or integral part of other legal instruments. Human rights (in the Charter shape) have the same legal effect as the EU Treaties therefore they are unique because this novelty changed the perception about the protection of human rights in the EU. Human rights became stronger, more powerful – as powerful as the EU Treaties themselves. Taking this into account we could state that at present moment human rights in EU law firstly stem from contractual obligations of the MS because the Charter is the only clear and direct legal document showing without doubts that human rights are being respected and protected in the EU.

Provisions of the EU Treaties, the Charter, bodies designed to ensure respect for human rights, the case-law of the EUCJ prove that the EU has a sui generis power to protect human rights. This power is of sui generis nature because it derived from national, international and EU legal instruments, at present it flows from the contractual obligations of the MS and its usage is unique – not similar to human right's application exercised by national authorities or international bodies. Family rights are a part of human rights therefore the EU has a sui generis power to protect family rights.

1.2 Concepts of 'Family' and 'Respect for Family Life'

Taking into account that the EU has a *sui generis power* to protect family rights; that TCNs also have families which require to be protected, there is a need to find out how families are defined according to EU law. The Treaty on the Functioning of the European Union (TFEU) does not define what family is. Though there are no concrete provisions concerning families, Article 79 TFEU proves

[27] Case C-329/11 Alexandre Achughbabian v. Préfet du Val-de-Marne [2011], point 33 and Case C-403/03 Reference for a preliminary ruling: Egon Schempp v. Finanzamt München V [2005], point 19.
[28] Consolidated version of the Treaty on the functioning of the European Union (*Official Journal of the European Union, 30.3.2010, C 83-47),* Article 263 TFEU.

that families are being protected in the EU. Moreover, not only families of citizens of the EU but also families of TCNs have to be protected (Article 79(2) (a) TFEU). The Treaty on European Union does not say a word about 'families' either. As EU primary law does not provide a definition of family and all relevant questions related to TCNs and their residence rights on the grounds of the protection of the family life are regulated by the secondary law of the EU, we must analyze secondary law of the EU.

Directive 2004/38/EC, directive 2003/86/EC, directive 2003/109/EC concerning the status of third-country nationals who are long term residents do not reveal the concept of family. Directives say nothing about the commitment, affection or love among family members. They only enlist individuals who fall under the definition of family. However, those individuals are not the same: "Different EC instruments have slightly nuanced versions of the definition of family"[29]. Directive 2003/86/EC gives preference to nuclear family, so it impliedly states that only parents and a child constitute family, other individuals *may* fall under the definition of family – this is for the Member States to decide[30]. Directive 2004/38/EC sets a broader definition of family, however, certain categories of individuals such as siblings or *non-dependant* grandparents do not fall under the definition either[31]. But who could deny that an aunt or a grandmother might be more important for the wellbeing of a child than a violent father? Such regulation is negative because it does not take into account social, cultural and emotional factors which determine the existence of family life. Obviously the EU legislator designs the definition of 'family' in particular legal act by taking into account only a particular area of legal relations. Such regulation is defective because there is a possibility that in one case a married couple with children will be considered as 'family'; in other case all human beings living together and sharing household duties could be treated as 'family'. Such regulation is inadequate because the EU denies the existence of family in situations where it obviously exists. "The Court of Justice [also] has tended to privilege the nuclear family"[32]. Taking into account that secondary EU law and the EUCJ prefer narrow definition of family we may conclude that not all groups of individuals who consider themselves as families and which clearly may be regarded as such are being protected under European Union law. However, there are some implications in the case-law of the EUCJ showing that substance is more important than the form: the EUCJ takes into consideration whether marriage is a sham or not[33]. Therefore it seems that it is important for the Court whether family ties are real and durable.

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[29] Dallal Stevens 'Asylum-seeking Families in Current Legal Discourse: A UK Perspective' (*Journal of Social Welfare and Family Law, Vol. 32, No. 1, 2010, pp. 5-22. Routledge*), p. 8.
[30] Council Directive 2003/86/EC of 22 September 2003 on the rights to family reunification (L251/12). Preamble, points 9-10.
[31] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (L158/77), Article 2.
[32] Dallal Stevens 'Asylum-seeking Families in Current Legal Discourse: A UK Perspective' (*Journal of Social Welfare and Family Law, Vol. 32, No. 1, 2010, pp. 5-22. Routledge*), p. 7.
[33] Case C-370/90 Reference for a preliminary ruling: The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department [1992], point 12.

In order to find out whether the EU chose a proper way to define families we must compare European Union law with international instruments and national laws[34]. As the EUCJ constantly draws inspiration from the ECHR and because of the fact that Article 7 of the Charter corresponds to Article 8 of the ECHR – therefore according to the Charter it should have the same meaning as Article 8 ECHR[35] – it is important to reveal how families are being defined according to the ECHR.

The Strasbourg Court by interpreting Article 8 of the ECHR[36] gave us indirect indications of what family is. The ECtHR accepts that families may be composed of a man, a woman and a child, however it analyses not only the relationships between married couples: it also tries to find out if other de facto families exist. Therefore, marriage is not the only factor that matters, other criteria may also be relevant: 1) dependency – the Court made it clear that there is no "[…] family life between parents and adult children unless they can demonstrate additional element of dependence"[37]; 2) "[…] the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child […]"[38]; 3) cohabitation – it is important in assessing the relationship between the child and a biological father[39] or between unmarried couples; 4) lawful and genuine marriage – it may be relevant in cases where one of the parents does not live with a child anymore[40]. The Court also analyses the "[…] nature and duration of the parent's relationship and in particular whether they had planned to have a child; […]; contributions made to the child's care and upbringing; and the quality and regularity of contact"[41]. The European Court of Human Rights explicated that cohabitating couples without children could be considered as 'families'[42] and it recognised that close relatives, such as grandmother, "[…] may play a considerable part in family life"[43].

Despite the fact that the ECtHR did not provide a clear definition of family, the Court managed to protect those *who considered themselves as members of the family*. Two factors are the most important for the Court: intention to establish family life[44] and authenticity of family life. The case-law of the ECtHR clearly shows that the relationships among individuals must be genuine: "[…] they must be closely knit and durable"[45]. Moreover, by not giving a precise definition of 'family', the Strasbourg

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[34] We will rely on Lithuanian law because the third part of the Thesis will be based (among other legal and non-legal instruments) on the opinions of Lithuanian experts.
[35] Charter of Fundamental Rights of the European Union, Article 52(3).
[36] "Everyone has the right to respect for his private and family life […]" - The European Convention on Human Rights, Council of Europe, Rome, 4 November 1950, Article 8.
[37] Case of A. W. Khan v. The United Kingdom – App. No. 47486/06 [2010] ECHR, point 32; A. A. v. The United Kingdom – App. No. 8000/08 [2011] ECHR, point 47.
[38] Case of Anayo v. Germany – App. No. 20578/07 [2010] ECHR, point 57.
[39] Ibid, point 56.
[40] Case of Berrehab v. The Netherlands – App. No. 10730/84 [1988] ECHR, point 21.
[41] Case of Joseph Grant v. The United Kingdom – App. No. 10606/07 [2009] ECHR, point 30.
[42] Case of Schalk and Kopf v. Austria – App. No. 30141/04 [2010] ECHR, point 94.
[43] Case of Marckx v. Belgium – App. No. 6833/74 [1979] ECHR, point 45.
[44] Conor O'Mahony 'Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-traditional Families' (*International Law Review, Policy and the Family, Vol. 26, No. 1, 2012, pp. 31-61. Oxford Journals)*, p. 34.
[45] Lucius Caflisch 'Family Right to International Protection' (*Max Planck Encyclopedia of Public International Law, 2011*), point 12.

Court impliedly tells us that it is not possible to give a legal definition of family because emotional and psychological circumstances can be more relevant. The ECtHR emphasised in its case-law that "[…] respect for family life implies an obligation for the State to act in a manner calculated to allow these ties to develop normally"[46]. Therefore, the States may have positive (to ensure the effective exercise of family rights) or negative (to refrain from taking measures which would hinder the effective enjoyment of family life) obligations[47]. The Court tried to distinguish those positive and negative obligations, however, recently the ECtHR emphasised that applicable principles are similar: "[…] regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation"[48].

The ECtHR chose a better way to develop the definition of family than the EU. It is not so important for the ECtHR whether individual is a son, a wife, a grandmother etc. – true relationships are more important. If constant care, support, affection exist among individuals, they must be regarded as family members. However, one condition must be met: the protection of family life should not disproportionally affect the interests of the State[49]. Whereas in EU law kinship is very important: because of the kinship some family members are even being privileged. However secondary EU law also started to envisage the concepts of dependence, care and durable relationships so it is a good start for the EU because by taking into account the mentioned elements the protection of family life becomes more evident. It is obvious that the case-law of the ECtHR made a significant influence to EU law – the EUCJ started to apply very similar criteria[50] when considering if there is a family or not.

International Covenant on civil and political rights and International Covenant on economic, social and cultural rights define family as "[…] a natural and fundamental group unit of society"[51]. The definition is unclear because it does not give any indications what individuals should be regarded as family members or what relations should be seen as family relations. Two points are clear however: 1) family is seen as a unit, so it means that the relationships of family members must be very close and 2) families deserve an adequate protection because of their *fundamental* nature.

The protection of the family is probably enshrined in all Constitutions. However, the notion of family is usually not revealed. The task of ordinary law is to concretize the provisions of Constitution however sometimes there is a lack of legal certainty in ordinary law, despite the fact that legal

[46] Case of Marckx v. Belgium – App. No. 6833/74 [1979] ECHR, point 45.
[47] Case of Karrer v. Romania – App. No. 16965/10 [2012] ECHR, point 38.
[48] Case of Ciliz v. The Netherlands – App. No. 29192/95 [2000] ECHR, point 61.
[49] Therefore the ECtHR trying to find a fair balance between the interests of both sides applies the principle of proportionality and analyses the following questions: whether there was an interference with the applicant's right under Article 8 of the ECHR; whether it was 'in accordance with law'; whether it pursued a legitimate aim; whether it was 'necessary in a democratic society' - Case of Amrollahi v. Denmark – App. No. 56811/00 [2002] ECHR.
[50] Though not so broadly: legal instruments of the EU restrict the Court's abilities because Directives enlist individuals who fall or *may* fall under the definition of family. It means that the EUCJ cannot apply wide interpretations to all individuals who consider themselves as family members.
[51] International Covenant on Civil and Political Rights, United Nations, New York, 16 December 1966, Article 23; International Covenant Economic, Social and Cultural Rights, United Nations, New York, 16 December 1966, Article 10.

regulation must be precise and clear. For example, Lithuanian Constitution sets that "Family is the foundation of society and the State"[52]. There are many other norms in Constitution where family is being mentioned. However, the notion of family is not revealed and ordinary law does not give the answer of what it is[53]. Commentators of Civil Code of the Republic of Lithuania have suggested the definition of family: "A group of individuals bound by property and personal non-property legal relations arising from marriage, cohabitation without registration of marriage, blood relationship, adoption, or other legal form of child care and upbringing"[54]. This defition is quite good because it is broad and many different individuals may fall under this definition. However, some people may not fall under the definition of family according to the blood relationship[55]. Constitutional Court of the Republic of Lithuania had interpreted the provisions of the Constitution taking into account the case-law of the ECtHR. It explained that other non-marital families may also be protected under the Constitution. The form of the expression of family relations does not have any significant meaning for the constitutional conception of family. The Constitutional Court highlighted that the constitutional conception of family is based on the following factors: mutual responsibility of family members, understanding, emotional affection, support, voluntary decision to assume certain rights and obligations[56]. Interpretation of the Constitutional Court is very similar to Bainham's approach. The scholar suggests that only valuable family relations should be respected by the States and that the factors such as love, affection, support, commitment and permanence should be the guiding principles in assessing whether family or family life exists or not[57]. Obviously Constitutional Court of the Republic of Lithuania drew inspiration from the ECHR, the case-law of the European Court of Human Rights and from the scholarly doctrine because it did not define the concept of family but distinguished the factors which determine the existence of family and impliedly pronounced that individuals themselves know the best what family is and what family form to choose.

Comparison of different legal instruments reveals that the EU's chosen way to define families is not adequate because the paramount consideration is being paid to the family status or kinship while the ECtHR and the Constitutional Court of the Republic of Lithuania give the priority to real and durable family relationships. Not all families are being protected under EU law despite the fact that

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[52] Constitution of the Republic of Lithuania (Valstybės žinios. 1992, No. 33-1014), Article 38(1).
[53] For example, Civil Code of the Republic of Lithuania does not concretize what family is, it only sets the principles and the legal acts which must be applied in family relations – Civil Code of the Republic of Lithuania (Valstybės žinios. 2000, No. 74-2262), Articles 3.1-3.4.
[54] Valentinas Mikelėnas ir kt. Lietuvos Respublikos civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė. Pirmasis leidimas, Vilnius: Justitia, 2002.
[55] Lithuania is a member of the EU therefore by implementing the norms of EU directives it also may limit the degree of kinship – this depends on the fact whether the norms of particular directive related to kinship are mandatory or optional. It means that there is a possibility that not all blood relatives could be regarded as 'family' in Lithuanian law either.
[56] 28 September 2011 Judgement of Constitutional Court of the Republic of Lithuania on the conception of national family policy, para. 15.1.
[57] Clare McGlynn 'Families and the European Union: Law, Politics and Pluralism', Cambridge: Cambridge University Press, 2006, p. 39.

the EUCJ started to pay attention to social and emotional factors, to genuine relationships. The EU should improve the definition of family in order to guarantee an adequate protection of family life.

1.3 Problems Arising for Illegally Residing TCNs Seeking the Protection of the Family Life

In EU law protection of family life is conditional because it depends on various factors: *citizenship*[58], *movement*[59], *legal residence*[60], *age*[61], *kinship*[62] *or length of residence*[63]. Therefore it is clear that not all individuals have the same protection of a right to respect for his / her family life. *Dereci case*[64] is an example showing that the protection of the family life of *illegally* residing TCNs is not the same as of legally residing individuals. The EUCJ impliedly stated that Mr Dereci should not be allowed to stay in the MS because the child could live a fully-fledged life without a father as his father did not support him financially and did not have EU citizenship. Such approach could be indirectly explained by the 'dominant ideology of the family' which states that parents have different roles: mother is a primary carer of the children and father is a breadwinner; "Fatherhood is seen as different from motherhood, less direct and immediate and more distant"[65]. Apparently, the father did not play his role so he was not seen as necessary for the family. However, this approach cannot be applied in this modern lifetime because the roles have changed significantly. More and more often mothers become the financial supporters of the family and fathers take care of children: "[…] there could be circumstances where the relationship of the child with the father was as strong or stronger"[66].

The case-law of the EUCJ suggests that not all *illegal* immigrants should be punished for disrespecting the laws of the MS – *Akrich* and *Metock cases*[67] clearly show that due regard must be taken to family rights. But national institutions and EU Courts do not take this into account properly all the time – *Dereci case* is one of those cases raising doubts about the fairness and justice of the decisions. It shows how skin-deep questions related to family rights are sometimes being considered: the Court did not try to investigate with which parent a child would like to live, whether the removal of

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[58] Family rights of the citizens of the European Union are better protected than the rights of the TCNs.
[59] Various EU legal instruments apply to individuals when there is a cross-border element because of the fact that the link with EU law appears.
[60] According to directive 2003/86/EC only *legally* residing TCNs have a right to family reunification.
[61] Directive 2003/86/EC confirms that different rules are applied for TCNs under the age and above the age of 15 – it seems that somehow children above the age of 15 are not considered to be family members, because directive states that residence may be granted to children who applied after the age of 15 on different grounds than family reunification (Article 4(6)).
[62] Directive 2004/38/EC and Directive 2003/86/EC confirm that different level of protection is being given to individuals depending on degree of relatedness.
[63] Seasonal workers do not have a right to family reunification because legal residents may apply for family reunification only when they have a residence permit at least for a year (see directive 2003/86/EC). However, seasonal workers do not stay in the EU for that long.
[64] Case C-256/11 Reference for a preliminary ruling: Murat Dereci v. Bundesministerium für Inneres [2011].
[65] Clare McGlynn 'Families and the European Union: Law, Politics and Pluralism', Cambridge: Cambridge University Press, 2006, p. 25-26.
[66] Mark W. Janis, Richard S. Kay and Anthony W. Bradley 'European Human Rights Law: Text and Materials', Oxford: Oxford University Press, 2008, 3d edition, p. 384.
[67] Case C-109/01 Reference for a preliminary ruling: Secretary of State for the Home Department v. Hacene Akrich [2003], point 58; Case C-127/08 Reference for a preliminary ruling: Blaise Baheten Metock v. Minister for Justice, Equlity and Law Reform [2008].

a TCN father would be in the child's best interests, whether a child is emotionally and socially dependent on his father; whether Mr. Dereci posed any threat to public security and safety, whether he was integrated into the host Member State, what his relationships with the country of origin were etc[68] – all the EUCJ saw was illegal stay and uncertain (his wife was EU citizen so she could maintain the family) threat to the social system of the Member State. Sometimes family rights are simply being negated by not trying to find out whether exceptional circumstances exist which could allow for a TCN to remain in the host MS. The decision seems to be unfair if we take into account the transfigured family roles, rights and obligations of the parents, interests of children and the essence of family life. However we could not say that the decision was completely opposite to law. Mr Dereci was an illegal immigrant so the EU, having a goal to return illegal immigrants to their countries of origin, complied with the rules laid down in EU law. However one question really concerns us: if the EU has a goal to return *all* illegally residing TCNs why it allows for some of them (the lucky ones) to stay and why in such cases the EUCJ applies different criteria[69]? If the Court decided to create possibilities for *illegal* immigrants to stay in the Member States it should guarantee equal opportunities for illegally residing TCNs to prove that they are worthy of protection, that their family situation (exceptional family circumstances) requires protection despite the fact that some family members resided in the Member State illegally. Equal oppurtinities could be guaranteed only if the EUCJ would apply the same criteria in all cases related to residence rights of illegally residinig third-country nationals.

Illegal immigrants should not be seen as an 'absolute evil' – "[…] an increasing number of them are educated […]"[70] and self-sufficient, so they cannot become a burden to the social systems of the Member States. Moreover exceptional family circumstances may require to guarantee the protection of the family life despite the fact that a TCN lived illegally in the Member State. It was rightly observed that fundamental rights of migrants in an irregular situation need to be protected[71]. Family rights must be granted to all human beings. So we will try to find out what legal grounds (not only the ones mentioned by the Court) could allow for illegally residing TCNs to stay in the EU *on the basis of the protection of the family life*. Moreover because of the fact that in the EU cases related to illegally residing TCNs' are being dealt with differently considering different factors we will try to find out whether the protection provided by the EUCJ is adequate or not.

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[68] Most of these factors were formulated by the ECtHR. The EU having a goal to accede to the ECHR and declaring in the Charter that it will not guarantee less protection of family life than the ECtHR (see about that in Chapter 3) should take into account all these factors in order to make reliable and just decisions.

[69] Comparison of *Zambrano, Zhu and Chen, Carpenter etc. cases* reveals that the Court applies completely different criteria in illegally residing TCNs' cases.

[70] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Study on the links between legal and illegal migration, Brussels. 4.6.2004, COM (2004), part 2, para. 3.

[71] European Union Agency for Fundamental Rights 'Fundamental Rights of Migrants in an Irregular Situation in the European Union', 2011, p. 19.

2. THE PROTECTION OF THE FAMILY LIFE AS A GROUND FOR ILLEGALLY RESIDING THIRD-COUNTRY NATIONAL TO CLAIM RESIDENCE RIGHTS

The previous sections revealed that the EU has a *sui generis power* to protect family rights. The EU has been created for the wellbeing of EU citizens not the TCNs so it is unclear whether *illegally* residing TCNs may demand residence rights on the grounds of the protection of their family life. Therefore, we are going to analyze this question. Moreover, we need to highlight that we will scrutinize the ability to grant residence rights for a particular group of TCNs ***– illegally residing TCNs who are family members of EU citizens that have never moved to the other MS***. It means that we will try to prove that despite the fact that neither directive 2004/38/EC nor directive 2003/86/EC can be applied (directive 2004/38/EC is only applied to EU citizens who move to or reside in a MS other than that of which they are a national and to their family members[72] and directive 2003/86/EC cannot be applied to TCNs if they are family members of EU citizens[73]), EU law still provides possibilities for *illegal* immigrants to stay in the EU on the grounds of the protection of the family life.

2.1 Article 7 of the Charter as a Basis for TCN to Claim Residence Rights

The Treaty on the Functioning of the European Union and the Treaty on European Union say almost nothing about the protection of family rights. However the right to respect for family life is enshrined in the Charter which became binding after the Lisbon Treaty had entered into force and now has the same legal value as the Treaties[74]. As we may not rely on concrete articles of the EU Treaties and directives (particularly directives 2004/38/EC and 2003/86/EC) the Charter is a very important instrument in order to find out whether family rights of *illegally* residing TCNs may be protected.

The Charter can be applied to EU citizens since it has been created for their well-being. There are even special articles which are adduced only to EU citizens (see title V of the Charter). Article 7 of the Charter was specifically designed to protect family rights so EU citizens could rely on this article and demand residence rights for their *illegally* residing TCN family members. However, we must find out whether TCNs themselves may rely on the Charter because the case-law of the EUCJ is controversial: in *Carpenter case* the EUCJ has formulated its decision in a way that a right to the protection of the family life belongs *only* to EU citizens[75]. *Dereci case* disclosed that family life might be enjoyed by only a mother and a child[76], so if only EU citizen would apply to the national court and would try to prove that his right to the protection of the family life has to be ensured by providing residence right to his TCN family member, nobody could be sure that he will be able to get it. This is because of the fact

[72] Directive 2004/38/EC, Article 3.
[73] Directive 2003/86/EC, Article 3(3).
[74] Article 6(1) TFEU.
[75] The EUCJ mentioned that deportation of Mrs Carpenter would infringe *her husband's right to respect for his family life* however the Court did not say a word that Mrs Carpenter's rights would be infringed - Case C-434/09 Reference for a preliminary ruling: Shirley McCarthy v. Secretary of State for the Home Department [2011], point 41.
[76] A TCN father was seen as not necessary for the family because he did not maintain his family – see *Dereci case*.

that the Court analyses whether a TCN is necessary for the family but it (almost) never considers whether the family is needed for the TCN. When individuals decide to found a family they commit to one another to live in wealth and in poverty, to take care of each other both emotionally and financially etc. The fact that only EU citizen is financially independent should not determine the Court's decision. Not only EU citizens may need financial or emotional support from their TCN family members the TCN family member may need such things too. The Court should look at the family as a whole: it should analyze their overall economic and family situation, their relationships and special needs, responsibilities not just the situation of the TCN. Taking this into account we must find out whether the Charter and particularly Article 7 of the Charter can be relied upon *illegally* residing TCNs.

The Preamble of the Charter makes no indication that it cannot be applied to third-country nationals. On the contrary there is a clear provision allowing to state that the Charter *can* be applied to TCNs: "It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice"[77]. As we can see from the text of the EU Treaty this area is significantly concerned with TCNs[78]. The majority of rights enshrined in the Charter are accorded to everyone so to third-country nationals too. Therefore Article 7 of the Charter is also dedicated to TCNs as it explicitly states that *everyone has the right to respect for his or her family life*. If this right would be guaranteed only for the citizens of the EU the Charter would say it very clearly as it does in other articles, e.g. title V notably states that those are the rights of the citizens of the European Union. There are some indications that *illegally* residing TCNs cannot enjoy *certain* rights: social security benefits and social advantages as well as freedom of movement and residence may be granted to TCNs legally resident in the territory of a Member State[79]. Article 7 is not among the mentioned Articles so it seems that it can be applied to *illegally* residing TCNs. However the norms of the legal document must be applied and interpreted systematically, so we need to make sure whether other provisions of the Charter do not forbid applying Article 7 for *illegally* residing TCNs. There might be a contradiction between Article 7 and Article 45(2) of the Charter because our situation is concerned with *illegal* immigrants who *seek to reside* in the EU therefore it seems that Article 45(2) may become an obstacle for *them*: according to Article 45(2) *residence* may be granted only to *legally residing* TCNs. It is not clear whether Article 45(2) applies to TCNs who move to the second Member State or to TCNs who come to the EU for the first time. Explanations of the Charter do not have a legal value however they are very significant: the EU Courts have to give due regard to them[80]. Therefore we must rely on them too in order to find out the answers. Explanations of the Charter indicate that "[…] Article 45(2) refers to the power granted to the Community by Article 62(1) and (3) and Article

[77] Charter of Fundamental Rights of the European Union, Preamble.
[78] See Title V of the Treaty on the Functioning of the European Union.
[79] Charter of Fundamental Rights of the European Union, Article 34(2) and Article 45(2).
[80] Ibid, Article 52(7).

63(4) of the EC Treaty"[81]. We are concerned about *residence* rights so only Article 63(4) is relevant to us (Article 62 is related to movement rights). Article 63(4) states that the Council shall adopt "measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member State"[82]. Apparently Article 45(2) applies only to those TCNs who have moved form one Member State to the other, therefore this Article is not relevant to us – it does not affect static *illegally* residing TCNs who want to stay in the EU on the grounds of the protection of their family life[83]. Therefore *static illegally residing TCNs* may rely on Article 7 of the Charter and claim residence rights on the grounds of the protection of their family life.

According to Article 51(1) of the Charter Member States have to ensure application of the provisions of the Charter "[…] only when they are implementing Union law". Some scholars express the idea that giving binding legal effect to the Charter restricted the application of human rights[84]. That may be true if we consider that before the Charter was given a binding legal effect the EUCJ and the Member States did not apply Article 51(1) very strictly. The case-law of the EUCJ confirms this idea because the Court has analyzed cases which "[…] did not involve direct implementation of EU law by the national authorities and concerned matters which were purely internal […]"[85]. Now the Charter does not allow doing this as it is a legally binding act – Member States and European Union institutions should apply the provisions as they are drafted.

Article 51(1) of the Charter is unclear as it is not evident what implementation of EU law means. Explanations of the charter indicate that Article 51(1) means that "[…] the requirement to respect fundamental rights defined in a Union context is only binding on the MS *when they act in the context of Community law*" (emphasis added). Such explanation makes more confusion than clarity because it seems that the concept of 'implementation of EU law' is much narrower than the concept of 'acting in the context of Community law'. Implementation seems to cover situations where MS implement directives and create national rules which have to correspond to the provisions of those directives. According to the European Commission it may also cover situations when Member States apply the EU regulations and decisions[86]. Whereas 'act in the context of Community law' suggests that the Charter should be applied by the MS not only when they implement EU law but when a slightest

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[81] Draft Charter of Fundamental Rights of the European Union (text of the explanations relating to the complete text of the Charter), Brussels. 11 October 2000 (18.10).
[82] Consolidated version of the Treaty establishing the European Community: http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html (viewed: 07.11.2012).
[83] Present EU Treaty, particularly Article 79(2) (d) TFEU (ex Article 63, points 3 and 4, TEC) also envisages that the mentioned residence rights apply to TCNs who reside in other Member States.
[84] Alina Tryfonidou 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (*European Law Journal, Vol. 15, No. 5, 2009, pp. 634-653*), p. 653.
[85] Aidan O'Neill 'The EU and Fundamental Rights – Part 2. The Charter of Fundamental Rights of the European Union' (*2011, Oxford Journals*), p. 383-384.
[86] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2010 Report on the Application of the EU Charter of Fundamental Rights, Brussels. 30.3.2011, COM (2011), point 2.1.

connection with EU law appears[87]. For this reason we agree with Craig and de Búrca who say that: "[…] the Charter has not in fact narrowed or changed the previous case-law of the Court"[88]. This statement can be substantiated by the fact that the EU Courts have to give due regard to the explanations of the Charter which allow for the MS to apply this legal document wider so it is not surprising at all that the Charter may be relied upon in situations where were is no direct implementation of EU law. However the vagueness of 'implementation of EU law' has to be rectified because individuals of the EU do not understand when the Charter may be applied, a lot of people think that the Charter can be applied in the matters of national competence and many individuals emphasize that "[…] it is false that the Charter applies to MS only when they implement EU law"[89].

Recently the EUCJ had a possibility to rectify the mentioned ambiguity and to explain what 'implementation of EU law' means. But the Court did not provide the answer. It only stated that the national court must decide whether the situation of the applicant is covered by EU law[90]. It is evident that the EUCJ uses a different conception – it invites to asses whether the situation is *covered* by EU law. This conception is more close to the conception provided by explanations of the Charter than the conception enshrined in the Charter text. So it would be reasonable to allege that the MS are bound by the provisions of the Charter not only when the situation is related to direct implementation of EU law. MS must ascertain whether there is a possibility *to apply EU law in that particular situation*. It means that Member States must look not only at the provisions of EU decisions, regulations, directives and national laws which implement them but at all other instruments of EU law: provisions of EU Treaties, general principles of EU law, possibly even non-legislative documents. Apparently the ability to find a link with EU law is much greater if we apply the concept formulated by the EUCJ.

The other unclear question is whether the EU citizen or the TCN may rely on Article 7 of the Charter without any other supporting EU provisions. A. G. Sharpston in *Zambrano case* expressed the idea that because of the fact that the Lisbon Treaty had not yet been concluded and the Charter was still not legally binding an individual could not claim a right to family life on the sole ground of Article 7 of the Charter[91]. Now the Lisbon Treaty has entered into force and the Charter has a binding legal effect. Moreover, Article 33(1) of the Charter states that the family shall enjoy legal, economic and social protection. As Alina Tryfonidou observes this provision "[…] illustrates that the Charter recognises that 'the family' in the EU has to be protected in its own right, and not only in the process

[87] EU institutions next to the legal acts adopt guidelines and communications where they set EU's objectives, commitments. So there is a possibility that such documents may also create a link with EU law in particular situations.
[88] Paul Craig and Gráinne de Bùrca 'EU law: Text, Cases and Materials', Oxford: Oxford University Press, 2011, 5th edition, p. 386.
[89] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2011 Report on the Application of the EU Charter of Fundamental Rights, Brussels. 16.4.2012, COM (2012), p. 8.
[90] Case C-256/11 Reference for a preliminary ruling: Murat Dereci v. Bundesministerium für Inneres [2011], para. 72.
[91] H. van Eijken and S. A. De Vries 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' (*European Law Review, Vol. 36, No. 5, 2011, pp. 704-721. Westlaw International)*, p. 714.

of achieving other goals whether economic […] or not"[92]. Taking into account *Dereci* case[93] we may conclude that it is not enough to indicate Article 7 of the Charter; supporting provisions are still needed: TCN family must substantiate that their situation is *covered* by European Union law. However this requirement had been slightly simplified because the EUCJ did not state (as it used to do earlier[94]) that family rights have to be guaranteed only for commercial goals. Non-commercial situations may also be covered by European Union law however the Court did not indicate what those situations could be. We think that particular situation could be covered by general principles of EU law derived from common legal principles of the Member States or general principles found in international law, therefore other fundamental rights (e.g. the rights of a child as it is one of the EU's goals enshrined in the EU Treaty (Article 3(3) TFEU), moreover rights of a child and obligation to protect those rights are envisaged in various international agreements of which the Member States are parties[95] and national laws), equality (e.g. equality between spouses as this principle is clearly stated in various international treaties[96]), proportionality (a TCN could claim that it would be disproportionate not to allow for him to live in the EU when his family is not (and likely will not be in the future) a burden to the social system of the MS – such reasoning could be easily substantiated by the fact that directive 2004/38/EC and directive 2003/86/EC envisage various requirements for legally residing TCNs in order to protect economic and social interests of the Member States) could be invoked by the TCNs in order to support Article 7 of the Charter. The situation might also be covered by non-legal documents of the EU as tasks, objectives and commitments are set in reports and communications of the EU which basically concretize the goals and obligations set in the European Union Treaties.

EU citizens and their TCN family members may rely upon Article 7 of the Charter and require for residence rights. However, not all families may rely upon it. Article 7 of the Charter cannot be applied as a sole ground: other supporting provisions must be adduced. It means that only those families who may prove that their situation is covered by EU law may rely upon Article 7 of the Charter. The EUCJ decided not to provide the answer when the situation may be covered by EU law; it only indirectly whispered that non-commercial goals could also be relevant. We suggest that not only directives, decisions and regulations of the EU could be applied next to Article 7 of the Charter.

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[92] Alina Tryfonidou 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (*European Law Journal, Vol. 15, No. 5, 2009, pp. 634-653*), p. 652.

[93] Mr. Dereci was illegal immigrant and he tried to get a residence permit relying on the citizenship status of their family members. The EUCJ considered that respect for family life may require from the MS to grant a residence permit, however in order to apply Article 7 of the Charter the situation of the family must be covered by EU law.

[94] Carpenter case revealed that family rights were not of paramount consideration; the most important thing for the Court was that Mr Carpenter provided services in various EU countries - Case C-60/00 Reference for a preliminary ruling: Mary Carpenter v. Secretary of State for the Home Department [2002], points 38-39.

[95] Convention on the Rights of the Child, United Nations, New York, 20 November 1989; International Covenant Economic, Social and Cultural Rights, United Nations, New York, 16 December 1966.

[96] The European Convention on Human Rights, Council of Europe, Rome, 4 November 1950; International Covenant on Civil and Political Rights, United Nations, New York, 16 December 1966.

General principles, provisions of the EU Treaties or non-legal documents concretizing objectives and obligations of the Union could be applied next to Article 7 of the Charter too.

2.2 Directive 2008/115/EC as a Basis for Illegally Residing TCN to Acquire a Residence Permit

When the EUCJ has to give rulings in cases concerning residence rights of illegal immigrants the Court usually bases its judgements on the EU Treaties, International Treaties and mostly on directives 2004/38/EC and 2003/86/EC[97]. The EUCJ relying on the ECHR accepts the idea formulated by the ECtHR that "the right to live with one's family results in obligations for the MS which may be negative, when a MS is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory"[98]. The Court applies positive obligations quite well. Detailed rules of directives 2004/38/EC and 2003/86/EC state the requirements in order *to allow* for the TCNs *to reside* in the territories of the MS. If a person complies with those requirements and does not constitute any danger to public policy, security and health MS allow for such individual to reside in their territories. However, it would be hard to agree that MS implement their negative obligation properly. Apparently the national courts and the EUCJ forgot to apply directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals in situations where the question 'whether to grant residence rights for *illegally* residing TCN or to send him to his country of origin' has to be solved. Because of the fact that objective of this directive is to return *illegally* residing TCNs, negative obligation should be taken into account. MS should not send *illegally* residing TCNs to their countries of origin by firstly not making sure whether such conduct is necessary (protection of family life may request not to deport *illegally* residing TCNs). Though negative obligation is as important as positive obligation neither national court nor the EUCJ relied on directive 2008/115/EC in *McCarthy* case[99] despite the fact that the MS new about this directive (it entered into force in 2008 and the national court applied to the EUCJ in 2009). Moreover in *Dereci* case the national court applied to the EUCJ after the end of transposition period set in directive 2008/115/EC[100], therefore MS have already been legally obliged to give due regard to the provisions of this new directive. The fact that the EUCJ did not say anything about directive 2008/115/EC (Return directive) in the mentioned cases could be explained by the fact that national courts have an obligation to formulate the questions and to choose the legal grounds – the EUCJ has no such responsibility[101].

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[97] See for example *Dereci case*.

[98] Case C-540/03 European Parliament v. Council of the European Union [2006], point 52.

[99] Mrs McCarthy (national of the United Kingdom) married *illegally* residing Jamaican national (he lacked leave to remain in the United Kingdom) and being static EU citizen required national institutions to grant a residence permit for her husband on the grounds of her EU citizenship status and citizenship rights- Case C-434/09 Reference for a preliminary ruling: Shirley McCarthy v. Secretary of State for the Home Department [2011].

[100] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (L348/98), Article 20.

[101] Notices clearly state that the national courts have to identify the EU law provisions relevant to the case as accurately as possible. It means that legal norms must be indicated by the national courts not the EUCJ – Notices from European Union institutions and bodies, Court of Justice. Information note on references from national courts for a preliminary ruling

We made an assumption that the protection of the family life may require from the MS not to deport *illegally* residing TCNs. We must substantiate this supposition by concrete provisions of Return directive. The Preamble of Return directive shows that *illegally* residing TCNs can be removed from the territory of the MS only if the authorities gave due regard to fundamental rights of third-country nationals[102]. Return directive also envisages that primary consideration should be given to the 'best interests of the child' and to 'respect for family life'. Moreover, decisions have to be made on a case-by-case basis; they must be grounded on objective criteria and the mere fact that a person stayed illegally in the EU could not determine the removal[103]. The obligation to make a decision on a case-by-case basis is a perfect safeguard for the MS because it means that not all TCNs relying on the protection of their family life could be granted a possibility to stay. Specific circumstances should determine the necessity not to deport him / her. Furthermore this directive states that it "[…] respects fundamental rights and principles recognised by the Charter […]"[104]. It means that the Member States must also analyze whether other rights may be violated by the return decision. It can be clearly seen that returning *illegally* residing TCNs is not the only objective of the Return directive. This directive seeks to ensure a fair balance between the interests of the Member States and the interests of the family. Article 7(2) of this directive states that the MS must "[…] extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links"[105]. Article 14(1) (a) also states that MS should consider whether "[…] family unity with family members present in their territory is maintained". Furthermore, Article 9(2) requires thinking about postponement of removal "[…] taking into account the specific circumstances of the individual case". Therefore it seems that the MS have to scrutinize every case and try to find out whether the individual concerned has integrated into the Member State. If he has, the need to protect the unity of his family may become more important than the desire to get rid of third-country nationals.

Article 5 confirms the idea expressed in the Preamble that due regard must be given to the rights of the child and family rights. However this provision does not mean that the national authorities will not return illegally residing TCN every time he relies on the grounds of the protection of his family life. The words 'due account' mean that after conducting the analysis it may become clear that interests of the MS are more important than interests of family therefore protection of family life could not be granted. Article 6(4) allows for the MS to grant an autonomous residence permit for *illegally* residing TCN for compassionate, humanitarian or other reasons. Humanitarian reasons are quite clear

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(*Official journal of the European Union, 5.12.2009, C 297/01)*, point 22. But the national court did not mention directive 2008/115/EC in his references for a preliminary ruling.

[102] Directive 2008/115/EC, Preamble, para. 2.

[103] Ibid, Preamble, para. 22 and para. 6.

[104] Ibid, Preamble, para. 24.

[105] Ibid, Article 7(2).

as MS usually state in their national laws that foreigners may not be forced to leave the country if they suffer from a serious decease, if professional activity creates obstacles for leaving the country, if *force majeure* circumstances do not allow for TCNs to depart etc.[106]. It is unclear however what situations hide under the words *compassionate reasons* and *other reasons*. The word *compassionate* is vague because it is not evident what it highlights: 1) situations related to mercy or 2) personal situations. Of course it may perfectly involve both of them. It is quite hard to interpret such a concept because the directive does not make any explicit indications about that. However, taking into account the norms of Return directive (particularly Article 5(c)) we suggest that compassionate reasons could involve individual's state of health. However we may not suggest the real reasons because official interpreter of the directive is the Legislator of this document and the EUCJ therefore we must wait and see what grounds will be mentioned by them in the future. On the other hand taking into account the Preamble of this directive it seems that compassionate reasons could be related to human rights because protection of human rights is expressed in the Preamble as a commitment of the European Union.

It is also not clear what it means 'other reasons'. Probably they should also be related to human rights as Preamble clearly states that this directive respects fundamental rights and principles enshrined in the Charter. We consider that the protection of the rights of a child and the protection of family rights may fall under the concept of 'other reasons'[107]. Article 5 only sets an obligation for the Member States to take due account to family rights and the best interests of a child. However after considering the mentioned factors Member States are not obligated by this article to allow for illegally residing TCNs to stay otherwise it would have been clearly stated that the existence of certain circumstances related to family life or interests of the child could allow for illegally residing TCN to stay / to grant a residence permit. Moreover, Article 6(1) of the Return directive indicates that the MS should "[…] issue a return decision to *any* illegally staying TCN […]", unless exceptions (envisaged in Article 6) exist. So it is clear that illegally residing TCN cannot be sent to his country of origin *only* if the circumstances explained in Article 6 arise. Therefore Article 6(4) could be seen as a specification of Article 5 which could mean that if a Member State after taking into account particular circumstances of TCN's family life decides that returning illegally residing TCN would be contrary to the interests of the TCN's family, the Member State may decide to grant such a person a residence permit. However it is clear from Article 6(4) that residence permit is autonomous permit. It means that other family members should reside in the EU legally because granting a residence permit for *illegally* residing

[106] Law on the legal status of aliens (Valstybės žinios. 2004, No. 73-2539), Article 18.
[107] It may also fall under the concept 'compassionate reasons', because particular familial circumstances could result in the need to take pity on third-country nationals.

TCN on the grounds of the protection of his family life could not make the residence of other *illegally* residing family members legal. The TCN acquires the residence permit only for himself[108].

Objective of this directive is *to return* illegally residing TCNs. It means that the decision to grant a residence permit for the TCN may be made only in exceptional cases. Therefore the reasons which could determine the decision to grant a residence permit for illegally residing TCN must be very serious. Those reasons and exceptional circumstances should show that *in this particular situation* a right of an *illegally* residing TCN to stay in the Member State and live with his family is more important than the interests of the State and the interests of the EU. May the protection of the family life of illegally residing TCN be more important than the interests of the State? We think that it certainly may. Otherwise Article 5 of Return directive would not oblige the Member States to take due account to family life and interests of children. There would be no point to envisage such a requirement if it could not have any legal consequences. Such obligation then would be void.

However, we think that in order not to disproportionally affect the interests of the Member States by granting for *illegally* residing TCN a residence permit the situation of that TCN should be specific. The facts of the family situation should show that it would not be wrong if the MS did not return *illegally* residing TCN to his country of origin. Therefore we think that such a TCN should live in a family where family relationships are valuable, durable and genuine and he should comply with more than a few of the following alternative requirements: 1) he is not a burden to the social system of the Member State; 2) he has a work or if he does not have a job he may still provide financial assistance for the family by other legal means or his family members provide him financial assistance; 3) he poses no threat to public policy, security or health; 4) he has serious health problems; 5) he is integrated in the society of the Member State; 6) he lives in particular MS for a long time (not less than 2 years) etc.[109]. We propose such requirements because according to the EU Treaty the EU has a goal to prevent and to combat illegal immigration[110] therefore staying of illegally residing TCNs in the EU should be useful for the Member State economically[111] or at least *illegally* residing TCNs should not pose any threat to the social system of the MS or particular circumstances of family situation should suggest that despite the fact that a TCN could not be considered as economically and socially useful or neutral he should still be allowed to stay. Then the Member States, taking into account the requirement enshrined in the Preamble that the MS should not remove TCNs on the mere fact that a person stayed in the EU illegally, would not be able to find a supporting ground in order to return such TCNs.

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[108] Such interpretation could be applied to cases such as *Dereci* as the wife and the child were legal residents therefore in order to preserve family relationships the Member State could guarantee a residence permit for such a TCN.
[109] The list of requirements is based on Return directive, directive 2004/38/EC and directive 2003/86/EC (the latter are applied to legally residing TCNs so we rely on them as an example): on their spirit, provisions and objectives.
[110] Article 79(1) TFEU.
[111] For example, illegally residing TCN could contribute to his legally residing family member‘s economic activity.

"[…] Directive 2008/115 concerns only the return of illegally staying third-country nationals in a Member State and is thus not designed to harmonize in their entirety the national rules on the stay of foreign nationals"[112]. However, the principles set in this directive, objectives and values expressed in the Preamble of this legal document have to be taken into account by the MS. This directive certainly does not harmonize the rules on the stay of TCNs however it provides a possibility to grant a residence permit for TCNs. Therefore we can claim that despite the fact that Return directive does not oblige the MS to grant residence rights for TCNs on the grounds of the protection of their family life, it definitely obligates the Member States to give due regard to the needs of the family, it obligates them to ascertain whether there are no circumstances showing that removing TCNs from their territories would infringe the interests of their family much stronger than non-removal of them would infringe the interests of the Member State. Therefore, taking into account all the arguments, we may conclude that Return directive may be a ground for *illegally* residing TCN to acquire a residence permit for family sake.

However Article 6(4) of the Return directive can be seen as problematic because it does not give an obvious answer whether illegally residing TCNs might be allowed to stay in the MS for life or only temporarily. The wording of Article 6(4) of the Return directive implies that depending on specific circumstances MS could grant either permanent or temporary residence permits (it means that Return directive envisages both types of permits) because according to Article 6(4) of the Return directive the issued return decision should be "[…] withdrawn or suspended for the duration of validity of the residence permit or other authorization offering a right to stay". Withdrawing return decision indicates that return decision should not be issued again (at least on the same grounds) because withdrawing means abolishment. Therefore if a MS decides to withdraw a return decision it should issue a permanent residence permit. And on the contrary if the MS decides only to suspend a return decision for the duration of validity of the residence permit / authorization it means that a residence permit / authorization could be only temporary. Unfortunately the Return directive does not indicate when the MS should issue a temporary residence permit / authorization and when to issue a permanent residence permit / authorization. Such a lacuna creates possibilities for the MS to abuse the rights and powers conferred by this Directive because it is more likely that the MS, seeking to protect their social and economic wellbeing, would issue only temporary permits. This way problems related to family life of illegally residing TCNs would not be fully resolved – they would only be suspended.

The other problem is that Article 6(4) of the Return directive does not say anything about the content of the rights which could be provided after the residence permit / authorization is being granted: whether illegally residing TCNs are able to acquire a full package of rights (to work, to require for social assistance, to travel, to get treatment etc.), or only some of them. It is unclear what the difference between residence permits and authorizations offering a right to stay is either. The

[112] Case C-329/11 Alexandre Achughbabian v. Préfet du Val-de-Marne [2011], point 28.

difference may be only formal – 'other authorization offering a right to stay' could mean that it is the same residence permit only has a different title. That way the MS would be allowed to decide how they want to entitle it as they could seek to distinguish the title in order to make it clear that the person received it while living *illegally*. In fact Europe sends us exactly such a reference. Official site of the EU states: "Due to compassionate, humanitarian or other reasons, a Member State may provide an illegally staying third-country national with an autonomous residence permit or *an equivalent right to stay* (emphasis added)"[113]. But the difference could also be substantial: a residence permit could make an illegal immigrant legal so he could work, access to the services of the health care, travel from one MS to the other etc. but 'authorization offering a right to stay' could indicate that a person is only not being returned however his status in reality remains the same so he would not be able to work, to require for social assistance, to get treatment etc. Such a broad discretion – the discretion to choose the duration of residence permits / authorizations and the content of the rights granted by them – conferred on the MS creates uncertainty and huge problems for families seeking to improve their legal position (to be more specific their illegal status). Because of the fact that the answers cannot be given by interpreting only the provisions of the Return directive and scholarly doctrine (in order to find the answers we would have to analyze the whole practice and legal documents of the Member States that have been obliged to implement this directive) and taking into account that only the Legislator of this directive or the EUCJ could give us the right interpretation of Article 6(4), we may not provide irrefutable comments about the content of the residence permits / authorizations offering a right to stay and their duration. However we believe that it is enough to indicate an ability to grant residence permits / authorizations offering a right to stay for *illegally* residing TCNs in order to make a conclusion that sometimes TCNs are worthy of protection despite the fact that their presence is illegal.

Furthermore it is possible to use directive 2008/115/EC as a supporting ground in order to rely on Article 7 of the Charter. Article 7 of the Charter may be applied when Member States implement EU law. This directive is addressed to the MS so they must transpose the norms of this directive into their national laws. Return directive clearly covers situations of our analysed families because it is directly related to illegally residing TCNs – Return directive has to be applied to illegally staying TCNs which the MS seek to return. Therefore Article 7 may be supported by the provisions of Return directive. It means that this way MS should guarantee adequate protection of a TCN's family life: Member States would be obliged in such cases to look not only at the provisions of Return directive but also at the case-law of the EUCJ and the case-law of the ECtHR[114]. On certain aspects[115] the protection of family

[113] Common standards and procedures for returning illegal immigrants (viewed: 26.11.2012): http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0014_en.htm

[114] According to Article 52(3) of the Charter, the meaning and scope of the right to respect for family life (Article 7 of the Charter) are the same as those of Article 8 of the ECHR. Explanations of the Charter state that the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the ECtHR and

life guaranteed by the ECtHR is higher than the protection granted by the EUCJ. Therefore, the EU Courts could apply the best-practises of the Strasbourg Court to our analysed situations: after all, some of the TCN families do not abuse the rights and opportunities provided by EU law, they do not place a burden on the social system of the Member States, they just want to live with their families a normal family life but adequate family life cannot be enjoyed because of the possible insurmountable obstacles. Therefore they need to be protected – they need to be allowed to reside in the EU.

Return directive creates possibilities to grant for illegally residing TCNs residence permits on the grounds of the protection of their family life. However, Return directive does not set any obligations: MS are free to decide whether to return illegally residing TCNs or not. However, they may return illegally residing TCNs with two conditions: MS must find a supporting ground in order to send illegally residing TCNs to their countries of origin as a mere fact that a TCN resides in the EU illegally cannot determine the decision and MS must ensure a fair balance between the interests of the MS and the interests of the families. The biggest problem is that when MS decide to allow for illegally residing TCNs to stay MS are free to choose the duration and the content of the residence permits / authorisations because the Return directive itself does not envisage any obligatory requirements for that. However Return directive could be used as a supporting ground in order to rely on Article 7 of the Charter which could guarantee more adequate protection of the family life.

2.3 EU Citizenship Status of a Family Member as a Basis for Illegally Residing TCN to Claim Residence Rights

European Union law has been initially created for economic reasons, so in order to ensure a suitable functioning of internal market the Member States decided to guarantee rights for EU citizens: they were allowed to move and reside, to work and to study in other MS than that of which they were nationals. For the same reason family members of EU citizens were also granted various rights despite the fact that they were not even economically active. "Since the 1970s, the EU has been active in relation to recognize the rights of the TCN family members of European citizens"[116]. However, the EU only did this because of economical purposes, not because it wanted to preserve the family unity[117]. The recent case-law of the EUCJ however reveals that the perception has changed significantly: *Zhu*

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by the EUCJ - Draft Charter of Fundamental Rights of the European Union (text of the explanations relating to the complete text of the Charter), Brussels. 11 October 2000 (18.10).

[115] In case of Rodrigues Da Silva and Hoogkamer v. The Netherlands the Court clearly stated that exceptional family circumstances may oblige the States not to return illegally residing TCNs; the ECtHR preserves the family unity, in illegally residing TCN's cases the Strasbourg Court takes into account specific circumstances of the family, relations with the country of origin and the host State etc. therefore there are more possibilities to grant the protection of the family life.

[116] Sergio Carrera and Anja Wiesbrock 'Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU' (*European Journal of Migration and Law, Vol. 12, No. 3, 2010, pp. 337-359. Martinus Nijhoff*), p. 343.

[117] "[…] the Community legislator has recognized the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty" - Case C-157/03 Commission of the European Communities v. Kingdom of Spain [2005], point 26; Case C-503/03 Commission of the European Communities v. Kingdom of Spain [2006], point 41.

and Chen and *Zambrano cases* show that TCN family members may be granted residence rights not because of the need to implement commercial goals but because of the necessity to ensure the protection of family life. Moreover, not only dependent children are now allowed to derive residence rights from the status of their parents – citizens of the Union. The EUCJ created a chance for adults – third-country nationals – to derive residence rights from the status of their children – EU citizens[118].

The protection of family life is not a self-standing right under EU law. If a TCN wants to reside with his family in the EU he must prove that his situation is *covered* by EU law. As we scrutinize the ability to grant residence rights for a particular group of TCNs – *illegally residing TCNs who are family members of European citizens that have never moved to the other Member State* – the situation of such families cannot be covered by directive 2004/38/EC because no cross-border element exists. However "[…] directive 2004/38/EC does not presently constitute the *sole* basis for the conditions governing the exercise of the right of residence in the European Union of Union citizens and their families"[119]. The EUCJ in *Zambrano case* suggested one more possibility for such families: residence rights could be granted to *illegally* residing TCNs if their family members (*static* EU citizens) could be deprived of the genuine enjoyment of the substance of the rights conferred on them by the status of EU citizenship[120]. It is clear from *McCarthy case* that the rule formulated in *Zambrano case* applies (so far[121]) only to families which have minor children – European citizens[122]. In other cases *illegally* residing TCN family members of *static* EU citizens cannot require for residence rights or in order to rely on directive 2004/38/EC EU citizens should move from one Member State to the other. We disagree with the Court's rulings because they do not respect the principles and provisions enshrined in EU Treaties. A combination of the right of residence attached to EU citizenship and the protection of the family life may grant residence rights for TCN family members of EU citizens despite the fact *that European citizen is not a minor* and he has not moved from one Member State to the other.

2.3.1 Residence Right Derived From European Union Citizenship Does Not Depend on Cross-Border Movement or Performance of Economic Activities

Till now the EUCJ required from European citizens to perform an economic activity or to cross borders[123] in order to invoke EU law and to claim residence rights for their TCN family members.

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[118] See Case C-200/02 Reference for a preliminary ruling: Kungian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004] and *Zambrano case*.

[119] Peter Starup and Matthew J. Elsmore 'Taking a Logical Step Forward? Comment on Ibrahim and Teixeira' (*European Law Review, Vol. 35, No. 4, 2010, pp. 571-588. Westlaw International)*, p. 577.

[120] See *Zambrano case*, point 42.

[121] Till now we have no cases of the EUCJ clearly stating that *illegally residing* TCNs could get residence rights relying on the citizenship status of their *adult* family members – EU citizens.

[122] Case C-434/09 Reference for a preliminary ruling: Shirley McCarthy v. Secretary of State for the Home Department [2011], point 50.

[123] We consider that 'crossing-borders' encompasses not only situations when a person travels to the other State to work but also to study, to research etc. i.e. it encompasses all individuals which are not necessarily economically active but having sufficient resources, sickness insurance etc. may travel and live in the other MS than that of which they are nationals.

Families that did not meet the above mentioned conditions were believed to fall into purely internal situations. It was alleged that "if a dispute does not involve the cross-border exercise of market freedoms […], Community law does not apply"[124]. The position of our analysed families is complicated because *they fall to situations which are considered to be purely internal*. *Hoge Raad case* proves that TCN family members could not reside with their family members – EU citizens – if the EU citizens had never exercised the right to freedom of movement within the European Union[125]. However, introduction of EU citizenship has changed (or should have changed) this perception significantly. Before the Maastricht Treaty had entered into force the EUCJ had an absolute freedom to apply the doctrine of citizenship because there were no provisions in the EU Treaty defining what the citizenship was, what it meant and what rights it conferred. However the Maastricht Treaty changed this by stating very clearly: "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby"[126]. This provision did not state that EU citizens could enjoy rights only if they moved from one Member State to the other. On the contrary the Treaty stated that one of EU's objectives is "[…] to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union"[127]. Obviously the Treaty sought to protect *all* EU citizens not the ones that have crossed the borders. Despite the fact that the EU Treaty did not link the citizenship status with movement or economic activities, the Court continued to require for cross-border element or commercial actions[128]. "There is a commonly held opinion that the court 'finds' in the Treaties ideas, values, concepts, norms and principles that are totally absent from the explicit words"[129]. We could add that the Court does not see what is obvious either. Fortunately the EUCJ regained his sight: it firstly started to see cross-border element in situations where movement was only indirect[130], and recently the EUCJ even started to see that neither cross-border movement nor economic actions are necessary – *Zambrano case* proves this[131]. Therefore despite the fact that the Court constantly highlighted that European Union citizenship "[…] is not intended to extend the scope *ratione materiae* of the Treaty to internal situations which have no link

[124] Mislav Mataija 'Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market' (*Columbia Public Law Research, 2009*), p. 34.
[125] Joined cases 35 and 36/82 Reference for a preliminary ruling: Hoge Raad – Netherlands [1982], point 16-17.
[126] Treaty on European Union (*Official journal C 191, 29 July 1992*), Article 8(2).
[127] Ibid, Article B, point 3.
[128] See for example Carpenter and McCarthy cases. Economic factors still played a significant role in these judgments.
[129] David H. King 'Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community' (*International and Comparative Law Review, Vol. 29, No. 2, 2007, pp. 291-308*), p. 303.
[130] See for example Case C-135/08 Reference for a preliminary ruling: Janko Rottmann v. Friestaat Bayern [2010]; Case C-200/02 Reference for a preliminary ruling: Kungian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004].
[131] "The most important aspect of Ruiz Zambrano is definitely the application of art. 20 TFEU as an autonomous right […] article 20 TFEU constitutes a sufficient link with Union law by itself" - H. van Eijken and S. A. De Vries 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' (*European Law Review, Vol. 36, No. 5, 2011, pp. 704-721. Westlaw International)*, p. 710.

with Community law"[132], European Union citizenship enlarged it to internal situations because in *Zambrano case* the link with EU law was found not because the person moved from one Member State to the other but because he had EU citizenship. Therefore taking this into account we agree with Anja Wiesborck that "The right of residence in the Union is a right that flows directly from the nature of Union citizenship and that is distinct from the right to move and reside in other Member States"[133].

The case-law that requires performing cross-border movement in order to get residence rights for TCN family members seems to be discriminatory because TCN family members of EU citizens, who have moved to the other MS, enjoy residence rights under Directive 2004/38/EC but TCN family members of *static* EU citizens cannot enjoy residence rights. It seems that citizenship rights enshrined in the EU Treaty have no real effect for some EU citizens: EU law only protects a small part of them. In scholarly doctrine such phenomenon is known as reverse discrimination: nationals who have not moved from one MS to the other are being treated less favourably than the ones that have moved because being in purely internal situation they cannot invoke free movement provisions of the EU Treaty[134]. Static EU citizens are being discriminated not because MS treat them less favourably but because EU law grants more favourable treatment to nationals of other MS – to nationals who decided to cross borders. However taking into account that the EU became more than economic Union; that the EU decided to grant a fundamental status for *all* EU citizens – "the incorporation of the provisions on EU citizenship into the Treaty is said to have opened the door to a new paradigm, according to which the right to move and reside in the EU is no longer reserved to economically active persons exercising a cross-border activity, but is to be enjoyed by all EU citizens"[135] – the question arises whether reverse discrimination may be justified in these modern times. Recent case-law of the EUCJ revealed that not only the movers or economically active persons are able to get rights – the Court managed in *Zambrano case* to grant residence rights for family members of static EU citizens though cross-border element did not exist. Therefore this raises doubts about the justification of reverse discrimination because the rule of reverse discrimination has been infringed (*the EU itself* guaranteed for 'non-movers' a possibility to benefit *from EU law*). Such a phenomenon raises new problems (especially after the Court's statement in *Dereci case*: "As nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the right pertaining to that status, including against their Member State of

[132] See Joined cases C-64 and 65/96 Reference for a preliminary ruling: Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen [1997], point 23; Case C-148/02 Reference for a preliminary ruling: Carlos Garcia Avello v. Belgian State [2003], point 26.

[133] Anja Wiesbrock 'Disentangling the "Union Citizenship Puzzle"? The McCarthy case' (*European Law Review, Vol. 36, No. 6, 2011, pp. 861-873. Westlaw International)*, p. 865.

[134] Camille Dautricourt and Sebastien Thomas 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?' (*European Law Review, Vol. 34, No. 3, 2009, pp. 433-454. Westlaw International)*, p. 433.

[135] Koen Lenaerts 'Civis Europaeus sum': from the cross-border link to the status of citizen of the Union' (Online journal on free movement of workers within the European Union, No 3, 2011), p. 10.

origin"[136]) because now it became unclear at all when EU citizen could avoid the application of reverse discrimination and when the application of reverse discrimination could be justified. Taking into account that equality is the value in the EU (Article 2 TEU); that the EU seeks to ensure equality between EU citizens (Article 9 TEU) it is hard to justify the existence of reverse discrimination because equality is not being ensured[137]. The EU itself, after creating the EU citizenship and conferring on every Union citizen a fundamental status, allowed discriminating them because reverse discrimination was created precisely by EU law. Therefore "[…] as reverse discrimination is a Community law generated problem, it should be remedied by the same legal order"[138]. And one way to do that (remembering the opinion of Anja Wiesborck) could be to grant residence rights for *all* EU citizens i.e. to separate very clearly that Article 20 TFEU confers rights (including residence) on every Union citizen and Article 21 TFEU *only* to persons who decided to move and reside in the other Member State. It is evident that *Zambrano case* basically started to go on this direction.

Taking into account that the Maastricht Treaty introduced European citizenship which did not require performing cross-border movement or economic activity, that present provisions of the EU Treaties ensure citizenship rights for all European citizens notwithstanding the fact whether they are static or dynamic citizens we can confidently state that residence right (derived from citizenship status) does not depend on cross-border movement or performance of economic activities.

2.3.2 The Vagueness of the Rule Formulated in Zambrano Case

It became clear after *Dereci case* that *Zambrano* rule[139] guarantees residence rights only for those *illegally* residing TCNs who are financial supporters of their children[140]. But can this argument be objectively justified taking into account that a child must be allowed to live with both of his parents unless that would be contrary to the child's interests[141]? Moreover, financial support can be rendered from abroad but personal contact, care, love, assistance in education, cannot. It seems that the Court forgot that dependency can be divided into four types: 1) legal dependency; 2) financial dependency; 3) social dependency and 4) emotional dependency. Social and emotional dependency could be really

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[136] Case C-256/11 Reference for a preliminary ruling: Murat Dereci v. Bundesministerium für Inneres [2011], point 63.
[137] "[…] reverse discrimination is an unjustified difference in treatment that conflicts with the Community principle of equality between Union citizens" - Alina Tryfonidou 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (*European Law Journal, Vol. 15, No. 5, 2009, pp. 634-653*), p. 650.
[138] Camille Dautricourt and Sebastien Thomas 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?' (*European Law Review, Vol. 34, No. 3, 2009, pp. 433-454. Westlaw International),* p. 436.
[139] TCN family members may get residence rights relying on the EU citizenship status of their family members only when the actions of particular MS deprive the EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.
[140] We derived such a rule by taking into account only our analysed families: composed of *illegally* residing TCNs and *static* EU citizens. If for example the EU citizen (a child's parent) would be *dynamic* taking into account Teixeira and Ibrahim cases we would probably say that the TCN family member does not necessarily have to support a child financially because a right to education derived from Article 12 of the Regulation No. 1612/68 on freedom of movement for workers within the Community is able to guarantee residence rights for TCNs. See particularly Case C- 310/08 Reference for a preliminary ruling: London Borough of Harrow v. Nimco Hassan Ibrahim [2010].
[141] See Convention on the Rights of the Child, United Nations, New York, 20 November 1989, Article 9(1).

important in this situation however the Court did not pay any attention to them. Social and emotional dependency between a child and his father play a significant role when the mother for example has a great job which can provide enough money for the whole family and the TCN father being non-economically active stays at home and looks after the children. Therefore it becomes not important whether the father has money or not. As has been mentioned in **section 1.3**, the roles in the family have changed significantly therefore providing money for the family may not necessarily be seen as the sole or the most important role of the father. Moreover, as rightly observed Advocate General Trstenjak "[…] the father, who is a TCN and who has custody rights, may exercise the right to determine the place of residence jointly with the child's mother and consequently decide (with her) where his child is to reside"[142]. The question arises: what could happen in *Dereci case* if custody rights belonged only to the father not to both of the parents? Probably the decision would be different because that way a child could be forced to leave the EU together with his TCN father. Our remark and remark made by Advocate General Trstenjak show that neither financial support nor citizenship of parents determine whether a child could enjoy 'substance of the rights' conferred on him by the status of Union citizenship. Everything depends on family relationships and the roles of family members.

In *Zambrano case* the EUCJ applying Article 20 TFEU had formulated the concept of 'substance of the rights conferred by virtue of their status as citizens of the Union'[143]. It is clear from the judgment that citizens of the EU have to be protected when more than one right has been infringed by the decisions or actions of the MS because the words 'substance of the rights' imply the existence of a set of rights. However, the Court gave only one example of such rights and based his ruling on that single ground – on the right to reside[144]. This is clearly seen in *Zambrano case* as the Court stated that a "[…] refusal to grant residence rights would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents"[145]. It means that children would not be able to reside in that particular Member State. Though the EUCJ mentioned residence *and movement* rights in *McCarthy case*[146], it does not necessarily mean that the Court provided another right (a right to move) which falls under the concept 'substance of citizenship rights'. In *McCarthy case* the EUCJ had to give a ruling on Article 21 TFEU not Article 20 TFEU. So it seems that the Court's ruling in *Zambrano case* is not complete because the Court based its decision on *one* right. Another problem is that the EUCJ did not indicate what the juridical framework of 'substance of

[142] Opinion of Advocate General Trstenjak in Case C-40/11 Yoshikazu Iida v. Stadt Ulm [2012], point 66.
[143] Case C-34/09 Reference for a preliminary ruling: Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2011], point 42.
[144] "In both Rottmann and Ruiz Zambrano the right to reside and the actual possibility to enjoy this right as an EU citizen were in danger". - H. van Eijken and S. A. De Vries 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' (*European Law Review, Vol. 36, No. 5, 2011, pp. 704-721. Westlaw International).*
[145] Case C-34/09 Reference for a preliminary ruling: Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2011], point 44.
[146] Case C-434/09 Reference for a preliminary ruling: Shirley McCarthy v. Secretary of State for the Home Department [2011], point 49.

the rights' is. It did not say where to look in order to know if particular rights belong to the substance of citizenship rights. And this could be very useful for the EU citizens because "[…] 48% of European citizens indicate that they are 'not well informed' about their rights as EU citizens"[147]. Taking into account that the Court did not mention where to look in order to find out what comprises 'substance of citizenship rights' the only thing we can rely on is the case-law of the EUCJ. However the Court's practise is negative because in our opinion the Court gave only one example. This creates obstacles for our mentioned families because they are not able to know when they could apply to the national courts in order to claim for residence rights under the concept of 'substance of citizenship rights'.

Zambrano rule created a chance for illegally residing TCNs to stay in the EU however this rule is erroneous because the EUCJ did not follow its own argumentation and provided only one right which falls under the concept of 'substance of citizenship rights'. Moreover, for now this rule can be applied only to TCN parents who are financial supporters of their children. Obviously the rule is too narrow (or even false) because financial support is not necessarily more important than social or emotional relations. The need to allow for illegally residing TCN to stay in the Member State should depend on family relationships and the roles of family members not on financial support.

2.3.3 May the Protection of the Family Life Fall under the Concept of 'Substance of Citizenship Rights'?

In order to make the Court's ruling complete (as the Court gave only one example of rights but it should have provided at least two of them) we need to find out what other rights may fall under the concept of 'substance of citizenship rights'[148]. When the situation is related to human rights the Court looks for the answer in the following legal sources: general principles of EU law, provisions of the EU Treaties, common constitutional traditions of the MS, International Treaties and the Charter. Therefore we will analyze some of them in order to find out what those other citizenship rights could be.

Article 20(2) TFEU presents citizenship rights which are conferred on every Union citizen. It means that those particular rights could be used by the Court in our analysed situations especially because of the fact that the Court's used right to reside (in *Zambrano case*) is enshrined in this particular article. It is evident that the list of rights presented in this article is not exhaustive. The Latin phrase *inter alia* used in Article 20(2) TFEU means 'among other (things)'. It means that EU citizens have more rights than enlisted in Article 20(2) TFEU. However, it is not clear what those rights are. The Charter enumerates citizenship rights (title V) however it does not add anything new; it only explains in more detail citizenship rights set in the European Union Treaty. Though the Charter does

[147] EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights, Brussels. 27.10.2010, COM (2010), p. 20.
[148] In *Dereci case* the Court explained the content of 'substance of citizenship rights', it stated that 'substance of citizenship rights' would be infringed in situations in which the EU citizen would have to leve not only the territory of the MS of which he is a national but also the territory of the Union as a whole (see point 66). However such explanation could also be seen as erroneous because still no second right falling under the concept 'substance of citizenship rights' has been named.

not give us any indications of what those other citizenship rights could be, it does not mean that such rights do not exist. Not only rights enshrined in title V of the Charter can be considered as citizenship rights. *Other human rights which are very significant in every citizen's life may easily fall under the concept 'citizenship rights'.* Anja Wiesbrock suggests that "[…] the substance of citizenship rights could also include, next to residence in the Union, fundamental rights, such as the right to family life"[149]. We agree with her because the case-law of the EUCJ revealed that "[…] limitations on the European citizen's right of residence must be interpreted in light of the right to family life"[150]. Therefore it is obvious that being with family is very important for the Union citizens. The European Union, trying to achieve its own commercial goals and understanding that the Union citizens would be more economically active if they could live with their families, decided to provide residence rights for the mentioned family members[151]. Furthermore, *Zambrano case* suggests that the closeness of familial ties is very important. Children being minors could not live in the European Union without the caregivers. The Court did not consider the possibility that the minor children could live in the territory of the European Union not with their parents but with their legal guardians appointed by the institutions of the Member States. However, it could do that because the EUCJ formulated its ruling in a way that everything has to be done only for the sake of European Union citizens not the family[152]. *However in reality the Court protected not only the citizens of the European Union but the whole family.* Moreover the protection of family life is enshrined in Article 23 of International Covenant on Civil and Political Rights. Such a right cannot be considered as political right because political rights are related to elections, petition, legislative initiative etc. Therefore, protection of family life belongs to the category of civil rights. It means that every citizen has a civil right to live with his family and his family life must be protected. Moreover, civil and political rights impose on the States *negative obligations*[153]. It means that the States are obliged to refrain from restricting civil and political rights. Therefore the EUCJ must take it into account and it could restrict those rights only when it would be strictly necessary (when other interests would require doing this).

It is evident that the protection of family life could fall under the concept of 'substance of citizenship rights'. But how the right to the protection of the family life could be infringed if a TCN family member would be forced to leave the country? If only a TCN would be forced to leave the EU

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[149] Anja Wiesbrock 'Disentangling the "Union Citizenship Puzzle"? The McCarthy case' (*European Law Review, Vol. 36, No. 6, 2011, pp. 861-873. Westlaw International)*, p. 866.
[150] Armin von Bogdandy and Felix Arndt 'European Citizenship' (*Max Planck Encyclopedia of Public International Law, 2011)*, point 12.
[151] Look at Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (*Official journal L 25, 19/10/1968).*
[152] "The Court in Ruiz Zambrano restricts its discussion entirely to citizenship and, despite the right of Mr Ruiz Zambrano's children to a family life being integral to the case, does not explain the role of fundamental rights in this respect." - Anja Lannsbergen and Nina Miller 'Court of Justice of the European Union European Union Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Offoce national de l'emploi (ONEM)' (*European Constitutional Law Review, 7, 2011, pp. 287-307)*, p. 303.
[153] FAQ's on Human Rights: http://www.unfpa.org/derechos/preguntas_eng.htm (viewed: 07.11.2012).

it would clearly violate the mentioned right because the family would be split. However, this way the EU citizen would not loose his residence right. According to *Zambrano case* 'substance of rights' must be infringed, so residence rights *and* family rights should be violated at the same time. Our suggested combination of rights could be infringed in situations where because of the fact that a TCN would be forced to leave the European Union, EU citizen could be forced to leave the EU too (either because he cannot live alone as he is dependent or because he wants to live with the whole family), therefore the EU citizen could not reside in the Union anymore. The fact that EU citizen would go together with his TCN family member(s) cannot mean that a right to the protection of the family life would be guaranteed. Living conditions in a foreign country could be so hard or unusual that it might create insurmountable obstacles for the EU citizen to lead a normal family life there: if EU citizen would not know the language, traditions, would not recognize the religion of a particular State, if he would need special treatment which would not be available in this foreign country etc. nobody could deny that the protection of family life would not be ensured. Therefore both rights would be infringed.

The case-law of the EUCJ, directives and regulations of the EU and International Covenant of Civil and Political Rights indicate that the protection of family life may be a part of citizenship rights. A combination of residence and family rights could resolve the errors made by the EUCJ – now we could clearly say that expulsion of TCN family member(s) would infringe 'substance of the rights'.

2.3.4 A Combination of Article 7 of the Charter and Articles 20 TFEU and 9 TEU as a Basis for TCN to Claim Residence Rights

As rightly observed by the Advocate General Sharpston: "If the European Union was to evolve into something more than a convenient and effective framework for the development of trade, it had to ensure a proper role for those it had decided to start calling its citizens[154]". Therefore not only minor Union citizens should be protected but also adults: everyone who has European Union citizenship. Our suggested improvement of the concept of 'substance of citizenship rights' should allow to grant residence rights not only for the TCN family members who have minor children – European citizens – but also to TCN family members of any European citizen because the protection of family life implies that not only minor children but the whole family should be protected. The concept of 'substance of citizenship rights' can be applied only when the actions of the MS may infringe citizenship rights. However residence rights should be granted not only when citizenship rights are being / are going to be violated. There must be other ways how to derive residence rights which would not depend on such infringements. Therefore, we suggest applying Article 7 of the Charter, Articles 20 TFEU and 9 TEU which should grant residence rights for *illegally* residing TCN family members of EU citizens.

[154] Opinion of Advocate General Sharpston in Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2010], point 125.

Article 7 of the Charter was specifically designed to protect family life. It became clear after the previous analysis that Article 7 is able to protect not only EU citizens but also third-country nationals (including *illegally* residing ones). However, in order to rely on Article 7 of the Charter Member States need to implement EU law (Article 51(1) of the Charter) or as stated by the EUCJ: *particular situation* of a family *has to be covered by EU law*. It means that it must be possible to apply EU law to our analysed situations. Taking into account our previous contemplations about Article 7 and 51(1) of the Charter, we may make an assumption that *our analysed family situations are covered by Article 20 TFEU and the general principle of EU law (particularly the general principle of equality).*

Article 20(2) TFEU among other rights envisages for the Union citizens the right to reside. It became clear after *Zambrano case* that Article 20 TFEU is directly effective because the applicant relied upon and the EUCJ based its ruling on this article – the Court did not apply any other directives, regulations or provisions of the European Union Treaties. *Therefore it is clear that Article 20 TFEU is able to create a link with European Union law*. We suggest that EU citizens could rely on Article 20 TFEU despite the fact whether particular actions of the Member States 'deprived European citizens of the genuine enjoyment of substance of citizenship rights' or not. Article 20 TFEU does not say anything about 'enjoyment of *substance of rights'*. It does not state that citizenship rights should be granted to European Union citizens only after possible infringements either. "Union citizenship is destined to be the fundamental status of nationals of the Member States"[155]. It means that citizenship status guarantees rights which are not of declaratory nature – they have to be real and effective. European Union citizens should be granted rights not because of the possible violations but because of the sole reason that they are European Union citizens and so they have fundamental status.

Our analysed situations are covered by Article 9 TEU too because it supplements Article 20 TFEU. Article 9 TEU requiring that all citizens should be seen as equal – equal in citizenship rights – strengthens the idea that Article 20 TFEU (and so residence right) should be applied to every European citizen: minor and adult, static and dynamic. Therefore there may be no doubts that Article 20 TFEU together with Article 9 TEU may *cover* family situation of a *static* European citizen.

Article 20 TFEU guarantees residence rights which cannot be withdrawn or suspended because it is a part of European citizenship. Therefore the European Union citizen having inalienable right to reside in the Member State[156] cannot be forced to leave the country for the sole reason that he had found a family with an *illegal* immigrant[157]. Being a European citizen an individual may rely on

[155] Case C-413/99 Reference for a preliminary ruling: Baumbast and R. v. Secretary of State for the Home Department [2002], point 82.
[156] "Since Mr Eind is a Netherlands national, his right to reside in the territory of the Netherlands cannot be refused or made conditional" - Case C-291/05 Reference for a preliminary ruling: Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind [2007], point 31.
[157] And when the MS disagree to grant residence rights for their family members – illegal immigrants – such decisions of the MS force them to leave the MS if they want to live a fully-fledged life with the whole family.

Article 7 of the Charter and require protecting his family life because his citizenship status together with Article 9 TEU creates a link with European Union law. It means that our analysed families are covered by EU law therefore European Union citizens may demand to grant residence rights for their TCN family members because of the need to ensure the protection of their family life. Our suggestion is supported not only by the general principle of equality, the provisions of the EU Treaties, the spirit and scope of European Union citizenship but also by the opinion of Advocate General Trstenjak who maintains that "[…] the Union-citizen status can, in individual cases, result in a right of residence under Union law also being conferred on a family member who is a third-country national"[158] and opinion of Advocate General Bot who considers that "The combination of the right of residence attached to Union citizenship and protection of […] family life, as implemented by EU law, may therefore effectively establish a right of residence for members of the family of the Union citizen"[159]. Of course conditions mentioned in **section 2.2** (alternative requirements which should be assessed when deciding whether to allow for illegally residing TCNs to stay in the Member States according to directive 2008/115/EC) should also be taken into account as a fair balance between the interests of the families and the interests of the Member States has to be struck in all cases. After all, the Union has a goal to return *illegally* residing TCNs therefore sepcific family circumstances should determine the need to allow for illegally residing third-country nationals to stay.

Our suggested combination of articles may grant residence rights for TCNs not because of the need to ensure protection of citizenship rights but because of the necessity to guarantee the protection of the family life: citizenship status is only a ground, a link with EU law in order to rely on Article 7 of the Charter. Article 20 TFEU together with Article 9 TEU activates application of European Union law and creates the ability to protect illegally residing TCNs by providing residence rights for them despite the fact what is the age, legal position or other status of their family members – EU citizens.

[158] Opinion of Advocate General Trstenjak in Case C-40/11 Yoshikazu Iida v. Stadt Ulm [2012], point 61.
[159] Opinion of Advocate General Bot in Case C-83/11 Secretary of State for the Home Department v. Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman [2012], point 74.

3. IMPROVEMENT OF THE PROTECTION OF ILLEGALY RESIDING THIRD-COUNTRY NATIONALS' FAMILY LIFE

3.1 Criteria Applied by the ECtHR in the Area of the Protection of the Family Life

When the ECtHR deals with TCNs' cases it usually states that no right for an alien to enter or to reside in a particular country is guaranteed by the ECHR. However, the Court admits that States may be forced to allow for foreigners to reside in their country because of the necessity to ensure protection of a person's family life. The ECtHR seeks to find a fair balance between the interests of a particular country and the interests of the family. Therefore the Strasbourg Court considers "[…] whether the State's refusal of leave to enter or remain in the country, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, deprives the applicant of the opportunity to benefit from his right and thus constitutes a sufficiently serious breach"[160]. States do not have an obligation to respect immigrant's choice of the country of his residence so the ECtHR usually pays a great attention to the fact whether the applicant and his family members came to a host country legally or not. Individuals who come to the host State illegally (or overstay their legal stay) and decide to found families in the host State knowing that their illegal status may cause serious inconveniences to their family life cannot expect that they would be protected. Family life of *illegal immigrants* has to be protected only when exceptional circumstances show that the need to ensure the protection of family life is more important than the need to ensure the interests of the State[161]. Despite the fact whether the immigrant came to the host State legally or not criteria used by the Court are almost the same.

Sonia Morano-Foadi and Stelios Andreadakis state that "[…] the tests used by the Court in the relevant case law are related to the degree of integration in the host country and the social ties with the local community"[162]. We want to add that the following factors are as important as integration criteria.

When the ECtHR investigates whether the applicant has integrated into the society of the host State it analyses whether the applicant worked there[163], it pays a great attention to the length of stay[164],

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[160] Sonia Morano-Foadi and Stelios Andreadakis 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence (*The European Journal of International Law, Vol. 22, No. 4, 2011; pp. 1071-1088*), p. 1081.

[161] See points 39 and 43-44 of the Case of Rodrigues Da Silva and Hoogkamer v. The Netherlands – App. No. 50435/99 [2006] ECHR. In this particular case the fact that the applicant had very strong relations with her daughter and could not return to her country of nationality with her children because parental authority has been awarded to the father and the fact that it was in the child's best interests for the applicant to stay in the Netherlands constituted exceptional circumstances.

[162] Sonia Morano-Foadi and Stelios Andreadakis 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence (*The European Journal of International Law, Vol. 22, No. 4, 2011; pp. 1071-1088*), p. 1082.

[163] "In Kaya v. Germany, the Court considered that even though the applicant had been born and spent all his life in Germany, it could not overlook the fact that he was not integrated into the labor market as he had never worked […]" - Clíodhna Murphy 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights' (*European Journal of Migration and Law, Vol. 12, No. 1, 2010, pp. 23-43. Martinus Nijhoff*), p. 33.

[164] "[…] the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be" - Case of Maslov v. Austria – App. No. 1638/03 [2008] ECHR, point 68.

to the efforts to learn the language of the host State[165]. Even the fact that an applicant became a member of the church community in the host country is an important element for the Court[166]. Alongside integration criteria the Court tries to find out whether the connection with the country of origin remained strong because the existence of strong relations could justify interference with family life. The Strasbourg Court analyses how much relatives remained in the country of the applicant's origin and how often the applicant visited them[167], it investigates whether the applicant completed his studies and worked in his country of nationality[168]. In short, the Court tries to find out what are the social, cultural and family ties with the country of the applicant's nationality.

Family situation of a particular alien is really important because certain familial circumstances may determine the Court's decision. The Court protects only genuine families because of the necessity to respect the interests of the States. Therefore families must show that their familial relations are very strong, real and durable. The Strasbourg Court analyses the following criteria: with whom the applicant lives in the host State (family, friends or maybe strangers); the strength of familial ties and dependency relations[169]; the nature and duration of the parents' relationship[170]; when an individual has not founded his own family yet the ECtHR looks at his age and dependency on his parents[171] etc. Interests of children are also very important when the Court deals with cases related to expulsion of aliens as the Court usually highlights that interests of a child have to be of paramount consideration[172]. Therefore the Court scrutinizes every circumstance related to children very carefully, it firstly takes into account the child's age and degree of dependency on the relatives[173]; then it considers what would be the best for a child[174] and whether a contact with the applicant is beneficial for the children's welfare[175]. The ECtHR also reminds that even though children are dependent on their parents, not only interests of parents have to be considered – a child has its own right to respect for his family life[176].

The ECtHR takes into account particular difficulties which could occur if the applicant would be forced to leave the country. The Court aims to preserve the family unity therefore the decision to

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[165] Case of Bajsultanov v. Austria – App. No. 54131/10 [2012] ECHR, point 85.
[166] Case of A. A. v. The United Kingdom – App. No. 8000/08 [2011] ECHR.
[167] Ibid, point 64.
[168] Case of Bajsultanov v. Austria – App. No. 54131/10 [2012] ECHR, point 86.
[169] "Nevertheless, it cannot overlook the fact that the applicant has never co-habitated with any of his children. Three of his children have now reached the age of majority, and although the applicant remains in contact with them, they are in no way dependent upon him […]" - Case of Joseph Grant v. The United Kingdom – App. No. 10606/07 [2009] ECHR, point 40.
[170] Case of Joseph Grant v. The United Kingdom – App. No. 10606/07 [2009] ECHR, point 30.
[171] Case of Onur v. The United Kingdom – App. No. 27319/07 [2009] ECHR, point 45.
[172] Case of Anayo v. Germany – App. No. 20578/07 [2010] ECHR, point 65.
[173] "I consider the applicant's separation from his daughter to be all the more serious as the child needed to remain in contact with her father, especially because of her young age" – Dissenting opinion of Judge Steiner in Case of Chair and J. B. v. Germany – App. No. 69735/01 [2007] ECHR.
[174] "[…] it is clearly in Rachael's bets interests for the first applicant to stay in the Netherlands […]" - Case of Rodrigues Da Silva and Hoogkamer v. The Netherlands – App. No. 50435/99 [2006] ECHR, point 44.
[175] "[…]Particularly in view of their African-German origins, a relationship with the applicant, their natural father, would be essential for them to get to know their roots, to build up their identity, to understand why they were different and to develop normal self-esteem […]" - Case of Anayo v. Germany – App. No. 20578/07 [2010] ECHR, point 13.
[176] Case of Osman v. Denmark – App. No. 38058/09 [2011] ECHR, point 73.

deport the applicant to his country of nationality usually amounts to the deportation of other close family members (children and spouse). So the Court always investigates the "[…] seriousness of the difficulties which the spouse [and the children – author's note] would be likely to encounter in the applicant's country of origin […]"[177]. Those difficulties must be really serious because if they would not be severe enough the Court could decide that expulsion could be justified. "One circumstance in which the Court would probably find that insurmountable obstacles exist to settling in the country of origin is where the applicant(s) have started a family in the host country and other children have been born or substantially brought up in that country"[178]. However, this should not be considered as a decisive factor, the ECtHR investigates much more circumstances in order to find out if serious difficulties exist. It analyses whether the children and the spouse know the language[179], traditions, culture of a foreign country to which they may be forced to go, social ties of family members with that foreign country, the possibilities for the family members to find a job in this foreign country[180].

Despite the fact that familial relations and the level of integration may show that a person should be allowed to reside in particular State the commission of crime may determine the Court's decision not to allow for such a person to stay – seriousness of crimes may outweigh integration. Therefore when an individual commits a crime the Court scrutinizes the following circumstances: the nature and seriousness of the offence[181]; the gravity of the crime[182]; the time which has elapsed since the offence was committed and the applicant's conduct during that period and whether the spouse knew about the offence at the time when he or she entered into a family relationship[183].

The ECtHR also takes into account the nationalities of the various persons concerned. Probably it does that because of the fact that the family might have a possibility to establish the family life elsewhere – neither in the host State nor in the country of the applicant's origin[184]. Futhermore the Court considers whether it could be dangerous for the family to live in the country of the applicant's nationality (e.g. civil war, political persecution etc.).

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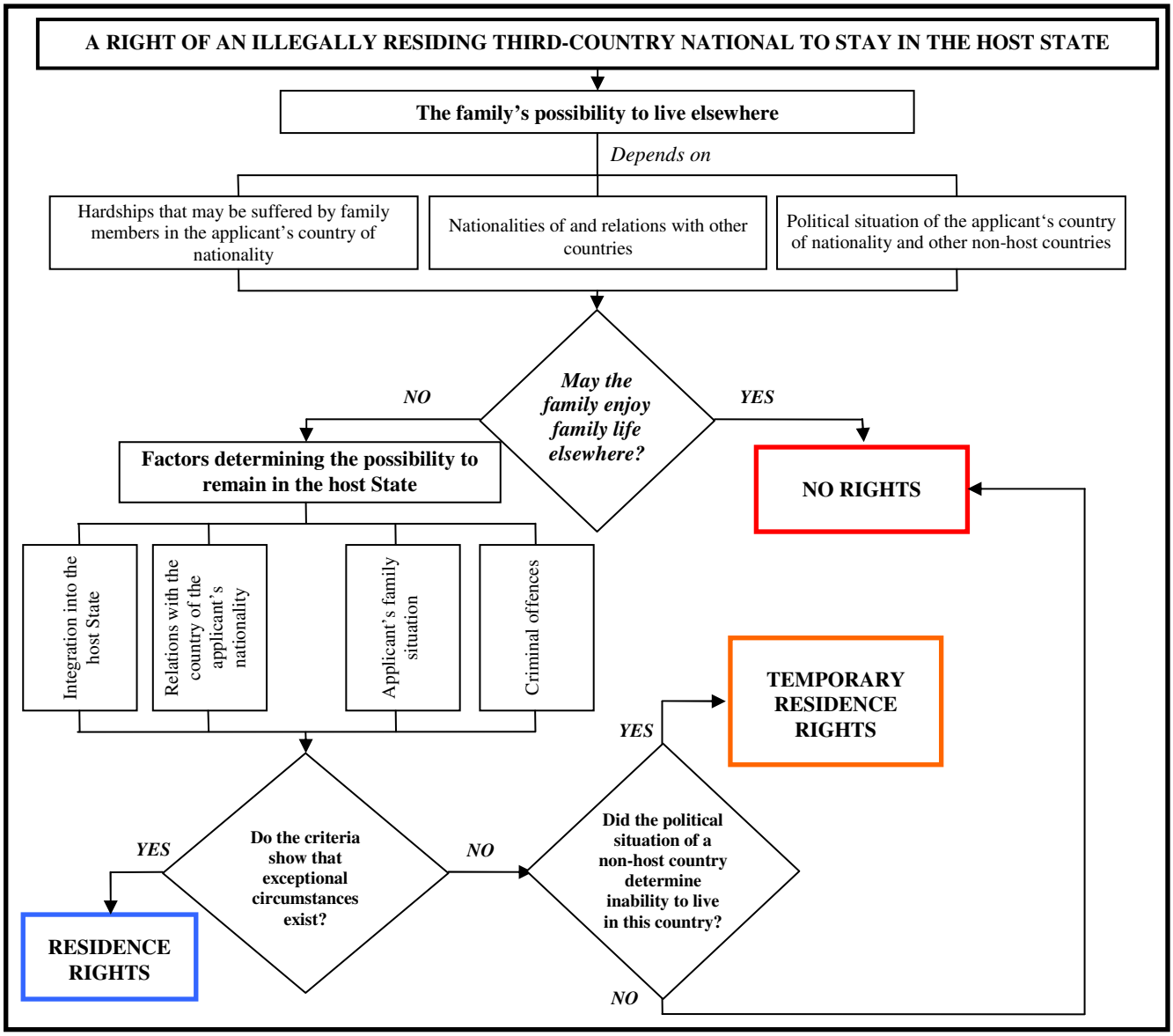
[177] Case of Boultif v. Switzerland – App. No. 54273/00 [2001] ECHR, point 48.
[178] Clíodhna Murphy 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights' (*European Journal of Migration and Law, Vol. 12, No. 1, 2010, pp. 23-43. Martinus Nijhoff*), p. 40.
[179] "In addition, his wife could not be expected to follow her husband to Algeria, "a State whose language she probably does not know". - Ibid, p. 33.
[180] "[…] Even if the applicant's wife had been ready to join her husband in Morocco, she would inevitably have encountered very serious difficulties, bearing in mind that she had been the main provider of the family" - Case of Chair and J. B. v. Germany – App. No. 69735/01 [2007] ECHR, point 66.
[181] "[…] that expulsion of an integrated alien as a rule constitutes lack of respect for his private life, but may exceptionally be justified where the alien is convicted of very serious crimes, such as serious crimes against the State, political or religious terrorism or holding a leading position in a drug-trafficking organization" – dissenting opinion of Judge Martens in Case of Boughanemi v. France – App. No. 22070/93 [1996] ECHR.
[182] "Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential elment for assessing the proportionality of the interference with the applicants' family life" - Case of Yildiz v. Austria – App. No. 37295/97 [2002] ECHR, point 45.
[183] Case of Boultif v. Switzerland – App. No. 54273/00 [2001] ECHR, point 48.
[184] "Furthermore, as the applicant's wife was an Italian national, living in France was not the only possibility for the couple to resume cohabitation" - Case of Mehemi v. France – (85/1996/704/896) [1997] ECHR, point 33.

Figure 1. **Criteria applied by the ECtHR in third-country nationals' cases**



Source: made by the author

Taking into account the criteria formulated by the ECtHR in cases related to residence rights of TCNs on the grounds of the protection of their family life we made an assessment model (see Figure 1) which shows how the ECtHR decides (or according to its' case-law and the principles of international law it should apply) whether to grant residence rights for *illegally* residing TCNs or not. Illegally residing TCNs cannot expect that a right of residence will be conferred upon them. Taking this into account and the fact that the ECtHR seeks to preserve the family unity the first thing the ECtHR should try to find out is whether such an *illegal* immigrant could live with his family in any other country[185]. This question can be answered by taking into account three criteria (look at the figure). If the question would be answered in the affirmative then the ECtHR should not guarantee residence

[185] The case-law of the ECtHR reveals that the ECtHR primarily examines whether individuals comprise family, whether true family life exists between them, whether there has been interference with the applicant's right to respect for his family life etc. Therefore our proposed assesment should be carried out only after the examination of the mentioned circumstances and only after deciding on these things in the affirmative.

rights. If the question would be answered in the negative then the ECtHR should evaluate the criteria which could help to decide whether the TCN and his family should be allowed to stay in the host State. If after conducting the analysis the Court would make a conclusion that the circumstances of the family life are exceptional then it would be forced to allow for *illegally* residing TCN to live in the host State. If the ECtHR would not find any exceptional circumstances, on the contrary, it would find that for example the applicant has made a very serious crime (e.g. organised drug-trafficking), his relations with the country of origin were much stronger etc. then the Court should decide not to allow for such TCN to stay unless political situation (civil wars, political persecution etc.) would not allow for the Court to send him to that country (the TCN should be allowed to reside in the host State until the circumstances which did not allow for the TCN to live in the non-host country would disappear).

3.2 Criteria Applied by the EUCJ in the Area of the Protection of the Family Life

When the EUCJ deals with cases related to the protection of TCN's family life it applies a little bit different criteria. Of course some of the factors correspond to the criteria applied by the ECtHR however factors such as *EU citizenship, movement and composition of family* play a very significant role in the EUCJ's jurisprudence. In cases related to *legal immigrants'* residence rights and the protection of their family life directive 2004/38/EC, directive 2003/86/EC and directive 2003/109/EC are being applied. When the MS and the EU courts need to decide whether to expel a *legal* immigrant they must evaluate the following criteria: how long the TCN has resided in particular MS, TCN's age, state of health, family and economic situation, social and cultural integration into the host MS and the extent of his / her links with the country of origin. Directive 2004/38/EC envisages even the same rule (as applied by the ECtHR) that the greater the degree of integration of Union citizens and their family members in the host MS, the greater the degree of protection against expulsion should be. It is clear from directives 2004/38/EC and 2003/86/EC that EU law like the ECtHR protects only genuine relationships as marriages of convenience have to be detected and such persons should not be allowed to reside. A TCN who wishes to be granted family reunification should not constitute a threat to public policy or security. The notion of public policy may cover a conviction for committing a serious crime[186]. Article 12 of Regulation (EEC) 1612/68 on freedom of movement for workers within the Community creates a possibility for family member – illegally residing TCN to get a residence right despite the fact that that his / her spouse ceased to be a worker, that a TCN does not have sufficient resources and sickness insurance etc. In order to get a residence permit a TCN has to meet only 4 conditions[187]: 1) he / she must be a spouse of EU citizen; 2) EU citizen must have been worked in the other MS than that of which he / she is a national; 3) a TCN must be a primary carer of the children

[186] Directive 2003/109/EC, Preamble, point 14.

[187] Those four conditions are being applied only to adult illegally residing TCNs. Minor TCNs can be granted residence rights if they are family members of EU citizens, working (or who have worked) in the other MS than that of which they are nationals and if minor TCNs are enrolled at an educational establishement.

and 4) children should be enrolled at an educational establishment[188]. The majority of criteria correspond to the criteria applied by the ECtHR. However, the mentioned directives and regulation cannot be applied to our analyzed families because they are composed of *illegal* immigrants *and static* EU citizens. The case-law of the EUCJ reveals that when the question is related to *illegally* residing TCN's right to reside in the EU the Court does not take into account so much factors. We consider that it is wrong because illegal entry or stay should not determine the application of less criteria – "[…] illegal entry should be regarded as only one of a number of factors for consideration in the proportionality test"[189]. So what criteria are being applied to our analyzed families?

The EUCJ usually examines whether true family life exists among family members[190]. The Court accepts that dependency is very important especially when we talk about minor children[191] or elder parents[192]. Even though the Court takes into account not only financial dependency but also emotional dependency[193] it became clear from *Dereci case* that financial dependency is much more important. The Court impliedly stated that if the TCN does not support his child financially he may not live in the EU. That could be explained by the fact that according to directives 2004/38/EC, 2003/86/EC and 2003/109/EC citizens of the EU and *legal* immigrants cannot become a burden to the social systems of the MS. Therefore *illegal* immigrants should also be financially independent and capable of providing financial support for the whole family. *Zhu and Chen case* confirms that the requirements envisaged in the mentioned directives (that TCNs need to have sickness insurance, stable and regular resources etc.) are applied to *illegally* residing TCNs if they seek to be allowed to stay in the EU[194]. Mrs Carpenter overstayed the leave to enter the United Kingdom and failed to apply for an extension of her stay, therefore she was an illegal immigrant. In this particular case the EUCJ analyzed whether Mrs McCarthy could in the future constitute a danger to public order or public safety[195]. Therefore the whole set of rules related to danger to public security, policy or health should be applied to *illegally* residing TCNs: "[…] measures taken on grounds of public policy or security are to be based exclusively on the personal conduct […]"; "[…] previous criminal convictions can be taken into

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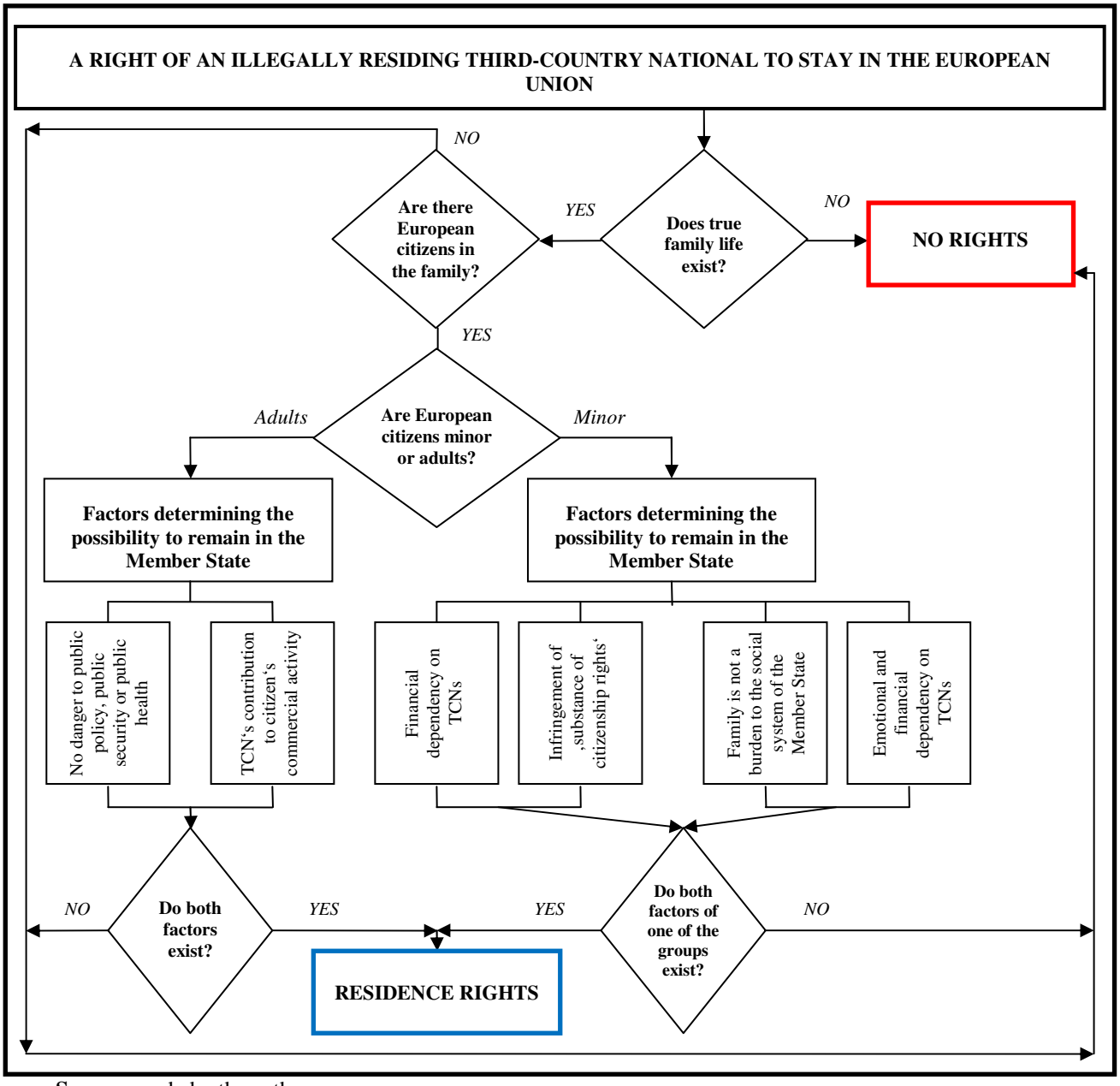
[188] See *Ibrahim case*.
[189] Dallal Stevens 'Asylum-seeking Families in Current Legal Discourse: A UK Perspective' (*Journal of Social Welfare and Family Law, Vol. 32, No. 1, 2010, pp. 5-22. Routledge*), p. 15.
[190] See *Akrich case* (point 58) and *Carpenter case* (point 44).
[191] See *Zhu and Chen case* and *Zambrano case*.
[192] However, in particular cases the fact that dependency exists must be proved by the TCNs as the Court had stated that a mere undertaking from a Community national or his spouse to support his parents is not sufficient for it to be considered that there is the dependence necessary for a residence permit to be granted - Case C-1/05 Reference for a preliminary ruling: Yunying Jia v. Migrationsverket [2007], point 21.
[193] Case C-200/02 Reference for a preliminary ruling: Kungian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004], point 13.
[194] "[…] Catherine receives private medical services and child-care services in return for payment in the United Kingdom, […] that the two appellants in the main proceedings provide for their needs by reason of Mrs Chen's employment, that the appellants do not rely upon public funds in the United Kingdom and there is no realistic possibility of their becoming so reliant, and, finally, that the appellants are insured against ill health" - Ibid, point 13.
[195] Case C-60/00 Reference for a preliminary ruling: Mary Carpenter v. Secretary of State for the Home Department [2002], points 43-44.

account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy"[196]; "[…] grounds of public policy cannot be invoked to service economic ends"[197]. When the situation is related to minor EU citizens and their TCN parents the EUCJ considers whether the removal of TCNs would infringe the 'substance of citizenship rights' of their children. Regrettably, neither cultural nor social integration into the host MS is being considered in cases related to families composed of *illegal* immigrants and *static* EU citizens, the EUCJ does not examine the extent of a TCNs links with the country of origin either – *Zhu and Chen, Carpenter, Zambrano, Dereci and McCarthy cases* prove this.

Figure 2. **Criteria applied by the EUCJ in illegally residing third-country nationals' cases**



Source: made by the author

[196] Case C-30/77 Reference for a preliminary ruling: Régina v. Pierre Bouchereau [1977], points 10 and 28.
[197] Case C-36/75 Reference for a preliminary ruling: Roland Rutili v Ministre de l'intérieur [1975], point 30.

Figure 2 shows very clearly that the case-law of the EUCJ (as this model is construed taking into account the case-law of the EUCJ) is very uneven, heterogeneous, that different criteria are being applied to families. The Court makes a difference between families having European citizens and families composed of entirely TCNs. Even families that have European citizens are being differentiated: minor European citizens are being protected much more than adults, different factors are being applied depending on the age and ability to live an independent life. Therefore it is evident that "Individual circumstances rather than a systematic and predictable interpretation of the EU Treaty rules seem to guide the Court's rulings"[198]. It is not even possible to distinguish general criteria which could be applied in most cases related to *illegal* immigrants (everyone, that has read the case-law of the EUCJ, can clearly see where *Carpenter*, *Zambrano* and *Dereci* or *Zhu and Chen* cases are reflected in the figure). And this causes serious problems for families as they cannot even imagine what arguments or / and evidence to produce, on what criteria to rely on in order to be protected.

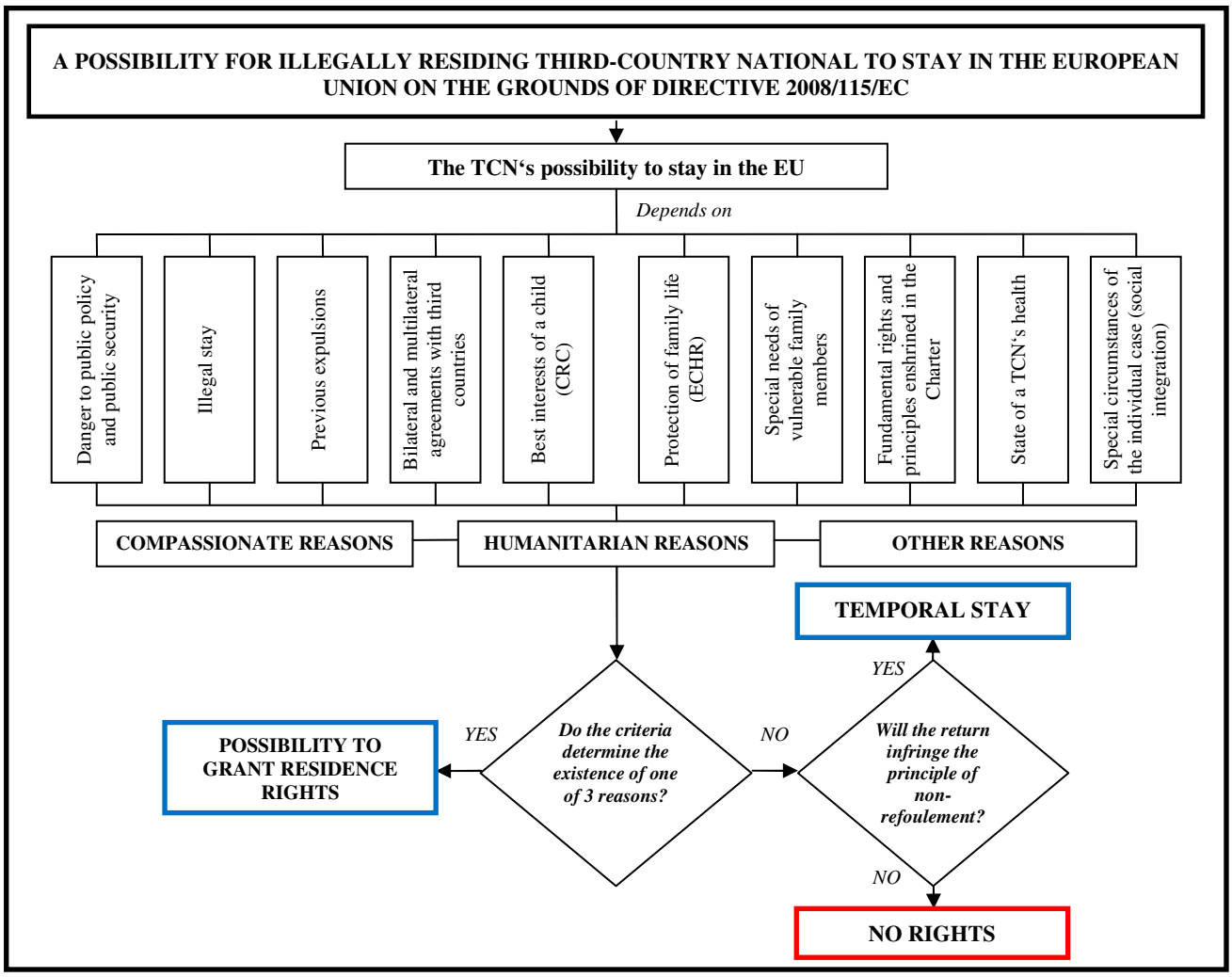
In **section 2.2** we analyzed Return directive and we made a conclusion that it creates a possibility for *illegal* immigrants to stay in the EU. However, it depends on the MS as they are free to decide whether to return illegally residing TCNs or not. Directive 2008/115/EC reveals that when the question is related to expulsion of *illegal* immigrants, the MS have to take into account their fundamental rights: 'best interests of the child' and respect for family life should be a primary consideration. Moreover the state of health of the TCN and the principle of non-refoulement have to be concerned[199] as well as the length of stay, the existence of family and social links, the fact that the family unity in the MS is maintained, that vulnerable persons may have special needs, that minors are granted access to the basic education system. When the EUCJ dealt with cases related to children of *migrant* workers the Court acknowledged that "[…] the child of a migrant worker has a right to continue his studies in order to complete his education successfully"[200]. Taking this into account we suppose that the rules applied to children of legal immigrants could also be applied to *illegally* residing TCNs' children. It would mean that not only basic education should be considered but also vocational and general; university courses should also be thought over. Taking into account the factors enshrined in directive 2008/115/EC we suggest that the MS and the EUCJ should apply them in cases related to illegally residing TCNs.

Figure 3 (see the next page) shows that if after evaluating ten criteria, the Member State or the EUCJ will find compassionate, humanitarian or other reasons to exist, then the MS will be able to decide that illegally residing TCN should be granted residence rights. If analysis of the TCN's situation will not convince the MS or the Court that the mentioned reasons exist, then the MS should

[198] Peter Van Elsuwege 'Court of Justice of the European Union, European Union Citizenship and the Purely Internal Rule Revisited, Decision of 5 May 2011, Case C-439/09 Shirley McCarthy v. Secretary of State for the Home Department' (*European Constitutional Law Review, 7, 2011, pp. 308-324*), p. 324.
[199] Directive 2008/115/EC, Article 5.
[200] Case C-7/94 Reference for a preliminary ruling: Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal [1995], point 24.

decide not to allow for such TCN to stay unless non-refoulement principle would demand not to return illegally residing TCN until the circumstances which disallowed to expel a person would disappear.

Figure 3. **Criteria derived from directive 2008/115/EC**



Source: made by the author

Analysis of different EU law instruments revealed that our hypothesis proved out. Article 7 of the Charter, EU citizenship status, directive 2008/115/EC are the examples showing that potential to create possibilities for *illegally* residing TCNs to stay in the EU exists – EU law envisages the protection of the family life for *illegally* residing TCNs. However the case-law of the EUCJ revealed that there are no common rules or criteria which should be assessed by the Court in cases related to residence rights of *illegally* residing TCNs. Moreover the EUCJ takes into account considerably less criteria than compared to legally residing TCNs' cases: it does not consider integration criteria, criteria related to relations with the country of the TCN's origin, interests of the children, specific circumstances of immigrant's family life etc. Because of this the EUCJ does not guarantee adequate protection of the family life for *illegally* residing TCNs. Therefore rules and criteria applied by the EUCJ to family members – *illegally* residing TCNs – of EU citizens should be improved.

3.3 The EU Has to Ensure Better Protection of Illegally Residing TCNs' Family Life

Comparison of the case-law applied by different European Courts and assessment models reveals that in one case the protection of family life is better ensured by the ECtHR (as the Strasbourg Court seeks to preserve the family unity) and in other case by the EUCJ (as the EUCJ interpreting the citizenship provisions allowed for *illegally* residing TCNs to stay in the EU and ensured a high level of protection for minor EU citizens). The EUCJ acknowledges that certain actions of the MS infringe the rights enshrined in Article 8 of the ECHR of an illegal immigrant[201] therefore it seems not right that the EUCJ does not take into account all the criteria formulated by the ECtHR. We suggest that the EU should improve the protection of illegally residing TCNs' family life by taking into account a wider spectrum of factors: the EUCJ could borrow particular criteria formulated by the ECtHR and it could apply additional criteria enshrined in Convention on the Rights of the Child. The ECtHR was specifically created for ensuring the protection of human rights therefore someone could wonder why the EU should care about increased protection of family rights: after all, the EU was not created in order to protect human rights; it was created for economic grounds. However, we may name 4 reasons showing that the EU should increase the level of protection of family life of *illegally* residing TCNs:

1.**All the Member States of the EU are parties to the ECHR**.

Most EU Member States accept that the Convention has a special status: national courts have to interpret and apply their national laws according to the ECHR and the case-law of the ECtHR[202]. It means that national laws have to be interpreted and applied by the MS in conformity with the ECHR. However, national laws have to be applied in conformity with EU law too – this requirement derives from the fact that EU law became an integral part of the national legal systems of the MS when they decided to join the EU. MS fail to comply with their international obligations because they do not ensure the protection of the family life as required. That can be indirectly explained by the fact that EU law aims to protect only European citizens while the ECtHR seeks to preserve the family unity. EU law has much greater influence on the actions of the MS than the ECHR therefore because of the fact that EU law envisages that illegally residing TCNs have to be returned to their countries of nationality we have a result that illegally residing TCNs are being kicked out of the Union. It is obvious that contradictions in these systems exist: even though the ECtHR also accepts that immigrants cannot choose where they want to reside and the Court firstly investigates whether the family could enjoy

[201] Case C-60/00 Reference for a preliminary ruling: Mary Carpenter v. Secretary of State for the Home Department [2002], point 41.

[202] For example Lithuanian Supreme Court has indicated that national courts applying national laws should follow the case-law of the ECtHR, which interprets the provisions of the ECHR-Lapinskas K. „Europos tarptautinių teismų ir nacionalinių konstitucinių teismų jurisdikcijos ir jurisprudencijos sąlyčio problemos" http://www.lrkt.lt/PKonferencijose/06.pdf (viewed: 14.11.2012); Bulgaria acknowledges that national law is to be interpreted in light of the ECHR, the UK law states that domestic law has to be interpreted 'so far as is possible' in conformity with the Convention - Giuseppe Martinico 'Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (*The European Journal of International Law, Vol. 23, No. 2, 2012, pp. 401-424*), p. 409.

family life elsewhere, however by taking into account integration criteria, relations with the country of origin and particular family circumstances the ECtHR very often makes a decision that the family should be allowed to stay in the host State because expulsion of integrated aliens would not strike a fair balance between the interests of the family and the State. The EUCJ does not protect illegally residing TCNs. If it protects the family it does that because of the need to ensure protection of European citizens or for commercial goals not because it wants to preserve the family unity. As two European systems envisage different protection of family life of illegally residing TCNs, MS, by trying to comply with the obligations derived from EU law, are not able to protect families as required by the ECHR. A good example of this is Dutch case[203]. An *illegally* residing TCN (woman) had two children with EU citizen. The father made a declaration of paternity so their children acquired Dutch nationality. The mother, relying on *Zambrano case* and on the right to the protection of the family life, required for residence rights. *However the Dutch Court refused to grant residence rights because her children could enjoy their residency in the EU with their father (*apparently *Dereci case* determined the decision of the Dutch court). Almost the same situation had happened in Case of Rodrigues Da Silva[204]. However, the ECtHR admitted that *exceptional circumstances* existed because of the strong relations between the mother and the child and because of the fact that the father (who had custody of a child) would not have agreed to allow for the child to leave the country with her mother. Taking this into account the ECtHR allowed for *illegally* residing mother to stay. Therefore it is evident that the criteria applied in cases related to illegally residing TCNs should be equalized at least a little bit in order to ensure that MS could implement both obligations: derived from EU law and from the ECHR.

2. **The European Union committed to accede to the ECHR**.

When the EU becomes a state party to the ECHR, criteria applied by the ECtHR in cases related to *illegal immigrants* will have to be applied in the Union too. The EUCJ will be required to take into account integration criteria, particular exceptional circumstances of the family, to analyze the TCN's relationships with the country of his origin *and the most importantly it will have to preserve the family unity*. Opinions of Advocate Generals (AG) show that before suggesting the possible ways how EU law should be applied AGs firstly analyze the case-law of the ECtHR and present the most important rules applied by the ECtHR[205]. Later taking into account those cited rules AGs formulate their own opinions. The EUCJ considers the suggestions formulated by AGs – this way the rules applied by the ECtHR are being incorporated into EU law. The fact that the case-law of the ECtHR occupies a significant part in the opinions of Advocate Generals (especially nowadays) shows a special

[203] H. van Eijken and S. A. De Vries 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' (*European Law Review, Vol. 36, No. 5, 2011, pp. 704-721. Westlaw International), p. 715.*
[204] See Case of Rodrigues Da Silva and Hoogkamer v. The Netherlands – App. No. 50435/99 [2006] ECHR.
[205] "In order to answer this question we need to remind the essential elements of the assessment designed by the ECtHR, on which the case-law of our Court is mostly being grounded" - Opinion of Advocate General Bot in Case C-356 and 357/11 S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L., point 65.

connection between two European Courts and reflects a commitment of the EU to accede to the ECHR. The majority of Advocates Generals[206] see the EU as a human rights' guarantor which is capable of providing improved protection of family life in the EU. Therefore the EUCJ understanding that accession to the ECHR is inevitable (unless the MS would decide to change Article 6 TEU) should add the Strasbourg Court's criteria next to its own factors and apply them to *illegally* residing TCNs.

3. Article 7 of the Charter corresponds to Article 8 of the ECHR.

Article 52(3) of the Charter states that when rights correspond, "[…] the meaning and scope of those rights should be the same as those laid down by the ECHR". This part further states that "[…] this provision should not prevent Union law providing more extensive protection". Analysis of the case-law of the EUCJ and of the ECtHR however revealed that *the protection is not the same* when we talk about *illegally* residing TCNs as the EUCJ does not apply the criteria formulated by the ECtHR in such cases. But it should take due regard to them because the protection of the family life cannot be less than the protection guaranteed by the ECtHR[207]. Cases such as *Dereci* or *McCarthy* allow us to question whether the Court gave the right decisions because it seems that the Strasbourg Court could guarantee higher level of protection in these particular cases[208]. Even though the EUCJ "[…] is not legally obliged to follow the interpretation of the ECtHR"[209] at the moment, accession to the ECHR would demand to follow them. The EUCJ and the ECtHR have long been seeking to adjust each other's case law on fundamental rights and the EUCJ has even re-considered its previous case-law on the grounds of the newest judgments of the Strasbourg Court[210]. Therefore, in our opinion the EUCJ should do the same in cases related to *illegally* residing TCNs. Even though the EUCJ has ensured higher level of protection of the family life of a TCN in *Zambrano case*, however by not ensuring the 'same level of protection' in cases such as *Dereci* or *McCarthy* the Court decreased the protection. Moreover, the Charter expressly states that "[…] it is necessary to strengthen the protection of fundamental rights in the light of changes in society […]"[211]. Adding this to the Charter text the EU

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[206] See for example opinion of AG Sharpston in Zambrano case and opinion of AG Bot in Case C-356 and 357/11.

[207] "[…] it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR […]" - Opinion of Advocate General Trestenjak in Case C-245/11 [2012], point 87.

[208] For example, the ECtHR taking into account the facts that children of Mr Dereci have been born in that Member State, that they probably do not know the Turkish language, that the mother of the children was European citizen and supported her family financially and that different way of life in Turkey could cause serious inconveniences for the family if they would be forced to leave the country with the father the ECtHR could find exceptional circumstances in this particular case as usually it is in the child's best interests to live with both of the parents.

[209] Lorena Rincón – Eizaga 'Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts Regarding Interpretation of Article 8 of the European Convention on Human Rights' (*International Law Review, No. 11, 2008, pp. 119-154*), p. 133.

[210] Sonia Morano-Foadi and Stelios Andreadakis 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence (*The European Journal of International Law, Vol. 22, No. 4, 2011; pp. 1071-1088*), p. 1072 and 1086.

[211] Charter of Fundamental Rights of the European Union, Preamble.

intended to ensure higher level of human rights' protection in the EU. Taking all into account it is evident that the EUCJ should improve the protection of family life of *illegally* residing TCNs.

4. The Union has a goal to ensure protection of the interests of a child.

Convention on the rights of the Child (CRC) requires to prevent separation of children from their parents: "[…] children's protection can be accomplished in the context of a family as a unity"[212]. CRC envisages that[213]: the *child should grow up in a family environment*; that in all actions concerning children *the best interests of the child* should be a primary consideration; that a child should be granted a *direct contact with both of his parents*. MS have to ensure recognition of the principle that *both parents have common responsibilities for the upbringing and development of the child etc*. The EUCJ quite often cites the CRC[214], moreover promotion and protection of the rights of the child is one of the objectives of the EU and all the MS are parties to this convention[215] but the rights of the TCN's children are not being taken into account seriously and protected duly in the EU despite the fact that the rights enshrined in CRC apply to all children irrespective of their status (Article 2 CRC) and despite the fact that Article 7 of the Charter "[…] must be read in conjunction with the obligation to have regard to the child's best interests, which are recognized in Article 24(2) of the Charter […]"[216]. It means that Article 7 of the Charter has to be applied together with the consideration of the best interests of the child. The EUCJ does not take the child's best interests into account in cases related to residence rights of *illegal* immigrants. For example the Court based its ruling in *Zambrano case* on citizenship rights by not taking into account such relevant facts that a child needs to live with both of his parents, that parents have the same rights and obligations towards their children, that parental rights constitute a fundamental element of family life etc. It is unclear whether the Court would have guaranteed the protection of family life if it would not have invented the rule of 'substance of citizenship rights'. Taking into account the fact that the EU seeks to return illegally residing TCNs it seems that the Court would not have granted residence rights for *illegally* residing TCN parents. This is wrong because the dislike of immigrants should not determine the decision: immigrants, whether they are legal or illegal, also have families and their family life may also be effective, therefore it should be protected. Moreover the Court constantly forgets that a child also has, as any other person in the world, his own right to respect for his family life. The Court usually weighs interests of the parents and of the MS but it forgets to ascertain what the needs of the child are[217]. Taking into account the

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[212] Evarist Baimu 'Children, International Protection' (*Max Planck Encyclopedia of Public International Law, 2009*), point 10.
[213] Convention on the Rights of the Child, United Nations, New York, 20 November 1989.
[214] See Case C-540/03 European Parliament v. Council of the European Union [2006].
[215] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child, Brussels. 15.2.2011, COM (2011), p. 3.
[216] Case C-540/03 European Parliament v. Council of the European Union [2006], point 58.
[217] It can be clearly seen in *Dereci case*.

Commission's opinion that "[…] it is time to move up a gear on the rights of the child and to transform policy objectives into action"[218], that the Union has a goal and is obliged by Articles 7 and 24(2) of the Charter to ensure protection of the interests of a child but it does not do it properly, that CRC sets only minimum standards therefore the protection cannot be less than envisaged in the Convention (however, the protection of child's rights seems to be less in the EU and the MS than required by the CRC) we consider that the protection of family life of *illegally* residing TCNs must be improved.

3.3.1 Expert Survey – Analysis of Criteria

Taking into account the fact that different legal systems (ECHR and EU law) cause problems for the MS because incompatibility of criteria does not allow to ensure that MS could implement both obligations: derived from EU law and from the ECHR, considering that the EU has a goal to accede to the ECHR and therefore the EU will be forced to apply the criteria formulated by the ECtHR in illegally residing TCNs' cases, taking into account the fact that the EU cannot ensure less protection than guaranteed by the ECtHR and the fact that the Charter requires from EU institutions and the MS to take due regard to the rights of a child, having in mind that the ECtHR has clearly stated that *illegally* residing TCNs may stay in the host State when exceptional circumstances exist we may conclude that **there is a clear need to improve the criteria** applied in the EU in cases related to residence rights of *illegally* residing TCNs on the grounds of the protection of their family life.

For the above reasons we have prepared Interview Guidelines (**see Appendix No. 1**) and asked experts (specialists working at Lithuanian Migration Department and other Migration Management Services) to answer the questions and to rate the proposed criteria. Criteria were divided into five main parts: 1) criteria applied by the EUCJ in cases related to *illegally* residing TCNs; 2) criteria applied by the EUCJ in cases related to *legally* residing TCNs; 3) criteria applied by the ECtHR in cases related to *illegal* immigrants, 4) criteria derived from the Convention on the Rights of the Child and 5) other criteria. The purpose of this survey was to find out how specialists estimate the criteria applied by the EUCJ towards *illegally* residing TCNs who require for residence rights on the grounds of the protection of their family life and to ascertain what additional criteria derived from the case-law of the ECtHR, from the Convention on the Rights of the Child etc. could be applied when dealing with cases related to residence rights of *illegally* residing TCNs. Therefore we sought to find out what **set of criteria** national institutions and the EU Courts could and should take into account when deciding whether to allow for *illegally* residing TCNs to stay in the Member States and to grant residence rights.

Reliability of expert surveys depends on the size of the group of experts, their composition by specialties and on individual characteristics of the experts[219]. Reliability of the survey is related to the

[218] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child, Brussels. 15.2.2011, COM (2011), p. 3.
[219] Vitalija Rudzkienė, Socialinė statistika: vadovėlis. – Vilnius: Mykolo Romerio universiteto leidybos centras, 2005.

minimum number of respondents. When more experts express their opinions, the reliability of the expert surveys increases significantly only up to a certain limit. E.g. the fourth expert increases the reliability of the survey to 75 percents and the fifth expert increases the reliability of the survey only by 5 percents. Therefore in our opinion the optimal number of experts should be from 7 to 10 experts. This number of experts should ensure that credibility of the survey would be 85-90 percents. We have questioned 7 experts (letter *m* indicates them in the tables, **see Appendix No. 3**). Moreover, results of the survey may be reliable only if the opinions of the experts are compatible. Compatibility of the expert opinions can be verified following the three steps (**see Appendix No. 2**). After conducting those three steps we have ascertained that the opinions of our questioned experts are completely compatible.

Survey of expert opinions revealed that responses of the experts depend very strongly on their personal attitudes towards *illegal* immigrants and their approach to family as one part of the experts provided opinions and suggestions which could be held as more favorable for illegal immigrants (those respondents indicated that they agree with the statement that "Not all illegally residing TCNs are being allowed to stay in the EU on the grounds of the protection of their family life despite the fact that their family circumstances show that in such situations interests of the family should be regarded as more important than interests of the State"). Others on the contrary were of the opinion that interests of the States are of paramount importance and illegally residing TCNs should be allowed to stay only in very exceptional cases: illegally residing TCNs cannot be allowed to regularize their illegal position unless exceptional circumstances such as illness of a spouse, disability, complete orphan in the country of his nationality etc. exist (those respondents did not agree with the mentioned statement). Most of the experts highlighted that subjective reasons (e.g. unwillingness to return to the country of origin) cannot be justified and tolerated by the MS. Therefore it became clear that serious grounds should determine the decision to allow for *illegal* immigrants to stay and to grant them residence rights.

Analysis of expert surveys revealed that the factors which should make the biggest impact on EU Courts and national institutions when considering whether to allow for *illegally* residing TCNs to stay in the host country or not are as follows (for short explanations **see Appendix No. 3**): true family life; exceptional family circumstances, state of immigrant's health; resources; work (integration criteria); science and studies (integration criteria); language (integration criteria); Work / studies (relations with the country of nationality); child's interests (criteria related to family situation); strength of family relationships; danger (hardships that may arise in the country of nationality); work (hardships that may arise in the country of nationality); gravity and nature of the crime; balance of interests and valuable family relations. Some of the factors were rejected by the experts as being not relevant (for short explanations see **Appendix No. 3**), therefore taking into account opinions of the experts we decided not to suggest applying to illegally residing TCNs the following criteria: 'Age' – TCN families that have minor children have to be guaranteed a higher level of protection; 'Religion' (Integration

criteria); ‘Language’ (hardships that may arise in the country of nationality); ‘Behavior of criminal’ and ‘Information’ (criteria related to crimes); ‘Opinion of a child’ and ‘Living conditions’ (criteria derived from CRC). **Experts also suggested to include two additional criteria**: ‘Educational background’ (it could allow for national institutions and courts to estimate the abilities of an *illegally* residing TCN to integrate into EU society); ‘Real estate’ (this factor would mean that if an illegal immigrant would have real estate in his country of origin this could indicate that his relations with the country of origin remained strong and he should not be allowed to remain in the host State). The suggested factors seemed to be reasonable therefore we decided to include them too.

Taking into account the criteria already applied by the EUCJ and having in mind that there is a need to equalize the criteria (applied by the ECtHR and the EUCJ) at least a little bit and to indentify the *general criteria* which could be applied in illegally residing third-country nationals’ cases (as the practice of the EUCJ is very uneven and heterogeneous) we suggest that the named factors should have a significant influence in the assessments performed by EU Courts and national institutions. Moreover factors which derive from directive 2008/115/EC should also be considered because they are particularly related to illegal immigrants. Taking all into account we suggest that the following **set of criteria (see Table No. 1)** should be considered in *all* cases related to the possibility for illegally residing TCNs to stay in the host Member State and to be granted residence permits on the grounds of the protection of their family life (criteria are shortly explained in **Appendix No. 4**).

Table No. 1. **Criteria that *should be* applied in *all illegally* residing third-country nationals’ cases**

Family situation	**Child welfare**	**Socio–economic policy of the State**
True family life	Best interests of a child	Resources
Exceptional family circumstances	Relations with parents	Sickness insurance
Strength of family relationships	Parents’ commitments	Accommodation
Valuable family relations	Separation from parents	Public health
State of health	Regular contact with parents	Economic benefit
Kinship	Child’s age	
Emotional and financial dependency	Emotional and financial dependency	
Special needs of vulnerable family members	A child’s right to respect for family life	
Living under one roof		
Family unity		
Integration criteria	**Relations with the country of nationality**	**Hardships in the country of origin**
Work	Work / studies	Danger
Science / studies	Social contacts	Traditions, culture, religion
Language	Affinity	Place of family foundation
Length of stay	Real estate	Work
Educational background		

Crimes	**Other criteria**
Gravity of the crime	Balance of interests
Nature of the crime	EU Citizenship
Public security and public policy	Substance of citizenship rights
	Possibility to live elsewhere
	Nationalities
	Illegal stay
	Previous expulsions
	Rights and principles of the Charter
	Agreements with third-countries

Source: made by the author

Because of the fact that some of the criteria had repeated (as we applied different legal instruments and some of them envisaged the same or similar factors) we had to regroup certain criteria (therefore we have distinguished 8 groups of factors, **see Table No. 1**). Moreover, as we have already mentioned, some of the criteria were rejected by the experts as not being relevant. Because of the mentioned reasons it became impossible to align all the criteria by relevance. However, some of the factors were clearly identified by the experts as being essential therefore we have marked them in yellow – it means that institutions and the courts should analyze those criteria more closely. But we do not say that those particular criteria should determine the decision – different factors may be decisive in different cases. Therefore the courts and the national institutions should take due regard to all these factors: decisions should be made by taking into account entirety of the criteria.

The proposed **set of criteria** should ensure more consistency and clarity in cases related to *illegally* residing third-country nationals and their ability to enjoy residence rights on the grounds of the protection of their family life. The set of criteria should help for the national institutions and the courts to identify whether exceptional circumstances indicating that there is a need to allow for illegally residing TCN to stay in the Member State exist. Or on the contrary analysis of a wider range of factors could reveal more evidently that illegally residing third-country national is not worthy of protection – a set of criteria should help to dispel all doubts. It should also concretize the procedures (related to returns and empowerment of residence rights / permits) because not having general criteria applicable in illegally residing TCNs' cases causes problems for the Member States – relying on the formal requirement that illegally residing TCN has to be returned to his country of origin MS have not ensured adequate protection of the family life in cases where family members clearly needed protection[220]. As rightly observed by the ECtHR, States giving such a paramount importance to the mere fact that a person stayed in the country illegally may show that States "[…] have indulged in excessive formalism"[221]. Moreover the set of criteria could be helpful not only to decision-makers but also to families – the set of criteria should bring more clarity for families seeking to know what arguments and evidence to provide, on what criteria to rely on in order to be protected.

[220] Dutch case (where the mother was not allowed to stay in the country where her minor children lived because she was an illegal immigrant) proves this.
[221] Case of Rodrigues Da Silva and Hoogkamer v. The Netherlands – App. No. 50435/99 [2006] ECHR, point 44.

CONCLUSIONS AND RECOMMENDATIONS

1. The EU having a *sui generis* power to protect family rights does not ensure the protection of the family life for all individuals who perceive themselves as family members because the EU has not construed a common definition of family but decided to enlist individuals which should comprise family. Enumeration of family members is really narrow and slightly different in different legal acts therefore despite the fact that secondary EU law envisages the concepts of dependence, care, durable and true family relationships etc. the EU is not able to ensure adequate protection of the family life as such wider interpretations can be applied only to a strictly limited category of persons. Moreover in EU law protection of family life is conditional as it depends on *citizenship*, *movement*, *legal residence*, *age*, *kinship or length of residence*. Therefore not all individuals have the same level of protection of their family life.
2. EU law provides legal grounds for *illegally* residing TCNs to stay in the EU for family sake: the Charter guarantees the protection of the family life not only for EU citizens but also for TCNs including illegally residing ones and it does not prevent the latter from claiming residence rights; Return directive creates possibilities for illegally residing TCNs to stay because principles, objectives and values expressed in this directive are related to family rights and they have to be taken into account by the MS when considering whether to return illegally residing TCNs or allow them to stay; illegally residing TCNs being family members of static EU citizens in certain circumstances may acquire residence rights because EU citizens having fundamental status derived from EU citizenship need to be protected by EU law.
3. The Charter envisages constraints to claim residence rights *only for those illegal immigrants* who move to the second MS therefore our analyzed families (composed of *illegally* residing TCNs and *static* EU citizens) may rely on Article 7 of the Charter and claim residence rights. However Article 7 *cannot be applied as a sole ground,* it can be relied upon only when the situation of the family is *covered* by *EU law* therefore families seeking to get residence rights must substantiate that their family situation is *covered* by EU law – substantiate by adducing *supporting provisions derived from EU law*. Directives, regulations, decision of the EU are not the only acts that may support application of Article 7. General principles, provisions of the EU Treaties or non-legal documents concretizing objectives and obligations of the Union could be adduced next to Article 7 of the Charter because they may create a link with EU law.
4. Return directive envisages a possibility to grant a residence permit for illegally residing TCN *on the grounds of the protection of the family life* because specific family circumstances must be considered by the MS. However MS are not obligated by this directive to allow for illegal immigrants to stay, they are free to decide whether particular family circumstances fall under the concepts of humanitarian, compassionate or other reasons and whether illegal immigrant is worthy of protection or not. Moreover when MS decide to allow for illegally residing TCNs to stay MS are free to choose the duration and the content of the residence permits / authorizations because the Retrun directive itself does not envisage any obligatory requirements for that. This

shows that Return directive is a very limited instrument in order to get a fully-fledged residence permit because everything depends on the will of the MS. However Return directive could also be used as a supporting ground in order to rely on Article 7 of the Charter because Return directive covers situations of families having *illegally* residing TCNs. This way Member States making decisions would be forced to look not only at the provisions of Return directive but also at the case-law of the EUCJ and the ECtHR. Because of the fact that the ECtHR preserves the family unity, applies a wide range of criteria and foresees a possibility to grant residence rights for illegal immigrants, MS would be forced not to look at particular situation formally but to scrutinize the question substantially. This way illegally residing TCNs could have more chances to be allowed to stay in the EU for family sake.

5. Cross-border element is not necessary when TCN family members of EU citizens seek to get residence rights relying on the citizenship status of their family members because neither the Maastricht Treaty nor the present EU Treaties requires that. Despite the fact that *Zambrano case* was generous as it created a chance to grant residence rights for *illegally* residing TCNs the rule formulated in this case is erroneous because it limited the ability to derive residence rights only for illegally residing TCNs who are financial supporters of minor EU citizens and because the EUCJ provided only one right (a right to reside) which falls under the concept of *'substance of citizenship rights'*. Analysis of different legal instruments revealed that *the right to family life* could fall under the concept of *'substance of citizenship rights'*. This way mistakes made by the Court could be corrected and not only TCN family members who are financial supporters of their *minor* children (EU citizens) but also TCN family members of *adult* EU citizens could acquire residence rights because the protection of family life implies that the whole family should be protected. Moreover a combination of Article 7 of the Charter, Articles 20 TFEU and 9 TEU creates a possibility to grant residence rights for illegally residing TCN family members of EU citizens even when no citizenship rights are being infringed: Article 20 TFEU being directly effective creates a link with EU law and together with Article 9 TEU (requiring to treat EU citizens equally and to confer citizenship rights on every EU citizen) allows for EU citizens to rely on Article 7 of the Charter and to claim residence rights.
6. The ECtHR applies a wide range of criteria in cases related to immigrant's right to reside: integration criteria, factors related to relations with the country of immigrant's origin, factors related to family situation etc. The ECtHR has even stated that exceptional family circumstances may determine the need to allow for illegally residing TCNs to stay and in such cases the Strasbourg Court applied the majority of the mentioned criteria. Moreover the ECtHR seeks to preserve the family unity therefore if serious reasons do not allow for a family to enjoy a normal family life elsewhere the Court allows for such illegal immigrant to stay in the host country. The case-law of the ECtHR seems to be uniform and well-developed. The same could not be said about the case-law of the EUCJ. The EUCJ applies only a small part of criteria in illegally residing TCNs' cases compared to the legally residing ones, its case-law is very

heterogeneous, different factors are being applied in illegally residing TCNs' cases and it is not even possible to distinguish general criteria which could be applied in *all* cases related to *illegal* immigrants. Furthermore the EUCJ does not seek to preserve the family unity; it guarantees the protection of the family life only for the sake of EU citizens or for commercial goals. Criteria applied by the EUCJ cannot ensure adequate protection of family life because those factors are not sufficient to evaluate the immigrant's situation substantially. Therefore criteria applied by the EUCJ should be improved.

Taking into account the fact that criteria applied by the EUCJ in illegally residing TCNs' cases are too heterogeneous; that different legal systems (ECHR and EU law) cause problems for the Member States because incompatibility of criteria does not allow to ensure that MS could implement both obligations: derived from EU law and from the ECHR; that the EU obligated to accede to the ECHR and to ensure that the protection of the family life would not be less than the protection guaranteed by the ECtHR; that the EU has a goal to ensure protection of the interests of the child we have conducted an expert survey in order to find out what criteria could be applied in *all* cases related to illegally residing TCNs. Taking into account the results obtained, we suggest that national institutions and EU Courts *in all cases related to residence rights of illegally residing TCNs* should:

1. Take into account the factors which are always being analyzed in legally residing TCNs' cases, such as sickness insurance, resources, state of health etc.
2. Consider the factors which are always being analyzed by the ECtHR: integration criteria, criteria related to relations with the country of origin, criteria related to family situation, criteria indicating hardships that may arise in the country of origin, criteria related to immigrant's crimes. Particular importance should be regarded to the following circumstances: whether illegally residing TCN worked / studied in the host Member State; whether he had learned the host country's language; whether true family life exists between him and his family members, how strong the relations between them are and what their mutual responsibilities are; whether exceptional family circumstances exist; whether state of immigrant's health requires special treatment; whether it would be safe for the immigrant to live elsewhere; whether immigrant had made a crime, if he had – what its gravity and seriousness is.
3. Consider the factors which derive from the Convention on the Rights of the Child. Particular importance should be regarded to best interests of a child (interests of the child have to be of paramount importance; when national institutions and courts make decisions they have to ensure what is best for the child) and to child's relations with parents.
4. Always seek to strike a fair balance between the interests of the family and the interests of the Member State, particular importance should also be given to citizenship rights of EU citizens – family mambers of illegally residing third-country nationals.
5. Take into consideration all the factors derived from the Return directive among which previous expulsions, rights and principles enshrined in the Charter, individual circumstances of the immigrant's family should have a great weight in decision-making.

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Šarkauskaitė S. A rights of an illegally residing third-country national to stay in the European Union on the grounds of the protection of the family life / Master thesis in European Union law and Governance. Supervisor: Prof. dr. L. Jakulevičienė. – Vilnius: Faculty of Law, Mykolas Romeris University, 2012. – 68 p. of text without appendixes. 4 appendixes are attached seperately.

ANNOTATION

In this Master Thesis we have analyzed how *illegally* residing TCN family members of *static* European Union citizens might get residence rights by relying on EU law; we have also distinguished the existing problems related to residence rights of illegally residing TCNs and proposed theoretical and practical solutions. In the first part of the Master Thesis we have ascertained how the EU may protect family rights despite the fact that it has no competence in human rights' area and we have revealed what family mebers are being protected in the EU. In the second part we have proved that *illegally* residing TCNs have possibilities to get residence rights in the EU on the grounds of the protection of their family life by relying on Article 7 of the Charter, the norms of Return directive and the citizenship status of family members – EU citizens. In the third part we have disclosed that the case-law of the EUCJ does not ensure for illegally residing TCNs adequate protection of their family life because the practise of the EUCJ in illegally residing TCNs' cases is too heterogeneous and the Court applies insufficient criteria. Therefore seeking to find out what additional criteria could be applied in illegally residing TCNs' cases we have conducted an expert survey and taking into account the results obtained we have proposed a set of criteria which could be applied in *all* illegally residing TCNs' cases related to residence rights.

Key Words: EU citizenship, illegal immigration, protection of family life, residence rights, third-country nationals.

Šarkauskaitė S. Nelegaliai gyvenančių trečiųjų šalių piliečių teisė pasilikti Europos Sąjungoje šeiminių ryšių pagrindu / Europos Sąjungos teisės ir valdymo magistro baigiamasis darbas. Vadovė Prof. dr. L. Jakulevičienė. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2012. – 68 p. teksto be priedų. Atskirai pridedami 4 priedai.

ANOTACIJA

Magistro baigiamajame darbe išanalizuota, kaip Europos Sąjungos piliečių, nesinaudojančių judėjimo laisve, šeimos nariai – *nelegaliai gyvenantys* trečiųjų šalių piliečiai – gali gauti teisę gyventi šalyje, remdamiesi Europos Sąjungos teise; darbe išryškintos pagrindinės problemos, susijusios su nelegaliai gyvenančių trečiųjų šalių piliečių teisėmis gyventi šalyje bei pasiūlyti teoriniai bei praktiniai problemų sprendimai. Pirmoje darbo dalyje išaiškinta, kaip Europos Sąjunga gali ginti šeimos teises, nepaisant to, kad ES neturi kompetencijos žmogaus teisių srityje bei atskleista, kokie šeimos nariai yra saugomi Europos Sąjungoje. Antroje dalyje įrodyta, kad, siekant apsaugoti šeimos gyvenimą, nelegaliai gyvenantys trečiųjų šalių piliečiai turi galimybių gauti teisę gyventi šalyje, remdamiesi 7 Chartijos straipsniu, Grąžinimo direktyvos nuostatomis ir Europos Sąjungos piliečių pilietybės statusu. Trečioje dalyje atskleista, kad Europos Sąjungos Teisingumo Teismo praktika neužtikrina nelegaliai gyvenantiems trečiųjų šalių piliečiams tinkamos jų šeimos gyvenimo apsaugos, nes Europos Sąjungos Teisingumo Teismo praktika nelegaliai gyvenančių trečiųjų šalių piliečių bylose yra nevienalytė ir Teismas taiko nepakankamai kriterijų. Todėl, siekant išsiaiškinti, kokie papildomi kriterijai galėtų būti taikomi nelegaliai gyvenančių trečiųjų šalių piliečių bylose, buvo atlikta ekspertų apklausa ir, atsižvelgiant į gautus rezultatus, buvo pasiūlyta kriterijų visuma, kuri galėtų būti taikoma *visose bylose*, susijusiose su nelegaliai gyvenančių trečiųjų šalių piliečių teise gyventi šalyje.

Pagrindiniai žodžiai: Europos Sąjungo pilietybė, nelegali imigracija, šeimos gyvenimo apsauga, teisė gyventi šalyje, trečiųjų šalių piliečiai.

Šarkauskaitė S. A rights of an illegally residing third-country national to stay in the European Union on the grounds of the protection of the family life / Master thesis in European Union law and Governance. Supervisor: Prof. dr. L. Jakulevičienė. – Vilnius: Faculty of Law, Mykolas Romeris University, 2012. – 68 p. of text without appendixes. 4 appendixes are attached separately.

SUMMARY

In this Master Thesis we have analyzed how *illegally* residing TCN family members of *static* EU citizens might get residence rights by relying on EU law. The thesis is relevant because cases of the EUCJ are very controversial and uneven and they do not provide a clear answer when *illegally* residing TCNs should be granted residence rights. The Thesis is novel because scholars usually write about legally residing TCNs but we decided to write about *illegal immigrants* and prove that in certain cases they need to be allowed to stay. We decided to investigate the following **problems**: 1) could *illegally* residing TCNs stay in the EU on the grounds of the protection of their family life?; 2) on what legal grounds of EU law illegal immigrants could rely on in order to be allowed to remain? **Objective** of the Thesis: to find out whether *illegally* residing TCNs have a right to stay in the EU on the basis of family relationships and to ascertain whether the protection afforded to them is adequate. Taking into account the current case-law of the EUCJ and the ECtHR, the legal framework of EU law we have formulated the following **hypothesis**: EU law envisages the protection of the family life for *illegally* residing TCNs but the EUCJ by applying insufficient criteria unduly narrows such a protection. In order to prove the hypothesis and to achieve the goal we have invoked the following methods: descriptive-analytical method; systematic method; comparative method; analysis of legal documents; analysis of scientific literature; expert survey method; statistical method. The first part of the Thesis reveals what families are being protected in the EU; the second part focuses on analysing the possible legal grounds which could grant residence rights for illegal immigrants; the third part suggests improving the criteria applied by the EUCJ in illegally residing TCNs' cases related to residence rights.

After conducting the analysis we have proved that EU law provides possibilities for *illegally* residing TCNs to stay and get residence rights in order to protect the interests of their families. *Illegally* residing TCNs may rely on Article 7 of the Charter, on the provisions of Return directive and on the citizenship status of their family members and require for residence rights. However it is not enough only to rely on these legal instruments: each of them requires either to adduce additional provisions of EU law or to indicate that certain specific circumstances / reasons exist. Our hypothesis proved out completely because comparison of the case-law of the European Courts revealed that the EUCJ applies too less criteria in illegally residing TCNs' cases, that the Court's practice is too uneven and heterogeneous; that having a commitment to ensure the protection of the family life not less than guaranteed by the ECtHR the EUCJ accomplishes this not in all cases, that the EUCJ protects only EU citizens or commercial goals but not the family unity so the protection of illegal immigrants' family life is not sufficient. Seeking to improve the protection, we have conducted an expert survey and taking into account the results obtained we have proposed **a set of criteria** which could be applied in *all* illegally residing third-country nationals' cases related to residence rights.

Šarkauskaitė S. Nelegaliai gyvenančių trečiųjų šalių piliečių teisė pasilikti Europos Sąjungoje šeiminių ryšių pagrindu / Europos Sąjungos teisės ir valdymo magistro baigiamasis darbas. Vadovė Prof. dr. L. Jakulevičienė. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2012. – 68 p. teksto be priedų. Atskirai pridedami 4 priedai.

SANTRAUKA

Magistro baigiamajame darbe išanalizuota, kaip ES piliečių, nesinaudojančių judėjimo laisve, šeimos nariai – *nelegaliai gyvenantys* trečiųjų šalių piliečiai – gali gauti teisę gyventi šalyje, remdamiesi ES teise. Tema aktuali, nes ESTT bylos labai kontraversiškos, nevienodos ir jos nepateikia aiškaus atsakymo, kada nelegaliai gyvenantiems TŠP turėtų būti suteikta teisė gyventi šalyje. Tema yra nauja, kadangi mokslininkai dažniausiai rašo apie legalius imigrantus, bet mes nusprendėme rašyti apie nelegalius imigrantus bei įrodyti, kad tam tikrais atvejais jiems turi būti leista pasilikti šalyje. Mes nusprendėme ištirti šias **problemas**: 1) ar gali nelegaliai gyvenantys TŠP pasilikti ES šeiminių ryšių pagrindu?; 2) kokiais ES teisėje numatytais pagrindais remiantis nelegaliems imigrantams gali būti leista pasilikti? Darbo **tikslas**: išsiaiškinti, ar nelegaliai gyvenantys TŠP turi teisę pasilkti ES šeiminių ryšių pagrindu bei sužinoti, ar nelegaliai gyvenantiems TŠP suteikta apsauga yra pakankama. Atsižvelgiant į dabartinę ESTT ir EŽTT praktiką, į ES teisinę sistemą, buvo suformuluota ši **hipotezė**: ES numato nelegaliai gyvenantiems TŠP šeimos gyvenimo apsaugą, tačiau ESTT, taikydamas nepakankamus kriterijus, pernelyg šią apsaugą susiaurina. Tam, kad įrodytume hipotezę ir pasiektume numatytą tikslą, pasitelkėme šiuos metodus: aprašomąjį-analitinį metodą, sisteminį metodą, lyginamąjį metodą, teisinių dokumentų analizės metodą, mokslinės literatūros analizės metodą, ekspertų apklausos metodą, statistinį metodą. Pirmoji magistro baigiamojo darbo dalis atskleidžia, kokios šeimos yra saugomos ES, antrojoje dalyje analizuojami galimi teisiniai pagrindai, kurie galėtų nelegaliems imigrantams garantuoti teisę gyventi šalyje, trečiojoje dalyje siūloma patobulinti ESTT taikomus kriterijus nelegaliai gyvenančių TŠP bylose, susijusiose su jų teisėmis gyventi šalyje.

Atlikus analizę, įrodyta, kad ES teisė suteikia galimybių nelegaliai gyvenantiems TŠP pasilikti ir gauti teisę gyventi šalyje tam, kad būtų apsaugoti jų šeimų interesai. Nelegaliai gyvenantys TŠP gali remtis 7 Chartijos straipsniu, Grąžinimo direktyvos nuostatomis, šeimos narių ES pilietybės statusu ir reikalauti suteikti teisę gyventi. Tačiau nepakanka tik remtis šiais teisiniais pagrindais, kadangi kiekvienas iš jų reikalauja arba pateikti papildomų ES teisės nuostatų, arba nurodyti, kad egzistuoja tam tikros išimtinės aplinkybės / priežastys. Hipotezė pasitvirtino visiškai, nes Europos Teismų praktikos palyginimas atskleidė, kad ESTT taiko per mažai kriterijų nelegaliai gyvenančių TŠP bylose, kad ESTT praktika pernelyg nevienoda, kad ESTT, turėdamas pareigą užtikrinti, kad šeimos gyvenimo apsaugos lygis nebus mažesnis nei tas, kurį garantuoja EŽTT, tai atlieka ne visais atvejais, kad ESTT saugo tik ES piliečius arba komercinius tikslus, bet ne šeimos vientisumą, todėl nelegaliai gyvenančių imigrantų šeimos gyvenimo apsauga nėra pakankama. Siekiant pagerinti apsaugą, buvo atlikta ekspertų apklausa ir, atsižvelgus į gautus rezultatus, pasiūlyta kriterijų visuma, kuri galėtų būti taikoma *visose* nelegaliai gyvenančių TŠP bylose, susijusiose su jų teisę gyventi šalyje.

APPENDIXES

Interview Guidelines, 2012

„A Right of an Illegally Residing Third-Country National to Stay in the European Union on the Grounds of the Protection of the Family Life“

Master Thesis. Auxiliary instrument of analytical part

Because of the fact that illegally residing third-country nationals (TCNs) do not respect the rules enshrined in European Union law and national laws and very often become a burden to the social systems of the Member States (MS), the European Union (the EU) and the Member States have a goal to return such persons to their countries of origin. When the Member States and the European Union Court of Justice (EUCJ) have to decide, whether to grant residence rights for illegally residing third-country nationals or not, they take into account only a small part of criteria compared with factors which are being applied towards European Union citizens or *legally* residing third-country nationals. However the EU treaties, directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, the Charter of fundamental rights of the European Union (the Charter) and other legal instruments show that EU law envisages wider protection for TCN family members, it foresees a possibility to allow for family members-illegal immigrants-to stay in the EU but the EUCJ inadequately narrowing application of the criteria in such cases precluded illegally residing TCNs to benefit from the opportunities.

The purpose of this research is to find out how specialists – experts of their working field – estimate the criteria applied by the EUCJ towards illegally residing TCNs who require for residence rights on the grounds of the protection of their family life. And also to ascertain what additional criteria could be applied by the European Union Courts and national institutions when they deal with cases related to residence rights of illegally residing TCNs.

We focus on the following subjects:

A. Criteria applied by the EUCJ towards *illegally* residing third-country nationals who require to grant residence rights for them in the host Member State on the grounds of the protection of their family life.

B. Criteria applied by the EU Courts and national institutions towards *legally* residing third-country nationals who require to grant residence rights for them in the host Member State on the grounds of the protection of their family life.

C. Criteria applied by the European Court of Human Rights (ECtHR) towards *illegally* residing immigrants.

D. Criteria derived from the United Nations Convention on the Rights of the Child.

E. Other criteria.

Accordingly ***the purpose of the survey*** is to find out what **set of criteria** national institutions and the EU Courts could and should take into account when deciding whether to allow for illegally residing TCNs to stay in the host Member State on the grounds of the protection of the family life or not.

We ensure that the answers will be kept anonymous and individual respondents will not be identified in the conclusions!

GENERAL INFORMATION

Your first and last name (optional):

The institution where you work:

Your position:

Your educational background:

- ☐ Advanced vocational education and training;
- ☐ Higher education (college type);
- ☐ Higher education (university type).

Do you agree with the statement: "Not all illegally residing TCNs are being allowed to stay in the EU on the grounds of the protection of their family life despite the fact that their family circumstances show that in such situations interests of the family should be regarded as more important than interests of the State?"

- ☐ Yes
- ☐ No

Criteria Applied by the EUCJ towards *Illegally* Residing Third-Country Nationals

Rank *the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the national institutions and the EU Courts, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 9 – the worst.*

CRITERIA APPLIED IN CASES RELATED TO ILLEGALLY RESIDING TCNs:	
True family life*: family relations are real; family members live together not out of the convenience*	
The EU citizenship: *Families that have European Union citizens need to be protected more than families composed entirely of TCNs*	
Emotional dependency*: child's emotional dependence on family members - TCNs*	
Financial dependency*: child's financial dependence on family members - TCNs*	
Burden to the society*: TCN's being a burden to the social system of the host Member State*	
Public policy and public security*: a TCN poses a threat to the host Member State's public order and safety*	
Citizenship rights*: returning illegal TCNs as an influence on European citizens' ability to enjoy the substance of citizenship rights*	
Economic benefits*: TCN's contribution to economic activity of his family member – European citizen*	
Kinship: *only the closest family members ("nuclear family") are worth to be protected*	

Criteria Applied by the EU Courts and National Institutions towards *Legally* Residing Third-Country Nationals

When the Member States and the EU Courts deal with question, whether to allow for the legal immigrant (who respects the rules of the national laws) to stay in the European Union, the Courts and national institutions substantiate their decisions after analyzing much more criteria than in cases related to illegally residing TCNs. We make an assumption that the following criteria could also be applied towards illegally residing third-country nationals.

Rank *the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 6 – the worst.*

CRITERIA APPLIED TOWARDS LEGALLY RESIDING TCNs:	
Age*: TCN families that have minor children have to be guaranteed a higher level of protection*	
Sickness insurance*: a TCN has sickness insurance in the host MS or if he does not have it he may still by not becoming a burden to the social system of the host MS get an adequate treatment by other legal means*	
Resources*: a TCN has sufficient resources and he is able to support his family by not becoming a burden to the social system of the host MS*	
State of health*: for serious health reasons TCNs need personal care of a Union citizen*	
Public health*: diseases with epidemic potential and other infectious diseases may determine the decision not to allow for a TCN to stay*	
Family situation*: exceptional family circumstances may determine the decision to allow for TCN to stay in the EU*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Criteria Applied by the European Court of Human Rights towards *Illegally* Residing Immigrants

Legal immigration is very important not only for the EUCJ but also for the European Court of Human Rights (ECtHR). According to the case-law of the ECtHR individuals who live in the host State *illegally* should not be granted residence rights on the grounds of the protection of their family life unless *particular exceptional circumstances* would determine the need to allow for such a person to stay in the EU. We assume that criteria formulated by the ECtHR should be applied in our concerned cases especially because of the fact that integration criteria and criteria related to relations with the country of nationality are being applied in the EU towards *legally* residing TCNs and European citizens.

***Rank** the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 5 – the worst.*

INTEGRATION CRITERIA	
***Work**: when immigrant works in the host State it shows his social links with the society of the State and determines the need not to return him*	
***Science/studies**: when immigrant studies in the host State it shows his social links with the society and determines the need not to return him*	
***Length of time**: the longer a person resides in the host State the stronger his ties with it and the weaker the ties with the country of nationality*	
***Language**: efforts to learn the host State's language shows immigrant's social links with the society and determines the need not to return him*	
***Religion**: when immigrant becomes a member of the church community, it shows his social links with the society of the State and contributes to the need not to return him*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other integration criteria which the Courts and the national institutions could also consider (briefly describe them):

***Rank** the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 3 – the worst.*

CRITERIA RELATED TO RELATIONS WITH THE COUNTRY OF NATIONALITY	
***Affinity**: a large number of relatives living in the country of the immigrant's nationality determine stronger ties with his country of nationality*	
***Social contacts**: the more the immigrant visits the relatives living in his country of nationality, the more he communicates with them on the means of distance communications, the stronger his ties remain with the country of his nationality*	
***Work / studies**: when a person works and studies in his country of nationality but does not do that in the host State, it shows that relations are stronger with the country of nationality*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other criteria related to relations with the country of nationality which the Courts and the national institutions could also consider (briefly describe them):

Rank *the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 8 – the worst.*

CRITERIA RELATED TO FAMILY SITUATION	
Strength of relationships*: strong and durable family relations determine the need to preserve the family unity*	
Authenticity of the family life: *nature of the parents' relationships, commitment to family members determine the need to preserve the family unity*	
Living under one roof: *when a person lives in the host State not with his family members but with his friends, strangers it shows that his family relations are not valuable*	
Child's interests*: interests of the child are of paramount importance therefore in the decision-making process they have essential importance*	
Child's age*: minor children are always being protected, adult children – only when they are dependent on their TCN parents*	
Relations with parents: *communication with a parent(s) has to be beneficial for the child*	
A child's right to respect for family life: *a child's right to respect for his family life is individual and independent from his parents' rights*	
Nationalities: *when family members have other nationalities than nationality of the host State, they may have a possibility to live elsewhere*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other criteria related to family situation which the Courts and the national institutions could also consider (briefly describe them):

Rank *the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 5 – the worst.*

CRITERIA INDICATING HARDSHIPS THAT MAY ARISE IN THE COUNTRY OF NATIONALITY	
Place of family foundation*: family foundation in the host State and / or the birth of the children or enduring life in this country may determine severe difficulties if the family would be forced to return to the country of immigrant's nationality*	
Language*: when children and the spouse do not know the language of immigrant's nationality, it may severely aggravate family life in the country of immigrant's nationality*	
Traditions, culture, religion*: if family members do not accept culture, traditions, religion of the country of immigrant's nationality, it may severely aggravate family life in the country of immigrant's nationality*	
Work: *inability of family members who maintained the family in the host State to find a job in the country of immigrant's nationality may inadequately aggravate family life in the country of immigrant's nationality*	
Danger: *civil war, ongoing in the country of immigrant's nationality, possible political persecution determine the obligation for the host State not to return illegally residing immigrant*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other criteria indicating hardships that may arise in the country of nationality which the Courts and the national institutions could also consider (briefly describe them):

Rank *the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 4 – the worst.*

CRITERIA RELATED TO IMMIGRANT'S CRIMES	
Gravity of the crime*: serious and very serious crimes may justify the removal of illegal immigrant from the host State*	
Nature of the crime*: consequences, crime mode, motive, objectives may determine the removal of immigrant*	
Behavior of criminal*: period of time which had passed since the crime was committed and immigrant's actions during this time determine whether the immigrant may stay in the host MS*	
Information: *whether the spouse knew about the crimes at the time it was decided to found a family together has a great importance*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other criteria related to immigrant's crimes which the Courts and the national institutions could also consider (briefly describe them):

Criteria Derived from United Nations Convention on the Rights of the Child

All the MS are parties to the United Nations Convention on the Rights of the Child, this Convention protects every child regardless of his legal status. Moreover, the EU has a goal to protect interests of children and Article 7 of the Charter, which states that everyone has the right to respect for his or her family life, includes the protection of the rights of the children. For those reasons we make an assumption that criteria derived from this Convention might and should be applied in the European Union in cases related to illegally residing third-country nationals.

Rank *the following criteria (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 7 – the worst.*

CRITERIA DERIVED FROM THE CONVENTION ON THE RIGHTS OF THE CHILD	
Interests of a child*: when Member States make decisions they have to ensure what is best for the child*	
Separation from parents*: children may be separated from their parents only when the interests of the children require separation*	
Family environment*: Member States have to ensure that a child could grow up in a family environment*	
Regular contact: *Member States have to ensure that children, separated from their parents, could keep direct contact with their parents on a regular basis, unless it would be contrary to the child's interests*	
Opinion of a child: *Member States have to assure to a child who is capable of forming his own views the right to express those views freely in all matters affecting him*	
Parents' commitments: *both parents have common responsibilities for the upbringing and development of the child*	
Living conditions: *Member States have to ensure the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other criteria related with children that the Courts and the national institutions could also consider (briefly describe them):

Other Factors

Some of the criteria applied by the EUCJ or the ECtHR could not be put in any of the distinguished groups because they were specific or could be regarded more as the rule than the factor (e.g. family unity). Moreover, scholarly doctrine indicates the criterion showing when family life should be considered as valuable and therefore protectable. We assume that those factors / rules could also be applied towards illegally residing third-country nationals.

Rank *the following factors (by taking into account the formulated statements) in terms of what influence they should do to the EU Courts and national institutions, when addressing the question whether to allow for illegally residing TCNs to stay in the host MS on the grounds of the protection of the family life or not, where: 1 – the best, and 5 – the worst.*

OTHER FACTORS	
Valuable family relations*: love, affection, support, commitment and permanence indicate the existence of valuable family relations therefore when those factors exist, family must be protected*	
Illegal stay in the EU*: a mere fact that a person resides in the EU illegally cannot determine the decision to return him from the MS*	
Balance of interests*: protection of family life may not disproportionally infringe the interests of the host Member State and vice versa*	
Family unity: *Member States have to ensure that family members would not be separated from each other but could live together*	
Possibility to live elsewhere: *firstly the MS must investigate whether family of an illegal immigrant could not live in the other non-EU country*	

Which of the named factors, in your opinion, should not be applied towards illegally residing TCNs and why:

Maybe you could suggest other factors which the Courts and the national institutions could also consider (briefly describe them):

THANK YOU FOR YOUR COOPERATION!

Formulas

Results of the survey are reliable only if the opinions of the experts are compatible. Compatibility of the expert opinions can be verified following the next three steps.

Step No. 1. We make two hypotheses in order to make sure whether the opinions of the experts may be considered as compatible: 1) H_0 – expert opinions are controversial (concordance coefficient is equal to zero, i.e. W = 0); 2) H_A – expert opinions are similar (concordance coefficient is not equal to zero, i.e. W ≠ 0).

Step No. 2. The concordance coefficient has to be calculated. The formula is as follows:

$$W = \frac{12S^2}{m^2\ (k^3 - k)}, \text{ where} \qquad (1)$$

S^2 – a sum of all square deviations; ***m* – the number of experts**; **k – the number of factors**.

S^2 is calculated as follows:

$$S^2 = \sum_{j=1}^{k}\left(\sum_{i=1}^{m} x_{ij} - a\right)^2, \text{ where} \qquad (2)$$

a – **the average value of ranks**, which we may calculate according to the following formula:

$$a = 0{,}5m(k+1) \qquad (3)$$

Step No. 3. After conducting the first three calculations the significance of concordance coefficient has to be examined. This should be done using χ^2_W criterion which must be calculated using the following formula:

$$\chi^2_W = W \times m \times (k-1) \qquad (4)$$

Table No. 1. **Chi square table**

Degrees of freedom	**Probability**										
	0,95	0,90	0,80	0,70	0,50	0,30	0,20	0,10	**0,05**	0,01	0,001
1	0,004	0,02	0,06	0,15	0,46	1,07	1,64	2,71	**3,84**	6,64	10,83
2	0,10	0,21	0,45	0,71	1,39	2,41	3,22	4,60	**5,99**	9,21	13,82
3	0,35	0,58	1,01	1,42	2,37	3,66	4,64	6,25	**7,82**	11,34	16,27
4	0,71	1,06	1,65	2,20	3,36	4,88	5,99	7,78	**9,49**	13,28	18,47
5	1,14	1,61	2,34	3,00	4,35	6,06	7,29	9,24	**11,07**	15,09	20,52
6	1,63	2,20	3,07	3,83	5,35	7,23	8,56	10,64	**12,59**	16,81	22,46
7	2,17	2,83	3,82	4,67	6,35	8,38	9,80	12,02	**14,07**	18,48	24,32
8	2,73	3,49	4,59	5,53	7,34	9,52	11,03	13,36	**15,51**	20,09	26,12
9	3,32	4,17	5,38	6,39	8,34	10,66	12,24	14,68	**16,92**	21,67	27,88
10	3,94	4,86	6,18	7,27	9,34	11,78	13,44	15,99	**18,31**	23,21	29,59
	Non-significant								**Significant**		

Source: Internet site[222]

[222]http://www.google.lt/imgres?imgurl=http://faculty.southwest.tn.edu/jiwilliams/probab2.gif&imgrefurl=http://faculty.southwest.tn.edu/jiwilliams/probability.htm&h=322&w=666&sz=108&tbnid=COWjfUSS0Rg_EM:&tbnh=64&tbnw=132&zo

If the calculated statistical meaning of (4) formula (which has χ^2 distribution with $f = k - 1$ degree of freedom) of the chosen significance level α (0,05 is used for statistical surveys therefore we use it too, see Table 1) and the number of degrees of freedom f exceeds the critical value ($\chi^2_{crit.}$ - see Table 1, numbers marked in blue), then the hypothesis H_0 (that expert opinions are controversial) may be rejected and the conclusion may be made that the opinions of the experts are compatible (if we have the opposite situation, the re-evaluation would have to be organized during which the experts should change their opinions taking into account the arguments of their colleagues).

om=1&usg=__xmtkBbqEHznV4JEruazULO80W3U=&docid=REmLH6dZSGghZM&sa=X&ei=1sawUIYSz-S1Bsy6gLgD&ved=0CEIQ9QEwBA&dur=283 (viewed: 2010-11-24)

Results of the Experts Surveys

Letter *m* indicates the questioned experts. Evaluated criteria are marked by letters *a, b, c, d* etc. in the tables (see Interview Guidelines (Appendix No. 1) where all the factors are explained in short). Sum of ranks is the sum of evaluations of each criteria made by the experts (for example Sum of ranks a_1 = 2+1+1+1+1+1+5). The formulas how to calculate the average value of ranks *a*, square deviation etc. are indicated in **Appendix No. 2.**

Table No. 1. **Criteria applied in cases related to *illegally* residing TCNs: calculation of concordance coefficient**

	a_1	a_2	a_3	a_4	a_5	a_6	a_7	a_8	a_9
m_1	2	3	6	5	4	9	1	8	7
m_2	1	2	7	6	5	3	4	9	8
m_3	1	2	6	5	4	9	3	8	7
m_4	1	2	6	4	5	8	3	9	7
m_5	1	2	6	5	4	8	3	9	7
m_6	1	3	5	6	4	9	2	8	7
m_7	5	3	7	6	4	2	1	9	8
Sum of ranks	**12**	**17**	**43**	**37**	**30**	**48**	**17**	**60**	**51**
The average value of ranks a	**35**	**35**	**35**	**35**	**35**	**35**	**35**	**35**	**35**
Square deviation	**529**	**324**	**64**	**4**	**25**	**169**	**324**	**625**	**256**
							S^2 = 2320; W = 0,79		

Significance of concordance coefficient: $\chi^2_W = 0{,}79 \times 7 \times (9-1) = 44{,}24$. Because $\chi^2_{crit.} = 15{,}51$ *(when degree of freedom – 8; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected.

Source: made by the author

Experts were asked to rate the criteria (by relevance) depending on what influence they should do to the national institutions and the EU Courts, when addressing the question whether to allow for illegally residing TCNs to stay in the host Member State on the grounds of the protection of the family life or not. Line *Sum of ranks* (see Table No. 1) indicates the relevance of particular criterion: lower number indicates greater importance. Therefore according to experts the most important factor should be factor No. 1 ('True family life' – family relations are real; family members live together not out of the convenience) (in order to see all explanations of the criteria see Interview Guidelines) which means that the Courts and the national institutions should always have to analyse whether family relations are real and strong. Factors No. 2 and 7 ('The EU citizenship' and 'Citizenship rights') were seen as also very important by the experts. Among the least important factors experts indicated criteria No. 8 ('Economic benefit') and No. 9 ('Kinship').

We decided to ask experts to rate the criteria applied towards *legally* residing TCNs because we think that factors which constantly are being analysed by the EU Courts in legally residing TCNs' cases could be applied in *illegally* residing TCNs' cases too. Experts expressed a quite homogeneous opinion (see table No. 2) that 'family situation' (factor No. 6 – exceptional family circumstances may determine the decision to allow for TCNs to stay in the EU) should be the most important for the EU Courts and the national institutions. Experts considered that factors No. 3 and 4 ('Recourses' and 'State of health') should be also very important. When experts were asked to indicate which criteria

should not be applied to illegal immigrants they appointed factors No. 1 and 2 ('Age' – TCN families that have minor children have to be guaranteed a higher level of protection and 'Sickness insurance'). They did not explain why they decided not to apply factor No. 1, however taking into account table No. 1 where the experts expressed the idea that true family relations should be very important, it is possible that according to the experts presence of children should not instantly guarantee a better position for the family because there might be a possibility that true family life does not exist there. By indicating 'Sickness insurance' as a not relevant factor, experts explained that it is related to the factor 'Recourses' therefore there is no need to distinguish it as a separate criterion. However, this criterion has always been separated from the 'Recourses' requirement, moreover according to *Zhu and Chen case* this factor should be applied in cases related to *illegally* residing TCNs. Therefore taking all into account we suggest that all criteria except factor No. 1 should be applied to *illegally* residing TCNs.

Table No. 2. **Criteria applied towards *legally* residing TCNs: calculation of concordance coefficient**

	b_1	b_2	b_3	b_4	b_5	b_6
m_1	6	4	3	2	5	1
m_2	6	1	4	3	2	5
m_3	6	4	5	2	3	1
m_4	2	5	4	3	6	1
m_5	4	5	3	1	6	2
m_6	4	5	3	2	6	1
m_7	5	6	3	4	2	1
Sum of ranks	**33**	**30**	**25**	**17**	**30**	**12**
The average value of ranks a	**24,5**	**24,5**	**24,5**	**24,5**	**24,5**	**24,5**
Square deviation	**72,25**	**30,25**	**0,25**	**56,25**	**30,25**	**156,25**
					$S^2 = 345,5;\ W = 0,40$	

Significance of concordance coefficient: $\chi^2_{W} = 0,40 \times 7 \times (6-1) = 14,00$. Because $\chi^2_{crit.} = 11,07$ *(when degree of freedom – 5; level of significance – 0,05)*, condition $\chi^2_{W} \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

We decided to distinguish the factors applied by the ECtHR into separate groups because the ECtHR when deciding whether the State has infringed Article 8 of the ECHR by not guaranteeing residence permit for the applicant(s) applies a wide range of different criteria. We called the first group integration criteria because they are related to immigrant's relations with the host State (see table No. 3). Experts expressed very clearly which factor is the most important and which is the least important; their opinions were very homogenous on this question. According to them criterion No. 1 ('Work') should be considered as the most relevant. As it can be clearly seen factor No. 5 ('Religion') was considered to be as the least important. Experts suggested that 'Religion' criterion should not be applied to *illegally* residing TCNs and explained that individuals who respect religious laws should also respect the laws regulating legal status of aliens. Therefore it would be wrong to apply this criterion. Moreover, according to the experts religion does not have a significant influence in the EU society and a person may easily practice his beloved religion elsewhere. Therefore taking into account opinions of the experts we suggest that all the factors except factor No. 5 should be applied to *illegally*

residing TCNs. Moreover, experts suggested that the factor 'Educational background' should be added and applied to *illegally* residing TCNs because this criterion could allow for national institutions and courts to estimate the abilities of an *illegally* residing TCN to integrate into EU society.

Table No. 3. **Integration criteria: calculation of concordance coefficient**

	c_1	c_2	c_3	c_4	c_5
m_1	2	3	4	1	5
m_2	1	2	4	3	5
m_3	2	3	4	1	5
m_4	1	2	3	4	5
m_5	1	2	4	3	5
m_6	2	4	1	3	5
m_7	2	1	3	4	5
Sum of ranks	**11**	**17**	**23**	**19**	**35**
The average value of ranks a	**21**	**21**	**21**	**21**	**21**
Square deviation	**100**	**16**	**4**	**4**	**196**
					S^2 = 320; W = 0,65

Significance of concordance coefficient: $\chi^2_W = 0{,}65 \times 7 \times (5-1) = 18{,}20$. Because $\chi^2_{crit.} = 9{,}49$ *(when degree of freedom – 4; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

Table No. 4. **Criteria related to relations with the country of nationality: calculation of concordance coefficient**

	d_1	d_2	d_3
m_1	3	2	1
m_2	3	2	1
m_3	2	3	1
m_4	3	2	1
m_5	3	2	1
m_6	1	2	3
m_7	3	2	1
Sum of ranks	**18**	**15**	**9**
The average value of ranks a	**14**	**14**	**14**
Square deviation	**16**	**1**	**25**
			S^2 = 42; W = 0,43

Significance of concordance coefficient: $\chi^2_W = 0{,}43 \times 7 \times (3-1) = 6{,}02$. Because $\chi^2_{crit.} = 5{,}99$ *(when degree of freedom – 2; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

Experts were very unanimous when they had to choose the most relevant criterion related to the connection with the country of the applicant's nationality (see table No. 4). They decided that factor No. 3 ('Work / Studies – when a person works and studies in his country of nationality but does not do that in the host State, it shows that relations are stronger with the country of nationality) should be regarded as the most important. The least important criterion was considered to be factor No. 1 ('Affinity' – a large number of relatives living in the country of the immigrant's nationality determine stronger ties with his country of nationality). Experts explained that having relatives does not necessarily mean that TCNs maintain close ties with them – the closeness of their relationships should be firstly identified. Experts did not indicate that any of the three criteria should not be applied to illegally residing TCNs. Therefore we suggest applying all of them. Moreover, experts suggested that the factor 'Real estate' could be added to this category of criteria. This factor would mean that if an

illegal immigrant would have real estate in his country of origin this could indicate that his relations with the country of origin remained strong and he should not be allowed to remain in the host State.

Table No. 5. **Criteria related to family situation: calculation of concordance coefficient**

	e_1	e_2	e_3	e_4	e_5	e_6	e_7	e_8
m_1	1	3	5	2	6	4	8	7
m_2	2	3	5	1	6	4	7	8
m_3	2	3	6	1	5	4	7	8
m_4	3	4	6	1	2	5	8	7
m_5	1	4	3	2	6	5	7	8
m_6	2	3	5	1	7	4	6	8
m_7	2	3	4	1	7	5	6	8
Sum of ranks	**13**	**23**	**34**	**9**	**39**	**31**	**49**	**54**
The average value of ranks a	**31,5**	**31,5**	**31,5**	**31,5**	**31,5**	**31,5**	**31,5**	**31,5**
Square deviation	**342,25**	**72,25**	**6,25**	**506,25**	**56,25**	**0,25**	**306,25**	**506,25**
						S^2 = 1796; W = 0,87		

Significance of concordance coefficient: $\chi^2_W = 0{,}87 \times 7 \times (8-1) = 42{,}63$. Because $\chi^2_{crit.} = 14{,}07$ *(when degree of freedom – 7; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected.

Source: made by the author

When experts had to decide which of the factors related to family situation should be seen as the most relevant they chose factor No. 4 ('Child's interests'– interests of the child are of paramount importance therefore in the decision-making process they have essential meaning), No. 1 ('Strength of relationships') and No. 2 ('Authenticity of the family life'). Therefore it seems that experts give a very high priority to real family life. Their opinions comply with the view of the EUCJ as it also investigates whether true family life exists. It means that valuable family relations have to be protected. Factors No. 7 ('A child's right to respect for family life') and 8 ('Nationalities') were regarded as the least important. As experts did not suggest not to apply some of the factors to *illegally* residing TCNs we suppose that all of them should be applied. We think like that because according to the ECtHR exceptional circumstances may determine the need to allow for *illegal* immigrants to stay in the host State. And those exceptional circumstances are usually related to family situation.

Table No. 6. **Criteria indicating hardships: calculation of concordance coefficient**

	f_1	f_2	f_3	f_4	f_5
m_1	5	4	2	3	1
m_2	5	3	4	2	1
m_3	5	2	3	4	1
m_4	2	4	5	3	1
m_5	3	4	2	5	1
m_6	2	5	4	3	1
m_7	2	4	3	5	1
Sum of ranks	**24**	**26**	**23**	**25**	**7**
The average value of ranks a	**21**	**21**	**21**	**21**	**21**
Square deviation	**9**	**25**	**4**	**16**	**196**
					S^2 = 250; W = 0,51

Significance of concordance coefficient: $\chi^2_W = 0{,}51 \times 7 \times (5-1) = 14{,}28$. Because $\chi^2_{crit.} = 9{,}49$ *(when degree of freedom – 4; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

In this category of criteria experts unanimously decided that factor No. 5 ('Danger') should be the most important. Their opinions are right and logical because they comply with the international legal principles. Other criteria have been estimated quite differently therefore their relevance is quite the same. Some of the experts suggest not to apply factor No. 2 ('Language' – when children and / or the spouse do not know the language of immigrant's nationality, it may severely aggravate family life in the country of immigrant's nationality). Experts think that it is not impossible for family members to learn the language of illegal immigrant's nationality; it should not harm family situation substantially therefore such a criterion should not be relevant. Taking into account opinions and suggestions of the experts we suppose that factors No. 1, 3, 4 and 5 should be applied to illegally residing TCNs.

Table No. 7. **Criteria related to immigrant's crimes: calculation of concordance coefficient**

	g_1	g_2	g_3	g_4
m_1	2	1	4	3
m_2	1	2	3	4
m_3	1	2	4	3
m_4	1	2	4	3
m_5	1	2	3	4
m_6	1	3	2	4
m_7	3	2	1	4
Sum of ranks	**10**	**14**	**21**	**25**
The average value of ranks a	**17,5**	**17,5**	**17,5**	**17,5**
Square deviation	**56,25**	**12,25**	**12,25**	**56,25**
				$S^2 = 137$; $W = 0,56$

Significance of concordance coefficient: $\chi^2_W = 0,56 \times 7 \times (4-1) = 11,76$. Because $\chi^2_{crit.} = 7,82$ *(when degree of freedom – 3; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

According to the ECtHR serious crimes may determine the need to return illegal immigrants to their countries of origin. Therefore those factors are really important especially because of the fact that here we discuss about *illegally* residing TCNs. It is clear that experts are of the same opinion as the Strasbourg Court because the most relevant criteria according to them should be No. 1 ('Gravity of the crime') and No. 2 ('Nature of the crime'). The remaining criteria have been rated as less important. In fact experts suggested not to apply criterion No. 3 ('Behavior of criminal') and factor No. 4 ('Information') to illegally residing TCNs. They substantiated their opinions by stating that every misdemeanor or behavior opposite to law shows disrespect to the country in which the immigrant is willing to live, therefore a good behavior after the crime has been committed should not justify the previous bad behavior. 'Information' criterion should not be applied to illegal immigrants because according to the experts it is just not relevant. Taking into account all the suggestions and observations we suppose that only factors No. 1 and 2 should be applied to *illegally* residing TCNs.

When experts had to evaluate criteria derived from the Convention on the Rights of a Child (see table No. 8), they decided that factor No. 1 ('Interests of a child') should be considered as the most important. Their opinions are very coherent (on this aspect) as in earlier group of factors they also

expressed their views that interests of a child should be relevant for the courts and national institutions. Criteria No. 2 ('Separation from parents') and 4 ('Regular contact') were also considered as important. The least important criteria were considered to be factor No. 5 ('Opinion of a child'), 3 ('Family environment') and 7 ('Living conditions'). In fact experts suggested no to apply factors No. 5 and 7 to illegally residing TCNs. They substantiated their suggestions by stating that opinion of a child cannot be regarded as very important and reliable because young individuals may be easily brainwashed by their parents, young people may often evaluate the circumstances very inadequately and sensitively. Factor No. 7 should not be applied because, according to the experts, to ensure adequate living conditions is the primary responsibility of the parents not the States. Taking into account the suggestions we consider that factors No. 1, 2, 3, 4 and 6 should be applied to *illegally* residing TCNs.

Table No. 8. **Criteria derived from the CRC: calculation of concordance coefficient**

	h_1	h_2	h_3	h_4	h_5	h_6	h_7
m_1	1	7	2	3	6	5	4
m_2	1	2	7	3	4	5	6
m_3	4	1	6	2	3	7	5
m_4	1	3	2	4	6	7	5
m_5	4	1	7	3	6	2	5
m_6	1	2	5	3	7	4	6
m_7	1	2	7	3	6	5	5
Sum of ranks	**13**	**18**	**36**	**21**	**38**	**35**	**36**
The average value of ranks a	**28**	**28**	**28**	**28**	**28**	**28**	**28**
Square deviation	**225**	**100**	**64**	**49**	**100**	**49**	**64**
					$S^2 = 651;\ W = 0,47$		

Significance of concordance coefficient: $\chi^2_W = 0,47 \times 7 \times (7-1) = 19,74$. Because $\chi^2_{crit.} = 12,59$ *(when degree of freedom – 6; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

Table No. 9. **Other criteria: calculation of concordance coefficient**

	i_1	i_2	i_3	i_4	i_5
m_1	1	5	2	4	3
m_2	3	5	1	2	4
m_3	1	4	3	2	5
m_4	3	5	1	2	4
m_5	4	5	1	2	3
m_6	1	4	3	2	5
m_7	2	4	3	5	1
Sum of ranks	**15**	**32**	**14**	**19**	**25**
The average value of ranks a	**21**	**21**	**21**	**21**	**21**
Square deviation	**36**	**121**	**49**	**4**	**16**
					$S^2 = 226;\ W = 0,46$

Significance of concordance coefficient: $\chi^2_W = 0,46 \times 7 \times (5-1) = 12,88$ Because $\chi^2_{crit.} = 9,49$ *(when degree of freedom – 4; level of significance – 0,05)*, condition $\chi^2_W \rangle \chi^2_{krit.}$ is satisfied, so hypothesis H_0 may be rejected

Source: made by the author

In this category of criteria opinions of experts were a little bit dissimilar. However we can clearly see that factor No. 3 ('Balance of interests' – protection of family life may not disproportionally infringe the interests of the host Member State and vice versa) was seen as the most important and factors No. 1

('Valuable family relations') and 4 ('Family unity') were considered to be of very similar significance. The least important criteria according to the experts should be factor No. 2 ('Illegal stay in the EU'). Experts have not suggested that some of the factors should not be applied to illegally residing TCNs therefore we think that all of them should be applied to *illegally* residing TCNs.

Criteria that Should be Applied in *All* Cases Related to Residence Rights of Illegally Residing Third-Country Nationals

Family situation:

- **True family life**: family relations are real; members of the family live together not out of the convenience.
- **Exceptional family circumstances**: exceptional family circumstances may determine the decision to allow for illegally residing TCN to stay in the EU.
- **Strength of family relationships**: strong and durable family relations determine the need to preserve the family unity.
- **Valuable family relations**: love, affection, support, commitment and permanence indicate the existence of valuable family relations therefore when those factors exist family should be protected.
- **State of health**: for serious health reasons illegally residing TCNs need personal care of a Union citizen.
- **Kinship**: the closest family members ("nuclear family") are worth to be protected more.
- **Emotional and financial dependency**: family member's emotional and financial dependence on illegally residing TCN family members.
- **Special needs of vulnerable family members**: national institutions and courts need to find out whether disabilities, serious health problems of illegally residing TCN's family members etc. exist.
- **Living under one roof**: when a person lives in the host State not with his family members but with his friends, strangers it shows that his family relations are not valuable.
- **Family unity**: national institutions and courts have to ensure that family members would not be separated from each other but could live together.

Child welfare:

- **Best interests of a child**: interests of the child are of paramount importance therefore in the decision-making process they have essential meaning; when national institutions and courts make decisions they have to ensure what is best for the child.
- **Relations with parents**: communication with a parent(s) has to be beneficial for the child.
- **Parents' commitments**: both parents have common responsibilities for the upbringing and development of the child.

- **Separation from parents**: children may be separated from their parents only when the interests of the children require separation.
- **Regular contact with parents**: national institutions have to ensure that children, separated from their parents, could keep direct contact with their parents on a regular basis, unless it would be contrary to the child‘s interests.
- **Child’s age**: minor children are always worthy of protection; adult children – only when they are dependent on their illegally residing TCN parents.
- **Emotional and financial dependency**: child’s emotional and financial dependence on family members – illegally residing TCNs.
- **A child’s right to respect for family life**: a child‘s right to respect for his family life is individual and independent from his parents’ rights.

Socio-economic policy of the State:

- **Resources**: illegally residing TCN has sufficient resources and he is able to support his family by not becoming a burden to the social system of the host MS.
- **Sickness insurance**: illegally residing TCN has sickness insurance in the host MS or if he does not have it he may still by not becoming a burden to the social system of the host MS get an adequate treatment by other legal means.
- **Accommodation**: illegally residing TCN family has a place to live (on lawful grounds, e.g. rental agreement) in the host MS.
- **Public health**: diseases with epidemic potential and other infectious diseases may determine the decision not to allow for illegally residing TCN to stay.
- **Economic benefit**: Illegally residing TCN‘s contribution to economic activity of his family member – European citizen.

Integration criteria:

- **Work**: when immigrant works in the host State it shows his social links with the society of the State and determines the need not to return him.
- **Science / studies**: when immigrant studies in the host State it shows his social links with the society and determines the need not to return him.
- **Language**: efforts to learn the host State‘s language shows immigrant‘s social links with the society and determines the need not to return him.
- **Length of stay**: the longer a person resides in the host State the stronger his ties with it and the weaker the ties with the country of nationality.

- **Educational background**: it shows an ability of an illegally residing TCN to integrate into EU society.

Relations with the country of nationality:

- **Work / studies**: when a person works and studies in his country of nationality but does not do that in the host State, it shows that relations are stronger with the country of nationality.
- **Social contacts**: the more the immigrant visits the relatives living in his country of nationality, the more he communicates with them on the means of distance communications, the stronger his ties remained with the country of his nationality.
- **Affinity**: a large number of relatives living in the country of the immigrant‘s nationality determine stronger ties with his country of nationality.
- **Real estate**: having real estate in the country of nationality indicates the existence of stronger relations with the country of nationality.

Hardships in the country of origin:

- **Danger:** civil war, ongoing in the country of immigrant’s nationality, possible political persecution etc. determine the obligation for the host State not to return illegally residing immigrant.
- **Traditions, culture, religion**: if family members do not accept culture, traditions, religion of the country of immigrant’s nationality, it may severely aggravate family life in the country of immigrant’s nationality.
- **Place of family foundation**: family foundation in the host State and / or the birth of the children or enduring life in this country may determine severe difficulties if the family would be forced to go to the country of immigrant‘s nationality.
- **Work:** inability of family members who maintained the family in the host State to find a job in the country of immigrant‘s nationality may inadequately aggravate family life in the country of immigrant’s nationality.

Crimes:

- **Gravity of the crime**: serious and very serious crimes may justify the removal of illegal immigrant from the host State.
- **Nature of the crime**: consequences, crime mode, motive, objectives may determine the removal of illegal immigrant.
- **Public security and public policy**: national institutions and courts must ascertain whether illegally residing TCN constitutes danger to public order or public safety or not.

Other criteria:

- **Balance of interests**: protection of illegally residing TCN's family life may not disproportionally infringe the interests of the host Member State and vice versa.
- **The EU citizenship:** Families that have European Union citizens need to be protected more than families composed entirely of TCNs.
- **Substance of Citizenship rights**: returning illegally residing TCNs as an influence on European citizens' ability to enjoy the substance of citizenship rights.
- **Possibility to live elsewhere:** firstly the MS must investigate whether family of an illegal immigrant could not live in the other non-EU country.
- **Nationalities:** when family members have other nationalities than nationality of the host State, they may have a possibility to live elsewhere.
- **Illegal stay in the EU**: a mere fact that a person resides in the EU illegally cannot determine the decision to return him to his country of nationality.
- **Previous expulsions:** national institutions and the courts should take into account whether illegal immigrant had been expelled previously.
- **Rights and principles of the Charter**: national institutions and courts must assess cases taking into account all the rights and principles enshrined in the Charter.
- **Agreements with third-countries**: Member States must ascertain that the rules expressed in bilateral and multilateral agreements with third countries are being followed.

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Completed on 19.12.2012