the economic crisis after 1973, guest worker countries continued to allow entry to the family members of settled migrants. In this way, immigration was largely determined by family unification up until the late 1980s (Bauer, Lofstrom and Zimmerman, 2000, p. 4). Beginning in the early 1990s, many EU Member States added various conditions on the right to be unified with one's family in order to limit immigration by means of family unification. Conditions such as the availability of appropriate housing, sickness insurance and sufficient resources have been adopted as policy means with which to reject the residence of a family member (Cholewinski, 2002). These conditions have been supplemented by further criteria such that the person applying for family unification must be a certain age, the couple must have greater attachment to the country of application than to the country where the family member comes from, language and cultural tests for family members to maintain residence rights, etc. Such criteria have gradually entered national policies and become effective means for restricting the right to family reunification.

The ECJ case-law increasingly challenges the restrictive policies of Member States as regards the family right of European citizens who have exerted free movement. The free movement rights of Community workers and subsequently European citizens thus challenge the many criteria bound into national policies and administrative practices as means to limit immigration through family unification. The line of case-law detailed below again demonstrates the Court's ability and willingness to question the justifiability and proportionality of a set of public policies defining the territorial boundaries between 'them' and 'us'/'insiders' and 'outsiders' of contemporary nation-states. In assessing the justifiability and proportionality of the means by which to select who shall be included in the national community, the Court touches another remaining - but vital - fibre of national control and sovereignty.

4.2 The right to be a family

On 25 July 2008, the Court produced another milestone in the perilous terrain of national policies of high political salience, removing another threshold conditioning the right to reside;

'A non-community spouse of a citizen of the Union can move and reside with that citizen in the Union *without having previously been lawfully resident* in a member state. [...] the Court holds that a non-Community spouse of a Union citizen who accompanies or joins that citizen can benefit from the directive[13], irrespective of when and where their marriage took place and of how that spouse entered the host Member State' (from the ECJ press release No. 57/08, on Case C127/08 Metock, 25 July 2008, emphasis added).

The *Metock* judgement subsequently triggered a significant uproar among member governments, immigration ministers and national parties. British Immigration Minister Liam Byrne declared, 'We are crystal-clear that there is a risk of injustice that flows from this judgement and we are not prepared to see it' (European Voice, October 2, 2008), and numerous Danish MPs suggested simply ignoring the impact of the judgement on Danish immigration policy. Both responses indeed challenge the legitimacy of the Court.

Metock represents the temporary climax on the line of case-law that interprets national policies and administrative practices concerning immigration against the Community right to free movement and Union citizenship.[14] Among the earlier cases was the *Carpenter* case[15]. In 1994, Mrs Carpenter from the Philippines was given a six-month residence permit in the UK. After the end of the six-month period, she did not apply for a new residence permit but remained nevertheless. In 1996, she married Mr Carpenter, a UK national. Mr Carpenter ran a business based in the UK, but he often

[13] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[14] The point of departure for the Court's expansion of the rights of non-Community family members was the *Singh* case from 1992; C-370/90, *Singh*, 7 July 1992.

[15] Case C-60/00, *Carpenter*, 11 July 2002.

travelled to other EU Member States for short periods as part of his business. Subsequent to their marriage, Mrs Carpenter applied for a residence permit as the spouse of a Community national. Her application was refused, and the British authorities subsequently issued a deportation order against Mrs Carpenter. The case was then referred to the ECJ.

The UK government submitted that Mr Carpenter had not exercised his right to free movement and his spouse was therefore not entitled to rights from Community law. However, the Court found that the case was not to be regarded as entirely domestic, since Mr Carpenter provided cross-border services. The Court held that the national decision to deport Mrs Carpenter did not 'strike a fair balance' between the respect for Mr Carpenter's family rights and the national considerations, such as the maintenance of public order and safety (para. 43 of the case). The national decision to deport was found disproportionate to the pursued objective. Although the case contains a minimal link with the Community economic dimension and free movement, Mrs Carpenter was protected against disproportionate national regulation (Spaventa 2004).

The Court's assessment of disproportionate national policies and actions continued in the *MRAX* case[16] (Dougan 2006). The *MRAX* case was brought against Belgium by the movement against racism: MRAX. The movement held that Belgian law and the administrative practices concerning the rights of third-country nationals married to European citizens ran counter to the Community legislation on free movement and the right to reside. *MRAX* pointed out that the administrative practices of the Belgian authorities did not provide legal certainty to the spouses of Member State nationals and that this could have discriminatory effects. Moreover, the national authorities demanded that the examination of a person's entitlement to a visa take place in the applicant's

[16] Case C-459/99, *MRAX*, 25 July 2002.

country of origin – and not in Belgium. Administrative practices also made the lack of sufficient documents to prove one's family relations suffice as grounds to refuse entry. Furthermore, the administrative practice included the opportunity to deny third-country family members not in the possession of a valid visa the right to re-apply for a residence permit had such first been refused to them. The Court was requested to consider whether these administrative practices ran contrary to the aims and means of free movement rights as expressed in different sets of Community secondary legislation.

The administrative practices were considered in the light of the principle of proportionality. The Court thus emphasised that national practices – although they might find justification in a strict or narrow reading of Community law – could not hinder the effective objective and meaning of Community legislation. So as pointed out in the cases on Union citizenship and welfare by Spaventa, we here again see that national acts which may be legitimised in secondary legislation, are turned unjustifiable and disproportionate in its effects by the ECJ (Spaventa 2008). In its interpretations, the Court clarified that the Community legislature had attached importance to the protection of family life. The right to be a family was therefore understood as the Community objective that the national actions were assessed against. Against this objective, the Court found it disproportionate to send a third-country spouse back to their country of origin in order to prove their identity and family ties (paras. 61 and 62 of the judgement). Nor was it proportionate to make the issuing of a residence permit dependent on whether the spouse had entered the territory of a Member State lawfully. The Court even referred to secondary legislation, pointing out that the Community legislature had ruled that the issuing of a residence permit could be made conditional upon the production of a document with which the applicant entered the territory (para. 76 of the judgement referring to art. 4 (3) of Directive 68/360 and art. 6 of directive 73/148). Conversely,

both national practices *and* its reading of Community law must be proportionate – which the Court found Belgian practices not to be;

'On the other hand, refusal of a residence permit, and a fortiori an expulsion order, based solely on the failure of the person concerned to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence directly conferred by Community law and would be *manifestly disproportionate* to the gravity of the infringement' (Case C-459/99, *MRAX*, para. 78. Emphasis added).

Again national measures could not be justified by any literal reading of Community law. Furthermore, issuing an expulsion order from national territory on the sole grounds that a visa had expired constituted 'a sanction manifestly disproportionate' to the gravity of the breach of national provision made (para. 90 of the judgement). The conditions inserted in national policies and exerted administratively - as well as those detailed by the Community legislature itself - were secondary to the Court's reading of aims and substance of Community law.

In *MRAX*, the question of prior lawful residence is considered by the Court. The Court namely stated that it

'is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State *on the sole ground that he has entered the territory of the Member State concerned unlawfully'* (para. 80 of the judgement. Emphasis added).

The question of the importance attributed to lawful residence continues to a set of subsequent cases. However, *Akrich*[17] came to contradict that which the Court began concerning prior lawful residence in *MRAX*. In *Akrich*, the Court concluded that in order to benefit from the free movement provision, the spouse of a Union citizen must be a legal resident in one Member State when they move to

[17] Case C-109/01, *Akrich*, 23 September 2003.

another Member State. *Akrich* thus restricted the more expansive interpretation in MRAX. The subsequent case of *Jia*[18] did not clarify the status of prior lawful residence[19]. Instead, the Court continued in *Eind*[20] and laid down that the fact that the third-country national, daughter of a Union citizen, had not previously lived in a Member State was not relevant for the consideration of the case. In *Eind*, the Court also found that the fact that the father received social welfare benefits was not relevant for his daughter's residence rights. The Court hereby set aside another of the national conditions previously considered justified; namely, that the Union citizen had to be economically active or be able to provide for oneself.

The unanswered question of the justifiability of prior legal residence as a national condition brings us back to *Metock* in July 2008, which can be seen as a path-breaking case due to the way it upright contradict the dominant restrictive pattern of national immigration policies, concerning family unification. *Metock* addressed the rights of four spouses from third counties who were married to Union citizens who had established themselves in another Member State: Ireland. The four spouses had previously been refused asylum in Ireland. Furthermore, they had each been refused the right to reside as the spouse of migrating EU citizens due to the fact that they had not previously resided legally in another Member State, having entered Ireland directly from third countries with no right to enter or reside.

In *Metock*, the Court interpreted the impact of the new residence directive 2004/38. The Court's interpretations substantiate that the 2004 residence directive is likely to become a strong referring

[18] Case C-1/05, *Jia*, 9 January 2007.

[19] Here, the Court stated that Community law *did not require* the member states to impose a prior lawful residence requirement (para 33 of the Jia judgement). This statement evidently does not clarify whether a prior lawful residence requirement is justified in regard of Community law.

[20] Case C-291/05, *Eind*, 11 December 2007.

point for the enhancement of the rights of European citizens to become full members of national communities. The Court clarified the purpose of the new directive. The ECJ emphasised that the Directive aimed to strengthen the rights of EU citizens. On that background, Union citizens could not derive less rights from the new Directive than from the previous secondary legislation that it amended or replaced (para. 59 of the judgement).

The case also demonstrates that the Court is not bound more by its previous interpretations than it can reconsider them and introduce new reasoning. *Metock* abandoned the previous lawful residence requirement laid down in Akrich;

'It is true *that the Court held* in paragraphs 50 and 51 of *Akrich* that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. *However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State*' (Case C127/08, *Metock*, para. 58. Emphasis added).

The interventions of the ten Member States in the case bear 'testament' to the grand political importance accorded to the case (Costello, 2009, p. 597). Nevertheless, the Court's interpretations directly contradicted the understandings stated by the Member States of what their exclusive competences were. The Court was by no means politically restrained in *Metock*. On the contrary, it outright stated that the interpretations put forward by the Irish Ministry of Justice and several other Member State governments - that Member States retain exclusive competence to regulate the first entry to a Community territory - had to be rejected (para. 66 of the judgement). Moreover, the Court was unresponsive towards other political observations submitted by the Member States. The Irish Ministry of Justice and several other governments had forwarded that it was necessary to control the

external borders of the Community in the contemporary context of strong migration pressure and that it was therefore necessary to examine all of the individual circumstances of a first entry into the Union territory. The Member States argued it necessary to require prior lawful residence in another Member State as an entry condition. Otherwise, the ability of Member States to control their external borders would be undermined (para. 71 of the judgement). The Court refuted the political arguments by listing the remaining means that Member States have to control such entry. The Court pointed out that residence could be refused on the grounds of public policy, public health or public security or if abuse or fraud could be proved, such as marriage of convenience (paras. 74-75 of the judgement). However, such measures had to be proportionate and subject to procedural safeguards (paras. 75 and 97 of the judgement).

For the time being, *Metock* marks a climax on the judicial integration of family unification rights.[21] With the case, the Court dismissed another means of national control in immigration policies, namely the prior lawful residence requirement for family members of Union citizens. Instead the Court set out that national conditions must be exercised in a proportionate manner. In this way, the Court places limits on future national actions and its discretionary scope.

4.3 National implications of judicial integration

Given the political salience paid to immigration policies, the Court's interventions in the field have not been lightly received by Member State governments. In addition, the line of case-law has had a direct impact on national policies. The legal clarifications thus exemplify Europeanization through judicial policy-making.

[21] See also the more recent cases C-310/08 and C-480/08, *Ibrahim* and *Teixeira*, 23 February 2010 where the Court follows suit and continues extending the rights of third country nationals with reference to the free movement principle of Community law.

Denmark has been one of the very affected Member States. Restrictive immigration legislation has increasingly been pursued by the Conservative-Liberal government and its support party: the right-wing Danish People's Party. One of the restrictive measures adopted by the government has been on family unification, argued to foremost target marriage of convenience. Despite a specific target, restrictions hit generally. Danish citizens, Union citizens and residence-permitted third-country nationals have experienced severe restrictions on the residence rights of spouses with non-EU nationality.

Danish and Union citizens have increasingly used Community law to circumvent restrictive Danish policies. The 'Dublin hop', according to which British families move to Ireland in order to fall within the scope of Community law, has a Nordic parallel, namely the Malmö route (Costello, 2009, p. 610). For years, Danish and European citizens have circumvented restrictive Danish policies by establishing themselves in the neighbouring Swedish city of Malmö, hereby enjoying the rights as migrating Union citizens to reside together with their third-country spouse. However, for those interested in reducing their period of residence in Sweden and returning to Denmark with their family as quickly as possible, residence rights remained conditioned by Danish law. National conditions such as the availability of appropriate housing, sufficient economic resources, employment of a certain period of time in another Member State, residence of a certain period of time in another Member State, the applicant being more than 24 years of age, lawful residence, etc. have effectively limited the right to family unification in Denmark in defiance of Community law. As seen with the UK rules on 'habitual residence' the whole area lacks legal certainty and there are few clearly settle criteria of what suffice to grant a right to reside as the third country family member of an EU citizens. For example there is no exact definition of how long one needs to stay in

another member state to be able to return to Denmark with ones non-EU family. That depends on an individual assessment. Danish administrative practice has proven to have its own interpretations of when and how migrating Union citizens can benefit from the EU rules.

Nevertheless, the pressure to adapt to the dynamics of Community law has intensified. In response to the Court's line of case-law, Danish immigration conditions have been forced to undergo significant change. In the early summer of 2008, the Danish newspaper Berlingske Tidende questioned and examined the practices of Danish immigration services in the light of EU law. That resulted in a significant debate in the Danish press. The press took an agency role to put pressure on established political and administrative practices, and in this way brought EU rules and rights to the fore of the public debate.[22] Although a great deal of clarification and information is still requested in order to make Community law effective in practice (Wind, 2009b), but the direct impact finally accepted by the Danish government and Danish Immigration Service is nevertheless significant. The Europeanization of Danish immigration policies among other factors due to the ECJ's interpretation on what is proportionate administrative practice and what is not is indeed evident. The Danish Immigration Service now makes clear that (www.nyidanmark.dk/en-us/frontpage.htm):

- there is no longer a minimum requirement for the length of the Danish national's residence in the other EU state;
- as a consequence of *Eind*, the Union citizen need not be economically active for the family's right to reside upon their return to Denmark;
- as a consequence of *Metock*, a family member is not required to have had previous lawful residence in another EU Member State; and

[22] A simple search in the Danish media search database 'Infomedia' on 'Metock' since June 2008 gives no less than 3504 hits. The media search database 'Infomedia' covers a wide range of Danish print media, broadcast media and online media.

- as a consequence of *Carpenter*, Union citizens residing in Denmark but providing cross-border services to other EU Member States may be entitled to family reunification under EU law in exceptional cases.

Also de facto the Europeanization of immigration policies has had a significant effect. In 2009, three times more individuals were granted family unification with reference to the EU rules than in 2008 (Danish Immigration Service, yearly report "Tal og Fakta på Udlændingeområdet", spring 2010).[23] The case thus demonstrates the impact of judicial Europeanization, in both administrative practices and de facto terms.

5. Concluding Remarks

The principle of proportionality is one of the key instruments available to the Court for use when considering the justifiability of national conditions and administrative actions which constitute barriers to the purposes of the European Union. Traditionally, the principle has been exerted to govern the economic community, but the Court has gradually become more daring, more pervasive, turning the principle into a general one and applying it equally strong to policy areas of strong national legacies and political salience such as welfare and immigration policies (De Burca, 1993; Tridimas, 2006; Spaventa 2008). The principle thus intervenes in policy areas where high national thresholds are set to conditions access and membership of the national communities, and becomes the prism through which the justifiability of such thresholds in the light of Community law is evaluated. As we have seen in the analysis above, the balance is often stroke in favour of the latter.

[23] In 2008, 155 individuals were granted family unification in accordance with Community law. In 2009, 467 persons were granted the same right. See the yearly report from the Danish Immigration Service "Tal og Fakta på Udlændingeområdet", spring 2010, p. 35)

Thus national conditions such as self-sufficiency, prior lawful residence, a true exercise of free movement, habitual residence, language and cultural ties, exerted on a discretionary basis and lacking comprehensive legal definitions, are increasingly evaluated by the European judiciary. Although member governments feel assured that their policy execution is justified and legitimated by secondary Community law itself, the ECJ's assessment may find the contrary.

The inherent tensions between the rules and norms of the EU and the administrative powers of the Member States are at play when the Court reviews national actions through the prism of proportionality. Legal scholars have long pointed out the principle of proportionality as a most powerful weapon when the judiciary strikes the balance between supranational rules and norms and national policy conditions and discretionary administration. Also political scientists should devote more attention to the principle. Its considerable political impact becomes evident for at least three reasons.

Firstly, it increases the opportunity for judicial intervention in both governmental and administrative decision-making. Secondly, it is no longer a principle which the judiciary reserves for assessments of inter-state trade, but is increasingly invoked against the entire range of fundamental EU principles and national policies. Thirdly, as invoked within the broadest spectrum of regulatory domains, it intervenes in the delicate balance between national and EU competences. Meanwhile it constitutes a means of EU policy-creation, it reduces the national scope of policy options, as national aims, means and conditions are evaluated in the European courtroom. It is thus a means of both judicial policy-making and subsequent Europeanization.

The analyses of Court interpretations and national responses regarding social minimum benefits and immigration policies demonstrate that we face new limits to the actions of the national executive. National policy-options are narrowed when the European judiciary creates policies. Not suddenly, but in very gradual moves and through creative means of interpretation. The inner core of national control, i.e. the power to detail, condition and administer national policies, must increasingly pass the Community proportionality test in almost all policy domains. The European Court of Justice thereby powerfully intervenes in the selective means of contemporary policies and the various thresholds set up to enter national communities.

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Cc: Kirsten Brix Pedersen; Sara Petrycer Hansen; Birgitte Staffeldt; Margrethe Groth-Andersen
Emne: Fundet
Vedhæftede filer: Martinsen_JEPP_150910.pdf

Kære Christina

Jeg har talt med Dorte Martinsen og hun har lige sendt vedlagte. Det er sædvanligt ophold "habitual residence" test, der er det særlige ved den engelske model. Det står på side 14 - afsnit 3.2.

Som du vil se, er hun selv kritisk over for anvendelsen af kriteriet, hvilket ikke kom ret klart frem i udsendelsen.

God læselyst

vh leo

8/10

397980
okt 22

Fra: Marion Greve [BB17@okf.kk.dk]

Sendt: 8. oktober 2010 07:43

Til: Christina Faurby Birck

Emne: SV: Solidarisk hæftelse

Tak. Den dom er jeg glad for at se.

Vi har flere lignende eksempler.

God weekend.

Hilsen

Marionn

Fra: Christina Faurby Birck [mailto:Christina.Birck@skat.dk]
Sendt: 6. oktober 2010 16:11
Til: Christina Faurby Birck; Marion Greve; Carsten Brank
Cc: Marianne Busk Bouraima; Klaus Kristensen
Emne: Solidarisk hæftelse

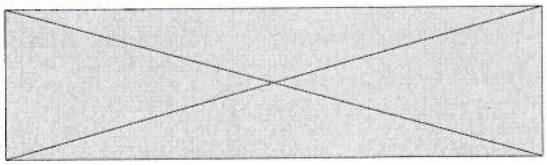
Kære Frank, Pia og Marion

Til spørgsmålet om solidarisk hæftelse for tilbagebetalingskrav for uberettiget modtagne ydelser vil jeg henvise til følgende principielle afgørelse B-1-07 fra Ankestyrelsen – der kan således rejses krav mod faderen, hvis han er den eneste i landet og en række andre forhold i øvrigt er opfyldt. Vi vil overveje om der er behov for yderligere præcisering af spørgsmålet.

Afgørelsen ses her: http://www.ast.dk/afgoerelser/principafgoerelser/

Med venlig hilsen

Christina Faurby Birck



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Kære Frank, Pia og Marion

I rejste som en lille – men alligevel vigtig ting, at ansøgningsskemaet til børnefamilieydelsen ikke var tilgængelig på SKATs hjemmeside, hvilket betød, at I printede og pr. post sendte skemaet til borgere, som retter henvendelse til jer. Oldnordisk og ressourcetungt, den er vi med påJ

Nu har vi tjekket SKATs hjemmeside og Borger.dk, og ansøgningsskemaet er faktisk tilgængeligt.

Hvis I går ind på SKATs hjemmeside under faneblad Borger, vælger "familie, unge og uddannelse", derefter vælger "børn", derefter vælger "Hvor meget får jeg i børnefamilieydelse" og klikker under "mere information", så kommer man ind til selve Pjecen om børnefamilieydelse. I pjecen er der desuden et elektronisk link til ansøgningsskemaet.

Den hurtige genvej er at trykke på mit link her:

http://www.skat.dk/SKAT.aspx?oId=133789&vId=203437&i=5#i133789

Tilsvarende kan ansøgningsskemaet findes på Borger.dk ved at søge på Børnefamilieydelse. Under informationen om ydelsen er der et link, som hedder: Ansøg om udbetaling af børnecheck (børnefamilieydelse). Efter valg af kommune kommer man til følgende site med blanketten:

https://www.borger.dk/Selvbetjening/Sider/fakta.aspx?sbid=19221

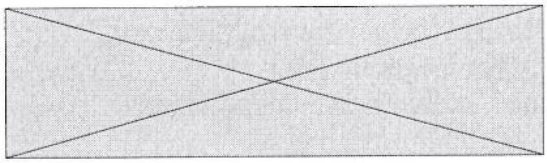
Så der skulle således være rige muligheder for at hjælpe telefoniske henvendelser hen til en selvbetjeningsløsning.

Vi vil tillige rette henvendelse til de ansvarlige for pjecen mhp. at få korrigeret oplysningen om socialforvaltningen og få det rettet til Kommunens Borgerservice.

Vi arbejder videre med jeres øvrige forslag, og I skal nok få tilbagemeldinger efterhånden, som vi bliver klogere. Jeg har ikke Pias e-mail, så jeg håber, at I vil orientere om denne tilbagemelding.

Med venlig hilsen

Christina Faurby Birck



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Engelske erfaringer med at undgå eksport af sociale ydelser til udlændinge

Kirsten Brix Pedersen var i sidste uge i England og har spurgt ind til de engelske erfaringer. Det forlyder nemlig (Jesper Skovhus Poulsen har med et halvt øre i P1 hørt England gør noget smart), at England har løsningen på hvordan problemet med eksport af sociale ydelser beskyttet af forordning 883 undgås.

England har efter det oplyste ikke fundet de vise sten.

Der er tale om en politisk udfordring, som i det engelske mediebillede fylder langt mere end i Danmark. Der kører dagligt historier i aviserne om østarbejdere, som kommer og "får glæde" af de engelske ydelser.

Den engelske regering er således udfordret betydeligt ift problemet. Men de har ingen løsninger og er klar over, at deres manøvrerum indenfor forordningens rammer er yderst begrænset.

Det engelske problem er tilsyneladende også større end det danske, for de tillader også udenlandske arbejdssøgere at få sociale ydelser. De såkaldte Jobseekers allowance.

En forskningsinstitution havde forsøgt at indføre sprogtest for at få del i institutionens ydelser, men der var blevet lagt sag an mod England fra Kommissionens side som følge heraf. Så det var vurderingen, at det ikke var en EUfarbar vej at gå.

England er pt. ved at samle alle sine sociale ydelser til et mere enkelt system og i den forbindelse er man opmærksomme på at få skabt en løsning, som ikke er eksportabel. Men pt. har de ikke løsningen på, hvordan det skal ske. De er ikke nået langt i dette arbejde.

Konklusionen var, at studiebesøget til England ikke havde givet dem nogle brugbare erfaringer og løsningsforslag.

Christina Faurby Birck, fredag den 8. oktober 2010, kl. 08.45.