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Divorce Immediately, or Leave. Rights of Third Country Nationals and Family Protection in the Context of EU Citizens' Free Movement: *Kuldip Singh and Others*

Case C-218/14, *Kuldip Singh and Others v Minister for Justice and Equality*, EU:C:2015:476, Judgment of the Court (Grand Chamber) of 16 July 2015

Forthcoming, *Common Market Law Review*, vol. 53 Issue 5 (2016)

1 Introduction

The judgment in the *Kuldip Singh* case¹ places a loose lid on the Pandora's box of third country national (TCN) rights earned in the penumbra of Union citizenship. The case focuses on the right to remain in a host Member State for the TCN spouse of a migrant EU citizen, in case of departure of the sponsor EU citizen, followed by dissolution of marriage. The Citizenship Directive² includes distinct (and different) rules on a TCN spouse's retention of a right of residence in each of these two scenarios. However it leaves partly undetermined what happens in case of combined occurrence of both events. This indeterminacy made for the *Kuldip Singh* preliminary reference. Hence, from a technical point of view, the judgment in *Kuldip Singh* fills a gap in the relevant legal framework. In addressing this gap, it also draws attention, once again,³ to the broader question of the relation between supranational citizenship and the rights of TCNs under EU law, question that has important implications in terms of Member States' retained and conferred sovereignty in a sensitive field. EU immigration law adopted as part of the common immigration policy,⁴ in grounding a range of rights for TCNs,⁵ sets a first set of limits to the Member States' sovereign power to admit or exclude non-nationals.⁶ Union citizenship goes one step further. Albeit only for selected classes of TCNs with a link to a Union citizen, it grounds an undergrowth of derived supranational rights, which mute Member States' powers in relevant respects.⁷ *Kuldip Singh* provides an opportunity to reflect on the rationale for these TCN rights derivative of Union citizenship, on the relation that they bear to the exercise of free movement and on the notion of family within whose frame these rights are articulated. Relevant reflections ultimately offer a perspective on the exploding tension in the EU, between commitment to the judicial protection of supranational rights in the name of Union citizenship, and resistance to such commitment in the

¹ Case C-218/14, *Kuldip Singh and Others v Minister for Justice and Equality*, EU:C:2015:476.

² Directive 2004/38, O.J. 2004, L 158.

³ Also see e.g. case C-456/12, *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.*, EU:C:2014:135; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, EU:C:2004:639; Case C-34/09, *Gerardo Ruiz Zambrano. v. Office national de l'emploi (ONEm)*, EU:C:2011:124.

⁴ TFEU art. 77-79.

⁵ For instance on the rights that the Family Reunification Directive (Directive 2003/86, O.J. 2003, L 251) entails for TCNs, with corresponding obligations for the Member States, see Case C-540/03, *Parliament v Council*, EU:C:2006:429, par. 60.

⁶ On the international law source of this power see e.g. ECtHR, Application No. 31465/96, *Sen v. Netherlands*, judgment of 21 December 2001, para 36. Also, for a broader reflection on the nature of EU immigration law, see Thym, "EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook" 50 CML Rev (2013) 709.

⁷ See Strumia "European Citizenship and EU Immigration: A Democratic Bridge between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude", *European Law Journal*, forthcoming 2016.

name of sovereign state powers, and the public interests that the latter protect.⁸ The court's shying away, in *Kuldip Singh*, from a purposive approach to these supranational rights may express discomfort with the judicial role in solving such tension. At the same time, the court's chosen interpretive route raises some conceptual discontents.

2 Background - How to Remain in Ireland when the Love is Gone

The reference in the *Kuldip Singh* case stemmed from the claims of three TCNs for retention of their right to reside in Ireland as family members of a migrant Union citizen after the dissolution of their marriage to the relevant Union citizen. Mr. Singh was an Indian national who had entered Ireland on a student visa and then had married a Latvian national who was working in Ireland.⁹ Mr. Njume was a national of Cameroon who had initially applied for asylum in Germany, where he had also met his future spouse, a German national. With her, he had moved to Ireland, where the couple got married.¹⁰ Mr. Aly was an Egyptian national. He had entered Ireland as a visitor and had married a Lithuanian national who was working in Ireland.¹¹ Mr. Singh's, Mr. Njume's and Mr. Aly's stories had several elements in common: they all gained a right to reside in Ireland as spouses of a migrant Union citizen under the Irish Regulations implementing Directive 2004/38;¹² they all supported for relevant periods their Union citizen spouses with their earnings;¹³ and in all three cases, the Union citizen spouse had departed Ireland to move to another Member State prior to the beginning of divorce proceedings.¹⁴ Mr. Singh, Mr. Njume and Mr. Aly all claimed a retained right to reside in Ireland under the Irish provisions transposing article 13(2) of Directive 2004/38. All three cases met the requirement under article 13(2) of a marriage lasting at least three years, including at least one spent in the host Member State.¹⁵ In all three cases, however, the claim was denied on the ground that the TCN spouse's right to reside in Ireland had ceased at the time the Union citizen spouse had departed.¹⁶ The Irish High Court, seized with judicial review of the Irish authorities' decisions denying retention of residence, raised three questions for the CJEU. The first question focused on the conditions for a TCN spouse to retain a right of residence in a host Member State after dissolution of marriage to a Union citizen. In particular, the question revolved around whether departure of the Union citizen spouse from the host Member State prior to the beginning of the divorce proceedings affected the non-Union citizen spouse's right to retain residence after the divorce or, at least, prior to the divorce. The second and third questions focused on whether the 'sufficient resources' requirement to which a Union citizen's right to reside in a host Member State for more than three months is subject could be met through resources and earnings of the Union citizen's TCN spouse.¹⁷

⁸ For one perspective on this see Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship' 15 GLJ (2014) 907, 933.

⁹ *Kuldip Singh*, *supra* note 1, para 11-14.

¹⁰ *Id.*, para 22-26.

¹¹ *Id.*, para 34-35.

¹² *Id.*, para 13, 25 and 34.

¹³ *Id.*, para 15, 26 and 35.

¹⁴ *Id.*, para 16, 27 and 35-36.

¹⁵ *Id.*, Opinion of AG Kokott, para 24-25.

¹⁶ *Id.*, para 17-18, 31-32 and 38-39.

¹⁷ *Id.*, para 44.

3 Opinion of Advocate General Kokott - The Combination of Two Provisions

Advocate General Kokott did not devote much attention to the Irish High Court's second and third questions, which she quickly dismissed in the turn of a couple of paragraphs, by referring to settled case law.¹⁸ The contentious issue was rather in the first question: how do the rights of TCN spouses survive the trial of both departure of the Union citizen spouse and dissolution of the marriage? The answer lied, according to Advocate General Kokott, in the interaction between two provisions of Directive 2004/38.¹⁹ A first provision was article 13—the one that the High Court expressly referred to—regulating the retention of residence rights in case of marriage dissolution. Under this provision, subject to certain conditions, both Union citizen and TCN spouses retain a right to reside in a host Member State after marriage dissolution. The second provision was article 12, regulating in relevant part retention of residence in case of departure of the Union citizen spouse. This provision distinguishes, for purposes of retention of the right to reside, between Union citizen spouses and TCN spouses. The latter group as a general rule does not retain a right to reside in a host Member State after departure of the Union citizen spouse.²⁰ According to the Advocate General, a combined reading of the two provisions led to the unavoidable conclusion that a TCN spouse, under article 12, would lose her right to reside in the host Member State upon departure of the Union citizen spouse, and would hence find no relief in article 13 if the marriage was subsequently dissolved.²¹ Both structural and conceptual reasons supported this outcome in the view of Advocate General Kokott. From a structural point of view, the absence of any references to divorce issues in article 12, while article 13 is specifically dedicated to divorce, was to be taken as an indication that relevant issues were not meant to alter the exhaustive regulation of departure in article 12.²² From a conceptual point of view, there was no room to argue that a right of residence that had clearly lapsed under article 12 could later be retained under article 13.²³ In this sense, the Advocate General noted that article 13 refers to 'retention of an existing, but not to revival of an already lapsed, right of residence'.²⁴ Considerations of legal certainty corroborated the suggested conclusion,²⁵ which the Advocate General found to withstand preoccupations for the practical effectiveness of the directive,²⁶ the risk of contingent inequities,²⁷ and respect for family life.²⁸

4 Judgment of the Grand Chamber - The 'Host Member State' Perspective

¹⁸ *Kuldip Singh*, *supra* note 1, Opinion of AG Kokott, para 52-53. Case *Zhu and Chen* (*supra* note 2), for instance, at para 29-33, established that, as long as the resources available to a Union citizen are sufficient for him or her not to become a burden on the finances of the host State, the origin of the resources is irrelevant.

¹⁹ *Id.*, para 14.

²⁰ They do retain a right to reside if they have custody of children who are enrolled at an educational establishment in the host Member State. Directive 2004/38, O.J. 2004, L 158, art. 12.

²¹ *Kuldip Singh*, *supra* note 1, Opinion of AG Kokott, para 26.

²² *Id.*, para 32-33.

²³ *Id.*, para 34.

²⁴ *Id.*, para 26-27.

²⁵ *Id.*, para 36-37.

²⁶ *Id.*, para 38-39.

²⁷ *Id.*, para 40-41.

²⁸ *Id.*, para 45-47.

The Grand Chamber, like the Advocate General in her opinion, devoted the most attention to the first referred question.

The judgment elaborated somewhat more than the Advocate General's opinion on the second question. It reconfirmed, in line with settled case law, that no origin requirement applied to the sufficient resources that a Union citizen must have available in order to be entitled to reside in a host Member State.²⁹ And it clarified that, as a result, relevant resources could come in part from the TCN spouse of a migrant Union citizen.³⁰ The third question, focusing on whether a TCN can work in a host Member State to procure relevant resources, did not need a response according to the Court, in light of the response to the second.³¹

As to the first question, the Grand Chamber chose a line of analysis different from the one pursued in the Advocate General's opinion. It offered a two-step answer, relying on the interpretation of articles 7(2) and 13(2) of Directive 2004/38, and it eschewed completely the question of the relation between article 12 and article 13.

As a first step, the Court considered whether persons in the condition of the applicants in the main proceedings enjoyed a right of residence under article 7(2) of Directive 2004/38. It concluded in the negative, as family members only enjoy a right of residence under article 7(2) in the Member State in which they 'accompany' or 'join' a Union citizen.³² As a result, once the Union citizen has left the host Member State to resettle in a further Member State or in a third country, his family members no longer meet the conditions to reside under article 7(2).³³

The Court went on to question, then, whether the applicants had a right to reside under article 13(2). It relied on the combined reference, in this provision, to 'host Member State' and the 'initiation of divorce... proceedings', to conclude that in order to retain a right under article 13(2), the TCN family member had to reside, at the initiation of the divorce proceedings, in a Member State which was still the 'host Member State' within the meaning of the Directive.³⁴ The Court reminded in this respect that 'host Member State' is defined in the Directive only by reference to a Union citizen's exercise of rights of movement and residence.³⁵ Building on these considerations, the Court came to its main conclusion: the sponsor migrant Union citizen had to reside in the host Member State until the day the divorce proceedings began, in order for her TCN spouse to retain a right of residence under article 13(2).³⁶

After walking a completely different line of reasoning, the Court eventually linked back, towards the end of its analysis of the first question, to one of the observations of the Advocate General: a

²⁹ *Kuldip Singh*, *supra* note 1, para 74.

³⁰ *Id.*, para 76.

³¹ *Id.*, para 78.

³² *Id.*, para 55.

³³ *Id.*, para 58.

³⁴ *Id.*, para 61.

³⁵ *Id.*

³⁶ *Id.*, para 66.

right of residence that had already expired once the conditions prescribed in article 7(2) were no longer met, could not subsequently revive for the effect of article 13(2).³⁷

5 Comment - Free Movement Instruments, Personal TCN Rights and Split Trans-National Families

The Court's approach to the question of TCN's retention of rights in the event of combined departure of a Union citizen spouse and subsequent divorce raises textual, systemic and methodological doubts. The Advocate General suggestions are more convincing from a systemic point of view, however they seem to disregard to some extent the telos of Directive 2004/38 (5.1). The seemingly discrete question that the *Kuldip Singh* case raises ultimately points to the nature and scope of TCN rights' derivative of Union citizenship (5.2). As the situation in *Kuldip Singh* evidences a systemic gap between rights of TCN as family members and as autonomous individuals, the case also calls for a reflection on the rationale for protection of the family in the context of EU citizens' free movement and on the extent to which EU law could or should stand for the protection of families in split living arrangements. (5.3) A clearer understanding of the origin of relevant TCN rights, and of underpinning notions of family suggests an alternative interpretation of the provisions of articles 12 and 13 of Directive 2004/38 (5.4), as well as some related conclusive considerations on the tension between sovereign powers of border control and supranational rights of foreigners.

5.1 Some Methodological Remarks

The first textual difficulty in the Court's judgment lies in its interpretation of article 7(2) of Directive 2004/38. The Court treats the reference, in this provision, to TCN family members 'accompanying or joining the Union citizen in the host Member State' as a condition to which the right of residence of the TCN is made subject.³⁸ So that, once the Union citizen spouse has relocated to another Member State, the TCN family member no longer meets the conditions to reside in the host Member State.³⁹ However, the provision of article 7(2) does not seem to support this interpretation. By referring to the fact of 'accompanying' or 'joining' a Union citizen, it does nothing more than identifying, among the family members of the Union citizen, those that in principle are entitled to reside with her in a host Member State, provided that, in practice, they meet some conditions.⁴⁰ These conditions are, in substance, their being either economically active or holders of sufficient resources.⁴¹ And it is to these latter conditions that article 14(2) ties the continuation of the right to reside. The requirement in article 7(2) of 'accompanying' or 'joining' the Union citizen refers to the inception of the TCN's right to reside, not to its continuation. The notion of 'retention' of the right to residence, which points to its continuation rather than inception, makes its first appearance in the directive only in article 12. A TCN family member's quality of having accompanied in the first place, or joined at a later time, the Union citizen in the host Member State is not lost just because the Union citizen later relocates elsewhere. And on the other

³⁷ Id., para 67.

³⁸ *Kuldip Singh*, *supra* note 1, paras 53 and 57.

³⁹ Id., para 58.

⁴⁰ Those found in paras 1(a), (b) and (c) of article 7 of Directive 2004/38.

⁴¹ Ibid.

hand article 7(2) does not refer to the TCN ‘residing continuously’ with the Union citizen in the Member State. Hence it seems that, along the same lines as the provision could not be read to require cohabitation of the Union citizen and the family members in the host Member State,⁴² it cannot either be read to require, by itself, continuation of residence in the same host Member State. Article 7(2) simply does not rule on cases in which one of the spouses no longer resides in the host Member State.

This is rather the task entrusted, in the system of Directive 2004/38, to articles 12 and 13. And it is to article 13(2) that the Court turns, in fact, after its dubious reading of article 7(2). The interpretation that the Grand Chamber offers of article 13(2) raises, however, no fewer doubts as the letter of the provision does not sustain it. The judgment artificially combines two concepts, ‘initiation of divorce proceedings’ and ‘host Member State’, that are independent of one another in the text of the provision of article 13(2)(a);⁴³ and it relies on this artificial connection to read an implication in the latter provision - the Union citizen spouse must reside in the host Member State on the day of initiation of divorce proceedings⁴⁴ - that the text of the provision does not suggest, let alone explicitly mention or impliedly support. On the contrary, the letter of article 13(2)(a) would allow concluding that the ‘one year in the host Member State’ could be at any time in the course of a marriage lasting at least three years, and not necessarily in the last year preceding dissolution. This reading would suggest, opposite to the Court’s conclusion, that the Union citizen spouse could reside wherever he or she pleases on the day of initiation of the divorce proceedings, and this fact alone would have no bearing on the destiny of the TCN’s spouse right to reside. Ultimately, it is precisely with the destiny of this latter right in case of termination of marriage that the provision under discussion is concerned: article 13 realizes one of the central objectives of the directive, clearly set out in Recital 15:⁴⁵ that is protecting the TCN in case of family dissolution, on a personal basis, and regardless of the location of the former spouse.

The only element that could cast doubt on the latter interpretation of article 13 is the regulation of a Union citizen’s departure from the host Member State in article 12 of Directive 2004/38. Despite the Advocate General’s attempt to point the attention in this direction, the Grand Chamber however chooses to strictly adhere to the formulation of the referred question. It disregards the article 12 perspective, as well as a systemic approach to the regulation of departure and dissolution of marriage under the Directive.

Such systemic approach is central instead in Advocate General Kokott’s opinion. However the combined interpretation of article 12 and 13 that the opinion offers also lends itself to both textual and teleological doubts. From a textual perspective, article 12 explicitly rules on selected hypotheses of retention of the right of residence in case of departure of the Union citizen, such as retention of the right on the part of a Union citizen spouse and retention of the right on the part of

⁴² Case C-244/13 *Ewaen Fred Ogieriakhi v Minister for Justice and Equality and Others*, EU:C:2014:2068, para 39, recalled in *Kuldip Singh*, *supra* note 1, para 54.

⁴³ *Kuldip Singh*, *supra* note 1, para 61. Article 13(2)(a) of Directive 2004/38 reads ‘prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State’.

⁴⁴ *Id.*, para 66.

⁴⁵ Recital 15, Directive 2004/38.

a spouse, Union citizen or TCN, who has custody of children studying in the host Member State.⁴⁶ It is silent on the effect of departure on a TCN's right in other cases, such as the hypothesis considered in *Kuldip Singh*. Advocate General Kokott interprets this silence as an indication that cases of retention are exhaustively regulated in the provision and that in other cases of departure that are not explicitly ruled upon, the TCN's right of residence lapses.⁴⁷ It would rather seem that if no specific provision is made, then the host Member State retains discretion to terminate the right of residence of the TCN provided such termination does not clash with other provisions of Directive 2004/38 or other EU law rules.

Article 13(2) of Directive 2004/38 entails precisely one of these rules, that any Member State decision to terminate residence in a case of departure not covered by article 12 would have to respect. In this respect, Advocate General Kokott's opinion also raises some questions from a teleological perspective. As recital 15 to Directive 2004/38 underlines,⁴⁸ the provision of article 13 embodies one of the central objectives of the directive: it is meant to safeguard the rights of TCNs, including by transforming them into personal rights, when family life is disrupted. The Advocate General's reading interprets the system of articles 12 and 13 in a way that disregards the directive's *telos* of protecting, as personal to the TCN, a right to reside that family dissolution, independent of the residence choices of the Union citizen spouse, is threatening.⁴⁹

The textual, systemic and teleological difficulties that the Grand Chamber's and Advocate General's approaches to this case reveal suggest a certain unease with the rationale and scope of rights of TCNs related to Union citizenship. It is to these rights that the question referred in *Kuldip Singh* ultimately points.

5.2 Union Citizenship and TCN Rights

While the provisions on Union citizenship are not concerned *per se* with TCNs and their status,⁵⁰ in certain situations they project rights onto TCNs.⁵¹ Rights that Union citizenship weaves in its penumbra for TCNs constrain the Member States' power to regulate the latter's entry and residence.⁵² In this sense, Union citizenship infiltrates to some extent the regulation of immigration, mounting new limits to Member States' broad discretion in this field. Such discretion already finds a boundary in the context of the EU common immigration policy, which incorporates, albeit with many flaws, a commitment to protection of fundamental rights in the context of cross-border movement.⁵³ However, Union citizenship brings about a novel perspective: when Union

⁴⁶ Article 12, Directive 2004/38.

⁴⁷ *Kuldip Singh*, *supra* note 1, Opinion of AG Kokott, para 34.

⁴⁸ See *supra*, para. 5.1

⁴⁹ The Advocate General refers to, and dismisses, considerations of practical effectiveness of the directive. However she does not engage with the *telos* of the directive as expressed in recital 15, which she merely restates. See *Kuldip Singh*, *supra* note 1, Opinion of AG Kokott, para 5 and para 38-39.

⁵⁰ Case C-40/11, *Yoshikazu Iida v Stadt Ulm*, EU:C:2012:691, para 66.

⁵¹ See Hailbronner, Thym, "Annotation of Case C-34/09", 48 CML Rev (2011) 1253, 1265.

⁵² Case *Iida*, *supra* note 50, para 72.

⁵³ While protection of TCNs fundamental rights is certainly not the main objective of the EU common immigration policy, protection of fundamental rights is a commitment in the frame of this policy, which resonates throughout relevant secondary legislation. See e.g. TFEU, art. 67; Family Reunification Directive, *supra* n. 5, recital 2; Directive 2003/109, OJ 2004, L16, recital 3. EU legislation in general must comply with fundamental rights. A

citizenship dictates rights for TCNs, it does not simply channel the exercise of Member States' competences so that these take into account individual rights, but rather it tends to draw pockets where relevant Member States' competences are annulled in the interest of some overarching rights. These are Union citizens' rights, that translate into derived rights for TCNs.⁵⁴ As Union citizenship has such a potentially disruptive effect on the exercise of powers of border management and entry control that the Member States jealously guard,⁵⁵ a fundamental question arises, that the case under discussion forcefully reiterates: what is the nature and scope of these rights of TCNs articulated around Union citizenship?

There are two rationales for rights of TCNs derivative of Union citizenship. First, the recognition of rights to TCNs family members is conducive to ensuring the effectiveness and viability of the system of free movement for Union citizens. In order for free movement to be exercised under conditions of 'freedom and dignity',⁵⁶ family life must be protected in the context of the exercise of relevant rights.⁵⁷ As a result, rights to move and reside need to be extended to family members of Union citizens, regardless of their nationality.⁵⁸ This is the *ratio* of the rights recognized to family members of migrant Union citizens, whether nationals of a EU Member State or of a third country, under directive 2004/38.⁵⁹ In substance these rights include the right to accompany or join a migrant Union citizen in a host Member State, to reside, work or study there, and to enjoy equal treatment with nationals to the same extent as the sponsor Union citizen.⁶⁰ Family members who are entitled to relevant rights include spouses, registered partners, direct descendants, and dependent direct ascendants.⁶¹ Beyond the situations, and the family members encompassed by Directive 2004/38, the European Court of Justice has recognized rights for TCN parent caretakers of minor Union citizens;⁶² rights for TCN family members upon return of the family to the Member State of origin of the Union citizen;⁶³ rights for TCN family members who enable the exercise of

challenge on fundamental rights ground has been brought for instance, albeit unsuccessfully, in respect of the Family Reunification Directive. See *Parliament v. Council*, *supra* n. 5. Also see Thym, "EU Migration Policy", *op. cit.*, *supra* note **Error! Bookmark not defined.**

⁵⁴ See case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, EU:C:2008:449, paras 66-75. Also see Strumia, *op. cit.*, *supra* note 7, at 9-10.

⁵⁵ In the context of the new settlement for the UK agreed within the European Council in February 2016, sovereign reassurance is entrusted in part to promised new provisions tightening the rights of TCNs family members of migrant Union citizens. See Declaration of the European Commission on issues related to the abuse of the right of free movement of persons, Annex VII to the European Council Conclusions, 18-19 February 2016, <http://www.consilium.europa.eu/en/meetings/european-council/2016/02/18-19/> (last visited 4 March 2016).

⁵⁶ Directive 2004/38, recital 5. In this respect, Directive 2004/38 builds on, and adds to, rationales and protections already elaborated in the context of early provisions on free movement of workers, as well as the other fundamental freedoms. See e.g. Regulation 1612/68, OJ 1968, L257, recital 5 and art. 10-12.

⁵⁷ See *Metock*, *supra* note 54, paras 56 and 62. Also see Spaventa, "Family rights for circular migrants and frontier workers: O and B", 52 CML Rev 753 (2015).

⁵⁸ Directive 2004/38, recital 5.

⁵⁹ *Id.*, art. 6, 7 and 16.

⁶⁰ *Id.*, art. 7, 23 and 24.

⁶¹ *Id.*, art. 2.

⁶² Case *Zhu and Chen*, *supra* note 3.

⁶³ Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, EU:C:1992:296; case *O. and B.*, *supra* note 3.

free movement on the part of a Union citizen, for instance by caring for children;⁶⁴ and rights for TCN parent caretakers, where no free movement has occurred, but the substance of a Union citizen's rights would otherwise be impaired.⁶⁵ The judgment of the Court in *Iida*, in an attempt to reconnect these situations to a common rationale, suggests that, while relevant situations fall in principle within the competence of the Member States to regulate the entry and stay of TCNs, they have in common an 'intrinsic connection' to free movement. It is this connection that attracts them within the regulatory sphere of Union citizenship.⁶⁶ A failure to protect rights of TCN family members in relevant situations would amount to an interference with the right to free movement of the Union citizen family member, as negative repercussions on the citizen's family life would discourage or constrain the exercise on his part of the relevant freedom.⁶⁷ Protection of family life in the context of free movement hence provides the first justification for extension of rights to TCNs. The rationale for relevant rights thus becomes moot when a Union citizen departs from a host Member State. Departure terminates, or shifts elsewhere, the exercise of free movement and of contextual family life. In similar cases, TCN family members no longer need rights in the host Member State in the context of their family life with a Union citizen, as there are other places where they can continue exercising relevant family life. A similar assumption seems to explain the regulatory frame underpinning the regulation of departure according to article 12 of Directive 2004/38, which suggests that the default result of departure should be the termination of protection of TCNs in the host Member State. This is because, under this first rationale for TCNs rights related to Union citizenship, relevant rights have no life of their own, but follow Union citizenship rights.⁶⁸

There is however a second rationale for TCNs rights as a reflection of Union citizenship. Recital 15 of Directive 2004/38 points to this. In the words of the CJEU, it is 'to offer legal protection to family members of citizens of the Union who reside in the host Member State, in order to enable them, in certain cases and subject to certain conditions, to retain their right of residence exclusively on a personal basis'.⁶⁹ That is, the TCN's right to reside which was born as a derivative right of Union citizenship must be capable, in certain situations, of emancipation. This is where Union citizenship meddles more intrusively with the power of the Member States to regulate entry and residence. It not only demands rights for TCNs as a proxy of Union citizenship, but it demands that the Member States choose the relevant TCNs as continuing members of their communities, regardless of the sorts of the family relationship and of a Union citizen's exercise of free movement. It is also one instance in which Union citizenship becomes a truthful vehicle for individual rights, of fundamental or lesser rank, independently of its symbiotic relationship with

⁶⁴ Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, EU:C:2002:434; case C-457/12, *S. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G.*, EU:C:2014:136.

⁶⁵ Case *Ruiz Zambrano*, supra note 3.

⁶⁶ Case *Iida*, supra note 50, para 72.

⁶⁷ See e.g. case *Iida*, supra note 50, para 68; case *O. and B.*, supra note 3, paras 36 and 45; case *Kuldip Singh*, supra note 1, para 50; also see Spaventa, op. cit., supra note 57 at 756-57 and 761-62.

⁶⁸ Case *Iida*, supra note 50, para 66.

⁶⁹ Case *Ogieriakhi*, supra note 42, para 40.

national citizenship and of the tight jurisdictional triggers that govern its operation.⁷⁰ Article 13 of Directive 2004/38, as well as the regulation of death of a Union citizen under article 12, are the concrete expression of this second rationale. Article 13, in particular, details a range of situations, in which rights of TCNs begin to live a life of their own.

The situation in the case under discussion falls into the interstice between the two provisions of article 12 and 13, and between the rationales for protection of TCN rights that they respectively embody. The rights of residence of Mr. Singh, Mr. Njume and Mr. Aly are no longer justified in the context of a Union citizen's free movement, and thus the treatment of departure in article 12 would seem to sentence their lapse. And at the same time the relevant rights do not squarely meet the conditions to be emancipated under the provision of article 13. The puzzle that is so revealed can only be solved by setting the analysis of TCN rights derivative of Union citizenship against the backdrop of protection of the family in the context of free movement.

5.3 The Family in the Context of Free Movement

Protection of family life in the context of cross-border movement reflects into EU law a broader commitment found in international law as well as, in a comparative perspective, in immigration law. Article 8 of the ECHR, for instance, protects the right to private and family life. While the ECtHR has interpreted this right with a certain statist bias,⁷¹ the relevant provision limits to some extent state parties' power to deport, and deny admission to, family members. The Court assesses the scope of this power, in relevant cases, in light of the particular circumstances of the persons involved, such as their ties to the contracting state, the extent of the disruption to their family life, as well as their ability to conduct their family life in the country of origin.⁷² It has for instance interpreted article 8 to prevent expulsion of a non-national from a contracting state when this would have detrimental consequences for the non-national's parental responsibilities and for the best interest of her national child.⁷³ It has also read article 8 to require admission of a non-national child in the contracting state where her parents already reside, if family reunification in the country of origin would be inadequate due to the presence of other children born in the host State.⁷⁴ Article 17 of the International Covenant on Civil and Political Rights has also been interpreted to the effect that a state party's refusal to allow a member of a family to remain on its territory may amount to interference with that person's family life.⁷⁵ Even in the context of domestic immigration law, family reunification is one of the most important grounds for the grant of visa and residence rights

⁷⁰ On the jurisdiction of Union citizenship, see e.g. Kochenov, "A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe", 18 CJEL (2011), 55; Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" 45 CML Rev 13 (2008).

⁷¹ See e.g. Application no. 9214/80; 9473/81; 9474/81, *Abdulaziz, Cabales and Balkandalo v UK*, judgment of 28 May 1985, para 67. Also see Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) at 104 and 112-122; Morano-Foadi, Andreadaksi, "The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: the ECJ and ECtHR Jurisprudence", 22 EJIL (2011), 1071, at 1080.

⁷² See e.g. ECtHR, Application No. 50435/99, *Rodrigues da Silva/Hoogkamer v. the Netherlands*, judgment of 31 January 2006, para 39.

⁷³ *Id.*

⁷⁴ See *Sen v. Netherlands*, *supra* n. 6.

⁷⁵ See e.g. Human Rights Committee, Communication 1557/2007, of 18 July 2011, CCPR/C/102/D/1557/2007.

to non-nationals.⁷⁶ Protection of the unity of the family, in other words, tempers the states' power to admit and exclude non-nationals, giving to the latter group's claims for admission a heightened status. It is not sensitivity for the rights of the non-nationals, however, which reinforces their claims for admission. The interests of the 'insider', the sponsor family member who has an autonomous entitlement to reside in a host Member State, rather drives legal protection of her family.⁷⁷

Considerations of the same sign inform EU immigration law. Under the family reunification directive,⁷⁸ TCNs who have resided in a EU Member State for at least one year are entitled to claim reunification, under certain conditions, with their family members who are outside the EU.⁷⁹ Highly qualified TCN workers who hold a European blue card are entitled to peculiar facilitations to have their family members join them in a EU Member State.⁸⁰ Also for purposes of processing asylum application, family considerations play a role: one of the criteria to allocate the responsibility to process applications to a Member State under the (infamous) Dublin regulation is the presence of an asylum seeker's family members in the relevant Member State.⁸¹

Beyond EU immigration law, protection of the unity of a migrant Union citizen's family, as evidenced above, also grounds a constellation of TCN rights in the context of EU free movement law. Also in this domain, protection of the interests of the migrant Union citizen is the driver of relevant TCN rights, however with two qualifications. First, as considered above, the rights of TCN family members become, in certain conditions, emancipated and personal to the TCN. Second, there is a distinct nuance to the rationale for protection of the family in the context of free movement. The underlying concern is not simply accommodating the interests of a migrant Union citizen who has moved; it is rather encouraging the exercise of her free movement rights in the first place.⁸² The objective of facilitating free movement grounds a distinctive narrative of cross-border rights for migrant EU citizens, as well as for their family members, which mounts novel challenges to the states' powers in respect of border management and admission and exclusion.⁸³ Protection of the family is embedded, in this sense, in protection of the rights of transnational citizenship to which free movement gives concrete expression.⁸⁴ This peculiar free movement context could yield, depending on the perspective one adopts, an impoverished, or an enhanced notion of family.

⁷⁶ See e.g. Legislative Decree 286/1998, *Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (Italian Immigration Act), art. 29; *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial* ('Belgian Law on Foreigners'), art. 40-47; US Immigration and Nationality Act, sect. 203.

⁷⁷ See Costello, *op. cit.*, supra note 71, at 106-107.

⁷⁸ Directive 2003/86.

⁷⁹ *Id.*, art. 3-4.

⁸⁰ Directive 2009/50 O.J. 2009, L 155, art. 15.

⁸¹ Regulation 604/2013, O.J. 2013, L180, art. 9.

⁸² See Spaventa, "Family Rights", *op. cit.*, supra note 57, at 768 (recent case law requires that the family member 'enables' free movement).

⁸³ See Costello, *op. cit.*, supra note 71, at 132-133; also see Strumia, *op. cit.*

⁸⁴ On Union citizenship as transnational citizenship, see e.g. Kostakopoulou, "European Union Citizenship: Writing the Future" 13 ELJ (2007) 623 Kostakopoulou, "European Union Citizenship: Writing the Future" 13 ELJ (2007) 623.

From the former perspective, the family turns into a mere instrument of market citizenship.⁸⁵ The primacy acknowledged to the interests of economically active migrant citizens prompts protection of a distorted version of family rights and explains the Court's reluctance to ground the same rights in a consistent appraisal of underpinning fundamental rights.⁸⁶ Indeed the Court, despite suggestions from Advocate Generals,⁸⁷ and invitations from the referring courts,⁸⁸ has avoided such appraisal even in those Union citizenship cases that, because of involving the family rights of particularly vulnerable citizens, such as children, would have naturally called for attention to fundamental rights.⁸⁹ Read through a similar lens, the *Kuldip Singh* judgment further distorts family rights, and the very notion of family surrounding Union citizenship. Up to *Kuldip Singh*, it was protection of family unity that had become an instrument for the protection of free movement. *Kuldip Singh* adds a twist to the instrumentality argument. It is family separation that risks, with this judgment, to become an instrument for the protection of TCN rights that no longer fit within the free movement frame.⁹⁰ The reading of article 13, and indirectly also of article 12, of Directive 2004/38 offered in *Kuldip Singh* builds up, in fact, an anti-systemic incentive to hurriedly break-up family relations, initiating divorce proceedings before departure occurs, so as to fill in the vacuum of protection left by the severing of TCN rights from free movement rights. From this perspective, the judgment in *Kuldip Singh* marks a tipping point in the interpretation of family rights as instruments of free movement to which the case law on Union citizenship has in part indulged.

From an alternative perspective, the frame of free movement and transnational citizenship could, or perhaps should, trigger a reconceptualization of the family and a progressive model of family protection, in comparison to the one enshrined in traditional migration law. Situations like the one in *Kuldip Singh*, in which family life is complexified by accidents of life, such as further migration or dissolution of marriage, provide an important opportunity for such reconceptualization. In these situations, it becomes evident that the rules conceived to protect the rights of a sponsor migrant, or the rights of his family members who are left behind, may be inadequate. In particular, protection of family unity may turn out not to be a sufficiently comprehensive frame. Protection of the interests of free movement and of transnational citizenship may warrant an approach which recognizes, also for admission and residence rights purposes, the independent, and possibly geographically split, role of different family members in creating common family life.

Unity of a family comprising two working spouses often requires, in fact, a degree of separation. The case law of the Court of Justice is not oblivious to this. Already in *Diatta*,⁹¹ in the context of free movement of workers, the Court held that family members of migrant workers are not required to permanently live with them in order to enjoy derivative rights of residence and are, in particular,

⁸⁵ This can be seen, in other words, as the reverberation of the first rationale for derivative TCN rights explored in section 5.2 in terms of the meaning of family life.

⁸⁶ See Spaventa, "Family Rights", op. cit., supra note 57, at 767-69 and 773-74.

⁸⁷ See e.g. *Ruiz Zambrano*, supra note 3, opinion of Advocate General Sharpston.

⁸⁸ See e.g. case C-86/12, *Adzo Doményo Alokpa, Jarel Moudoulou, Eja Moudoulou v Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:645, para 19; *Zhu and Chen*, supra note 2, para 15.

⁸⁹ See e.g. *Zhu and Chen*, supra note 2; *Ruiz Zambrano*, supra note 3; *Alokpa*, supra note 88.

⁹⁰ Also see Costello, op. cit., supra note 71, at 111-112 (on the role of migration in producing family separation).

⁹¹ Case 267/83, *Aissatou Diatta v Land Berlin*, EU:C:1985:67.

allowed to take up employment positions anywhere in a host Member State, even if this is ‘at some distance from the place where the migrant worker resides’.⁹² Distances have become larger and smaller at the same time since *Diatta*. The Court impliedly acknowledged this in *Iida*, where it reiterated, with regard to two spouses residing in different Member States, that spouses are not required to live together for purposes of the derivative residence rights of family members under EU law.⁹³ This line of reasoning suggests that the approach to TCN family members’ rights of residence upon departure of the sponsor Union citizen, hinted in Directive 2004/38 and articulated in *Kuldip Singh*, is inadequate. Departure may well form part of cross-border family life, and it may be dictated by the same free movement interests that prompted migration in the first place. While it does not necessarily sanction cessation of family life, departure of a Union citizen does also not allow assuming that family life may continue elsewhere. Often, family life continues, at least for interim and transitional periods, but at times on an extended basis, through separation. As Advocate General Kokott remarks in her opinion, a split living arrangement may be dictated by career choices.⁹⁴ Union citizenship, which brings about a right to belong across borders,⁹⁵ provides the key frame to protect the unity of split families, beyond duties of childcare, and possibly even in the context of necessary arrangements to discharge such duties. While the traditional rationale for family protection in the context of migration, for instance in the frame of the ECHR, only requires that family life may be conducted somewhere,⁹⁶ free movement, it seems, requires something more. It requires that family life may be conducted across borders in certain circumstances. Protection of family life across borders harbors an opportunity to engage with a progressive idea of family, giving concrete bite to notions of gender equality and equal opportunities that are so central to the European *acquis*.⁹⁷ In this sense, family rights derived of Union citizenship could enrich rather than impoverish protection of the family in the context of migration.

5.4 Rethinking the Interaction of Departure and Family Crisis

The rationales for TCN rights derivative of Union citizenship, and the concept of family within which these rights are articulated, ultimately corroborate the textual reading of article 12 of Directive 2004/38 suggested in paragraph 5.1. They also suggest some systemic and teleological reflections on the combination of articles 12 and 13 of the Directive. As considered above, textually, article 12 does not decree the lapsing of residence rights in cases of departure that it does not regulate. In relevant cases, the Member States are free to exercise their discretionary power to exclude a TCN, within the constraint, however of other applicable rules of EU law, in particular other rules on free movement and on family reunification.⁹⁸

⁹² *Id.*, para 19.

⁹³ *Iida*, *supra* note 50, para 57-60 (although Mr. Iida could not benefit from rights under the directive as he lived in the Member State of origin of his spouse).

⁹⁴ *Kuldip Singh*, *supra* note 1, Opinion of AG Kokott, para 48-49.

⁹⁵ *Strumia*, *op. cit.*, *supra* note 7.

⁹⁶ *Costello*, *op. cit.*, *supra* note 71, at 117.

⁹⁷ See TFEU, art. 157; Directive 2006/54 O.J. 2006, L 204/23. Also *Costello*, *op. cit.*, *supra* note 71, at 105.

⁹⁸ See *supra* para 5.1.

From a systemic perspective, a first constraint on Member States' power in this respect comes from the rule of article 13. If departure of the Union citizen from the host Member State occurs in the context of a family crisis, and the TCN family member meets the conditions for emancipation of his right to residence under article 13, then the system of the rules of article 12 and 13 would appear to dictate that the situation be attracted within the sphere of article 13. This would not be a case of revival of a lapsed right, as article 12 per se does not determine the lapsing of rights, but simply a case of survival under article 13 of a right that does not necessarily survive under article 12. The lack of explicit coordination between the two provisions certainly makes for a problematic degree of uncertainty in the treatment of relevant situation. While a combined reading in this sense may set a clear expectation on the part of the TCNs that their rights would survive if their marriage came to dissolution, it would be hard for Member States to distinguish in practice situations in which departure is in the context of family crisis or else. Member States could apply a waiting period before taking any action against a TCN whose Union citizen partner has departed and who meets the conditions to retain a right of residence under article 13. This may however create a perverse incentive in families in a split living arrangement to represent a 'separation of convenience' in order to gain residence time in the limbo between articles 12 and 13.

The pragmatic difficulties that balancing articles 12 and 13 in a coherent system causes are perhaps mitigated if one goes back to the telos of Directive 2004/38. As already emphasized above,⁹⁹ article 13 is the enactment of an explicit objective pursued by the directive: that is providing legal safeguards for family members in cases of death of a Union citizen and other sources of family crisis.¹⁰⁰ A combined reading of articles 12 and 13 that dilutes this function of article 13 would seem to contrast with the very purposes that the directive pursues. From this teleological perspective, the directive only supports a system of the two provisions that leaves no gaps between the protection of TCN rights as an instrument of free movement, and the protection of emancipated TCN rights that are enjoyed on a personal basis. While at the same time taking into account the forms of family life that free movement may engender. There are two interpretive options in this respect. A first option would be to read the system of the two provisions so as to recognize split family arrangements as a tool for enabling free movement, and thus deserving of protection under the rationale that supports, in part, article 12. Another option would be to link the emancipation of TCN rights not to family crisis per se, whether due to death or marriage dissolution, but to circumstances that make the relevant TCN's family rights no longer justifiable as an instrument of free movement. The former option requires, in substance, stretching further the free movement rationale, and could be realized through a combined interpretation of the directive provisions and of article 21 TFEU. It faces two challenges. First, the explicit recognition in article 12 of a retained right to reside to Union citizen family members of departing Union citizens, while a statement of the obvious,¹⁰¹ arguably creates a textual distinction from the condition of TCNs. Second, it would remain open to the challenge that departure of the Union citizen spouse to a third country would not justify protection of the TCN's rights. The latter option would rather entail reinforcing the

⁹⁹ See *supra*, sections 5.1 and 5.2.

¹⁰⁰ Directive 2004/38, Recital 15. Also see *Kuldip Singh*, *supra* note 1, para 60.

¹⁰¹ Union citizens who respect the conditions set forth therein already have a right to remain under art. 7 of Directive 2004/38.

rationale for protection of TCN rights as autonomous rights, possibly through a fundamental rights' informed interpretation of relevant rights.¹⁰²

Either option seems to offer a more convincing approach than the conflation of article 13(2) and article 7(2) of Directive 2004/38 that the Court opts for in the *Kuldip Singh* judgment. Yet, both options raise a further question. Could the Court, or should it, have engaged in such a bolder teleological reading of the provisions of Directive 2004/38? A reference from the Court of Appeal of England and Wales, currently on the CJEU's docket, could provide an opportunity to reconsider some of these issues.¹⁰³ However, an activist reading of Directive 2004/38 on the part of the CJEU could further exacerbate national acrimonies towards free movement and the constraints it brings to the Member States' powers to control immigration.¹⁰⁴ This also explains perhaps the cautious approach of the Court in *Kuldip Singh*. On the other hand, it is unlikely that a legislative revision of Directive 2004/38, albeit looming on the horizon in case the UK votes to remain in the EU, would go in this direction. There is thus an inevitable impasse, in which it seems, the rights of TCNs derivative of Union citizenship are relegated to the paradoxical alternative that *Kuldip Singh* opened up: divorce immediately, or leave.¹⁰⁵

The way around this impasse possibly passes through thinking of the limits that Union citizenship brings to the Member States' powers in the domain of immigration from an aggregate point of view, rather than from the perspective of each individual Member State and their loss of control. A reconciliation of the provisions of articles 12 and 13 along the lines suggested above would rationalize the existing system, rather than eroding further power of control from the Member States. It would only ensure protection of a Member State (the one to which a Union citizen departs) from the burden of integrating yet another TCN family member, at the moderate cost for another Member State (the one where the TCN family member remains) to let a well-integrated worker stay a little longer.¹⁰⁶

¹⁰² In the context of a split living arrangement, for instance, protection of private and family life under article 7 of the Charter of Fundamental Rights would encompass protection of these rights.

¹⁰³ Case C-115/15, *Secretary of State for the Home Department v NA*.

¹⁰⁴ On this see the UK Prime Minister's Letter to Donald Tusk, 10 November 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf (last visited 25 May 2016).

¹⁰⁵ In a broader perspective, another paradoxical consequence derives from the repercussions of the rule in *Kuldip Singh* for the application of Regulation 1259/2010 on the law applicable to divorce and legal separation (OJ 2010, L 343). Under art. 8 of the Regulation, the law applicable to a divorce proceeding, in case the spouses are no longer resident in the same country, is the law of the last State where they were habitually resident as a couple, provided that at least one of the spouses still resides there. If neither spouse still resides in the relevant State, and the spouses have different nationalities, then the law of the State where a court is seized with the proceeding applies. As, under *Kuldip Singh*, the TCN spouse loses the right to reside in the host Member State the moment his Union citizen spouse departs, if he or she does not divorce before departure of the Union citizen, he or she becomes subject to the law of the State that the Union citizen spouse, after having departed, may choose to initiate divorce proceedings. In other words, the dictat becomes, 'divorce immediately or, not only leave, but also accept the law that pleases your ex!' (the only other option being, for the TCN spouse, initiating divorce proceedings in the State of origin first thing after having been deported back there...).

¹⁰⁶ Resource requirements apply to remaining TCNs under articles 12 and 13, and would have applied to the TCNs in *Kuldip Singh*. Further, only a well-integrated TCN would arguably find a valid reason to want to live apart from a spouse from whom he or she is not separated.

Conclusion

Ultimately the jarring interpretation of Directive 2004/38 in the *Kuldip Singh* case evidences the difficulty, for the Court, and for EU law, to find a sustainable balance between the power of the state to control borders, including against the passage of uninvited foreigners, and the supranational rights that Union citizenship brings about, also for those very foreigners. From this perspective, *Kuldip Singh* can be seen both as a word of wisdom and as a dangerous slip.

It may be a word of wisdom to the extent that striking this balance has become a matter of contested sovereignties. The purposive exercise of judicial functions is inadequate for solving a contest of this type, which calls into question the very substance of those purposes and the democratic consensus underpinning them.¹⁰⁷ In this respect, whether supranational rights of a minority of citizens and foreigners are to prevail over competing public interests of which the states consider themselves legitimate guardians is a matter for political debate rather than adjudication. As an expression of the Court's self-restraint at a time of unrest on the purposes of integration, the judgment is thus a prudent one.

It is a dangerous slip however in terms of coherent protection of a legacy of rights. On the one hand, the hurried dismissal of the teleology of Union citizenship pushes the reasoning in the judgment into unsteady systemic constructions and textual stretches, which leave the interpretive strategy of the Court on uncertain grounds. On the other hand, the judgment foregoes an opportunity to unravel the nature of the tension between retained supranational rights and state interests in the context of European migration: in this context, the supranational rights cast against the powers of a host Member State reflect to some extent the extraterritorial powers of a Member State of origin, or the interests of a further host Member State. Hence the tension around European borders is not a binary one, but rather a re-articulation of multiple overlapping sets of interests. Acknowledging this much may have offered an interpretive alternative to the Court, as well as making the judgment a conceptual starting point for political re-engagement with the purposes of Union citizenship and of supranational TCN rights.

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¹⁰⁷ See in this sense Weiler, "In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration" 34 *Journal of European Integration* (2012) 825; Davies, "Democracy and Legitimacy in the Shadow of Purposive Competence" 21 *ELJ* (2015) 2; Bartl, "The Way We Do Europe: Subsidiarity and the *Substantive* Democratic Deficit" 21 *ELJ* (2015) 23.

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