The United Kingdom and European Citizenship: A Reluctant Contributor

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Submitted to: Central European University

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In partial fulfillment of the requirements for the degree of Master of the Arts

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Budapest, Hungary

2012

Word Count: 15,831

ABSTRACT:

By the end of the twentieth century, the United Kingdom constituted an anomaly both in its consistent pursuit of restricting immigration and in its hostility towards deepening European integration. While other West European countries experiencing large migration flows began enacting restrict policies late in the twentieth century, the United Kingdom (UK) began introducing migration controls in the early 1970s. When the European Union extended its competences to include asylum and immigration policy, the UK exercised its opt-out to avoid legislation conferring significant rights upon Third Country Nationals (TCNs).[1] Yet a survey of the requests for a preliminary reference[2] presented to the European Court of Justice indicates that the UK not only contributed a very large proportion of cases concerning European citizenship but, within these cases, there emerged a clear trend of reliance upon European Union (EU) citizenship rights to confer residency upon TCN family members. This study seeks to explore this paradox to explain how the dynamics of European legal integration help those excluded from the policy-making process counteract restrictive Member State policies and consequently expand the protection offered through EU rights.

[1] The United Kingdom's "opt-outs" in regarding asylum and migration policy will be discussed in more detail in Chapter 1

[2] The preliminary reference procedure allows national courts to refer questions regarding the interpretation or validity of European law arising from open cases

ACKNOWLEDGEMENTS

I would very much like to thank Professor Marie-Pierre Granger, who has been incredibly patient and remarkably supportive during this writing process, offering quick and constructive feedback that has helped me immensely in navigating the murky waters of the European legal integration process.

I would also like to thank Kseniya Zakharova, Amanda Alcott, and Anna Krozser for the emotional support, constructive criticism, and technological guidance.

I am also thankful to my family for their unconditional support, and specifically to my mother, who is and always will be the best role model I could ever hope to have.

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INTRODUCTION

By the end of the twentieth century, a consensus emerged among social scientists that the United Kingdom constituted an anomaly both in its consistent pursuit of restricting immigration and in its hostility towards deepening European integration. While other West European countries experiencing large migration flows embarked on a road towards achieving "zero immigration" fairly late in the twentieth century, the United Kingdom began introducing migration controls in the early 1970s while other countries were actively courting guest workers. When the European Union extended its competences to include asylum and immigration policy, the United Kingdom exercised its opt-out to avoid legislation conferring significant rights upon Third Country Nationals (TCNs).[3]

Yet a survey of the requests for a preliminary reference[4] presented to the European Court of Justice indicates a surprising pattern. The United Kingdom not only contributed a very large proportion of cases concerning European citizenship but, within these cases, there emerged a clear trend of reliance upon European Union (EU) citizenship rights to confer residency upon non-European Economic Area (EEA) family members. This study seeks to explore this paradox to help explain how the dynamics of European legal integration help those excluded from the policy-making process counteract restrictive Member State policies and consequently expand the protection offered through EU rights.

To this end, the first chapter will situate the case of this British paradox within the wider debate on the degree of Member States'control over the process of European legal

[3] The United Kingdom's "opt-outs" in regarding asylum and migration policy will be discussed in more detail in Chapter 1

[4] The preliminary reference procedure allows national courts to refer questions regarding the interpretation or validity of European law arising from open cases

integration and articulate the historical institutionalist approach employed throughout the following chapters. The second chapter will demonstrate how changes in the British legal system coincided with a period during which the executive's attempts to tighten migration controls and restrict migrants' access to judicial recourse was systematically constrained by the EU rights granted through EU citizenship to TCN family members. In the third chapter, I will discuss how NGOs' use of the opportunity structures made available through the EU legal system generated judicial rulemaking that contributed substantially to the EU rights regime, such that EU citizenship rights apply even in internal situations.

CHAPTER 1

The importance of the European Court of Justice in the process of European integration first rose to prominence in the 1990s and continues to shape discussion on integration today. Studying the legal integration of Europe revived a challenge to the dominant intergovernmentalist framework that accorded primacy to Member State preferences in shaping the trajectory of European integration. The trend of British preliminary reference rulings expanding the EU rights of Third Party Nationals through the EU citizenship of their family members appears highly relevant to this debate, as the United Kingdom appears as an anomaly among EU Member States both due to the early development of an enduring consensus in support of restrictive migration policies and due to its famously lukewarm attitude towards European integration. The government's continued preference of restricting migration policy and constraining deepening European integration finds expression in its strategic choice to exercise its opt-out to avoid European legislation conferring greater rights protection upon Third Country Nationals. A historical institutionalist framework will be operationalized to structure the following inquiry on how legal integration allows British judicial and social actors to expand the rights available to TCNs through the EU legal system despite executive preferences to the contrary.

The debate on European legal integration

Studying the legal integration of Europe brought together social scientists and legal scholars to examine how the European Court of Justice (ECJ) emerged as an "unlikely hero" of the integration process, contributing to gradual transformation even during periods when the political will of Member States ran counter to deepening integration. Such analyses provoked numerous reconceptualizations of the theoretical frameworks used to explain the progress of European integration centering around disagreement regarding Member States'

ability to control the European Court of Justice and the pace and outcomes of legal integration. The account of an activist European Court of Justice incrementally extending its own competence revived a neofunctionalist challenge to the intergovernmentalist paradigm of an EU integration process heavily controlled by Member State preferences. Neofunctionalism emphasized Member States' inability to curtail the effects of "spill-over" in furthering integration. Intergovernmentalist or rational choice institutionalist scholars responded by insisting upon the ECJ's sensitivity to the threat of Member State noncompliance. In response to the centrality of the relationship between the ECJ and the national courts in circumventing the control of the executive in the neofunctionalist account, research has moved on to explore the relations between the ECJ and the national courts and the important role of individual litigants in expanding the scope of EU law beyond Member State control.

Burley[5] and Mattli's 1993 article, "Europe Before the Court: a Political Theory of Integration," referred to a foundational study by Joseph Weiler[6] on the role of the ECJ in the process of legal integration to draw larger conclusions about the process of integration and to revive neofunctionalism as an explanatory framework. Their account emphasized that self-interest drives the integration process, as sub-state and supranational actors take advantage of the opportunities made available by the integration process.[7] They placed special emphasis on how the preliminary reference procedure in conjunction with the direct effect doctrine[8]

[5] Later known as Slaughter

[6] Weiler's account also emphasized the importance of the ECJ's legal doctrine of supremacy, which holds that national courts must uphold the pirmacy of EU law over national law when the two come into conflict, in the incremental expansion of the scope of EU law. See Joseph H.H. Weiler "The Transformation of Europe." *Yale Law Journal*. 100. no. 8 (1991): 2403-2483

[7] Burley, A, and W. Mattli. 1993. Europe before the Court. A Political Theory of Legal Integration. International Organization, 47: 41-76, 54

[8] The legal doctrine of direct effect holds that EU law may confer rights upon individuals which the national courts must recognize and enforce.

allowed individuals to engage in the process and incrementally expand the scope of the law.[9] The procedure mobilized the self-interest of lower national courts to engage with ECJ jurisprudence. Burley and Mattli touch briefly upon the ECJ's activism in portraying itself as a "protector of individual rights against the state" and appealing to national courts in this regard, although this idea is not fully developed.[10] Furthermore, they argued that the technical language of law insulated the judiciary from political constraint.

Geoffrey Garrett, in particular, emerged as a skeptic of the neofunctionalist narrative of legal integration and explored a rational-institutionalist approach towards European integration. In his 1992 paper, he argued that Member States relied upon the ECJ to help settle "incomplete contracts" (an argument adapted from international political economy) and generally maintained control over the process, as the ECJ would rule in accordance with "the interests of powerful States."[11] Garrett's work stressed the constraints upon the legal system that kept the ECJ subservient to Member State control. In a subsequent article, he argued that the ECJ is also a rational actor who wishes to court compliance from the Member States and therefore anticipates their preferences.[12] He expanded this framework further in 1998 with co-authors Kelemen and Schultz to present the Court as a strategic actor balancing its purpose of maintaining the clarity of EU law against the threat of legislative restraint by the Member States.[13] The principle-agent model Garrett applied structured much of the following contestation regarding the Court's sensitivity or resistance to Member State control.[14]

[9] Burley and Mattli, 60
[10] Ibid, 63
[11] Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market." *International Organization.* 46. no. 2 (1992): 533-560, 537
[12] Geoffrey Garrett, "The Politics of Legal Integration in the European Union." *International Organization.* 49. no. 1 (1995): 171-181, 173
[13] Geoffrey Garrett, Daniel R. Kelemen, and Heiner Schultz. "The European Court of Justice, National Governments, and Legal Integration in the European Union." *International Organization.* 52 (1998):149-176.
[14] Alec Stone Sweet, The European Court of Justice and the judicialization of EU governance. Living Reviews in European Governance, 5(2): 20120 (accessed 5 May 2012): http://europeangovernance.livingreviews.org/Articles/lreg-2010-2/download/lreg-2010-2Color.pdf,, 10

In response to Garrett's criticism of a neofunctionalist explanation, Mattli and Slaughter strengthened their argument to highlight how the contributions of subnational actors, empowered by the opportunities available within the Community legal system, shielded the legal integration process from Member State control.[15] Seeking to better explain the role of individual litigants and national courts in the dynamics of legal integration, Burley and Slaughter provided a tentative explanation of the opportunity structures incentivizing and constraining both. They argued that litigants would be incentivized to "minimize law by winning the case" and "maximize trade gains and individual rights by seeking new… EU rules" although they would be constrained by "limited resources and a relatively short time horizon." Self-interested national courts would cooperate in the incremental expansion of the EU legal system by responding to the possibility of strengthening their scope of judicial review and improving their position relative to other national courts.[16] Mattli and Slaughter's effort to defend neofunctionalism against rational-choice criticism marked the beginning of analyzing the relationships between individual litigants and national courts.

Stone Sweet and Brunell have, to date, contributed the most comprehensive adjustment of the neofunctionalist framework to describe the dynamics of European legal integration. Their framework also hinges on the participation of litigants in the EU legal system, as they argue that legal integration is "triggered" by "contracting and other forms of rulemaking," which "create social demand for third-party dispute resolution (TDR)."[17] As long as judgments supply the demand, litigants will continue to ask for further rulings. Furthermore, the judgment will create precedent for the resolution of disputes in a similar

[15] Mattli, Walter and Slaughter, Anne-Marie, 1998a, "Revisiting the European Court of Justice", International Organization, 52(1): 177–209, 180
[16] Ibid, 185, see table
[17] Stone Sweet, Alec. The European Court of Justice and the judicialization of EU governance. Living Reviews in European Governance, 5(2): 20120 (accessed 5 May 2012): http://europeangovernance.livingreviews.org/Articles/lreg-2010-2/download/lreg-2010-2Color.pdf, 7

manner, affecting future legislation.[18] These dynamics create feedback loops creating self-sustaining causal chains.

Expanding on this secondary feedback loop, Stone Sweet's "Judicial Construction of Europe" argued that judgments also structure "argumentation frameworks" which "give some measure of determinacy to legal norms, and thus help to legitimize judicial lawmaking."[19] In this way, precedent established through case law helps lawyers create "litigation markets" and enhances compliance.[20] There is a self-sustaining logic underlying the dynamics of European integration, as these effects constitute a "virtuous circle."[21] Stone Sweet also argues for the importance of the doctrines of supremacy and direct effect and the mechanism of preliminary reference rulings in advancing legal integration. These institutions simultaneously "undermine certain constitutional orthodoxies" and open "the legal system to private parties."[22]

Karen Alter has also contributed significant work that criticizes the neofunctionalist explanation of legal integration and argues for a historic institutionalist approach to incorporate the context and counterforces that shape the legal integration process. [23] She argues that private litigants and national courts are constrained in their ability to influence national decision-makers without several necessary preconditions. Institutional structures, such as EU legislation and ECJ jurisprudence favoring the litigants' position, litigants who use legal arguments based on EU law in national courts, and national courts that support litigants' efforts through preliminary references or applying the more favorable ECJ

[18] Stone Sweet, Alec and Brunell, Thomas L., 1998b, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community", American Political Science Review, 92(1): 63–81, 64
[19] Alec Stone Sweet, *The Judicial Construction of Europe*. Oxford University Press, Oxford; New York, 2004, 4
[20] Ibid, 4
[21] Ibid, 21
[22] Ibid, 21
[23] Karen Alter, *The European Court's Political Power: Selected Essays*. Oxford; New York: Oxford University Press, 2009, 16

jurisprudence, must be present.[24] National courts' use of the preliminary reference system is not automatic but a political decision, as they cannot in practice be compelled to refer a case.[25] Alter also argued that it is only when interest groups find that "political channels are closed," that interest groups will turn to judicial recourse, due to the high cost of litigation.[26] This marks an important contribution in conceptualizing the conditions that structure private litigants' ability to make the contribution highlighted by Mattli and Slaughter.

Rachel Cichowski has contributed arguably the most comprehensive study of how societal actors take advantage of the EU legal system to further their policy goals in "The European Court and Civil Society." While her analysis spreads across both the national and supranational levels, her empirical account appears to concentrate on mobilization by supranational interest groups. She draws on New Institutionalism and Neofunctionalism to operationalize a framework that explains interest groups' role in the incremental advance of the scope of EU law. She notes that litigation and social activism create changes in "opportunity structures," such that "litigation enables individuals and groups, who are often disadvantaged in their own legal systems, to gain new rights at the national and EU level."[27] The judgments provided by the courts in response to litigation create "specific rights of access that provide protection to a class of people or interests that were not previously available…[and these new rights] provide the foundation for subsequent litigation strategies."[28] In Cichowski's account, it is the creation of new "opportunity structures" offered at the European level that incentivizes interest groups to pursue their goals through litigation and subsequently incrementally expand the scope of EU law. This process allows

[24] Ibid, 189
[25] Ibid, 195
[26] Ibid, 194
[27] Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*. Cambridge: Cambridge University Press, 2007, 5
[28] Cichowski, 11

individuals to counter national government's restrictive policies and expand the trajectory of EU legal integration in a direction that runs against Member State preferences.

The British paradox

The case of the United Kingdom's preliminary references regarding EU free movement and citizenship rights is uniquely suited to examine the role of newly empowered judiciaries and interest groups in advancing the scope of EU law and the protection offered by EU rights. The British government, political elites and British public developed a consensus on restrictive migration policies fairly early in the twentieth century, at a time when most other West European states were actively encouraging labor migration. This enduring preference towards restricting migration and migrants' rights finds expression in the British decision to avoid participation in most EU legislation attempting to confer EU rights upon Third Country Nationals.

Britain's evolution into a multicultural society and the subsequent hardening of public opinion and government policy towards immigration owes much to the liberal citizenship laws maintained as the last vestiges of its great empire. The British legislators did not imagine that the rights preserved in these laws, which were intended primarily to maintain relations with Old Commonwealth countries, would engender mass migration from the New Commonwealth. [29] However, the original British Nationality Act of 1948 granting entry rights to New Commonwealth citizens proved difficult to overturn until 1962.[30] The rebounding British economy and active recruitment in several industries attracted migrants in

[29] Randall Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation.* Oxford: Oxford University Press, 2000, 53
[30] Andrew Geddes, "Still Beyond Fortress Europe? Patterns and Pathways in EU Migration Policy." University of Liverpool Queen's Papers on Europeanisation No 4/2003, 32

large numbers, primarily from the West Indies, India, and Pakistan during this period.[31] The British authorities were remarkably uninvolved in this process and, unlike other European countries, quite reluctant to allow immigration to counter the post-war labor shortages.[32]

The problematization of New Commonwealth migrants as a threat to social cohesion of the United Kingdom, coupled with public opposition to immigration, led to the revision of British citizenship policy and the tightening of immigration controls.[33] While public opinion was never supportive of the large wave of migrants, a series of "race riots" and concerns over the migrants' inability to adapt to British society provoked the passage of the restrictive 1962 Commonwealth Immigrants Act. [34] The government would continue to couple migration control with preserving "race relations" and social stability, passing increasingly restrictive migration and nationality laws throughout the second half of the twentieth century.

Successful limitation of primary labor migration resulted in tightening controls on secondary migration, especially family reunion. By 1980, the Conservative government introduced what became the infamous "primary purpose rule," which gave the Home Office wide discretion in determining whether the applicants had created a "marriage of convenience."[35] It required applicants to prove that the "primary purpose" of marriage was not migration, and placed the burden of proof heavily upon the applicants.[36] South Asian families, who embrace marriage traditions that do not necessarily conform to the British ideal

[31] Rafaela M Dancygier, *Immigration and Conflict in Europe*. Cambridge: Cambridge University Press, 2010.77 citing Hiro 1991
[32] Dummett, Anne. "United Kingdom," in *Acquisition and Loss of Nationality: Policies and Trends in 15 European States. Volume 2: Country Analyses,* eds Rainer Bauböck, Eva Ersbøll, Kees Groenendijk & Harald Waldrauch. Amsterdam: Amsterdam University Press, 2006 p. 551-58, 565
[33] Note: the "Old Commonwealth" describes the pre-1945 Dominions of the British Empire, such as Austria, New Zealand, South Africa and Canada. The "New Commonwealth" describes the former colonies of the British Empire. Geddes, 36
[34] Dummett, 565
[35] Hansen, 232
[36] Katherine Charlsey et al.,"Marriage-related migration to the UK." *International Migration Review.* 46. (2012), 4

of love before marriage, were disproportionately affected by this rule.[37] This suspicion regarding the validity of marriage to a non-resident of the United Kingdom would be revived in later debates in the twenty-first century. Even in the twenty-first century, there is no right *per se* for a British citizen to be joined by their spouse in the United Kingdom.

While the consensus against liberal migration policies remains strong in the United Kingdom, it has demonstrated a preference for participating in coercive measures and avoiding liberalizing measures at the European level. The United Kingdom has famously balked at the idea of abolishing internal borders controls, and other member states originally set up the Schengen system outside of the aegis of the European Union partially to circumvent British opposition. [38] The Amsterdam Treaty of 1997 later incorporated the Schengen Agreements in the European *acquis communautaire* while also establishing the new Area of Freedom, Security and Justice (AFSJ). [39] During negotiations, both the United Kingdom and Ireland secured exemptions and opt-ins through the Schengen and the Title IV EC Protocols governing the AFSJ.[40] The Lisbon Treaty negotiations resulted in increasing the number of opt-outs for the United Kingdom from areas that were traditionally part of the third pillar and now constitute the Area of Freedom, Security and Justice. While abolishing the pillar system and placing the majority of the Justice and Home Affairs policy under co-decision making appeared as one of the great successes of the Lisbon Treaty, the UK seized upon the opportunity offered by the Lisbon Treaty negotiations to extend its existing opt-outs to criminal justice and policing matters.[41]

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[37] Charsley et al., 7
[38] Kathryn Costello, "Policy Primer: UK Migration Policy and EU Law." *The Migration Observatory at the University of Oxford*. http://migrationobservatory.ox.ac.uk/policy-primers/uk-migration-policy-and-eu-law (accessed May 19, 2012), 2
[39] Maria Fletcher, "The European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'." *European Constitutional Law Review*. 5. (2009): 71-98, 79
[40] Ibid, 79
[41] Ibid, 93

In exercising its opt-out, the United Kingdom exhibits a tendency towards supporting border and migration control mechanisms at the EU level and opting out of policies that may confer greater protection than British migration policies. The United Kingdom has opted into most of the directive regarding asylum adopted after Amsterdam as well as various EU measures intended to address 'illegal migration.' It has adopted the Carrier Sanctions Directive and participates in the Readmission Agreements signed with non-EU countries. The United Kingdom did not, however, opt into the controversial Return Directive. At the same time, the United Kingdom did not opt in to the few EU measures aimed at extending uniform rights to TCNs, such as the Directive on Family Reunification, the Long-term Residence Directive, and the Blue Card Directive.[42] For the purpose of this paper, however, it is important to note that the United Kingdom did not have a choice in accepting Directive 2004/38 (the Citizens' Directive) and transposed it into national law through the Immigration (Economic Area) Regulations 2006.[43] In sum, there emerges a clear trend of British avoidance of legislation attempting to confer EU rights protections onto Third Country Nationals.

Conceptual framework and research design

A Historical Institutionalist approach, introduced by Pierson and adapted by Alter, provides a suitable framework to analyze the discrepancy between the high number of preliminary references extending the scope of EU rights protection on TCNs originating from the British courts and the restrictive preferences of the British government. Historical institutionalism challenges the intergovernmentalist understanding of European integration by arguing that Member States are constrained in their ability to realize their preferences at the

[42] Costello, 6-7
[43] Anthony Valcke, "Five years of the Citizens Directive in the UK: Part 2." *Journal of Asylum and Nationality Law*. 25. no. 3 (2011): 217-244, 219

EU level and therefore cede control over the integration process. Pierson finds numerous gaps between the preferences of Member States and policy outcomes, which may occur due to "short-term" time horizons, the "unanticipated consequences" of policies, or the evolution of policies as social actors respond to make reversal of policy decisions more difficult.[44] Most importantly for this analysis, Pierson argued that policy-makers' past decisions create "lock-ins" that constrain the margin of maneuver for future policy-makers. Adapting to previous policies imposes a heavy cost on decision-makers intending to reverse them, such that reversal appears highly unattractive.[45]

Historical Institutionalism also places importance on the concept of "path-dependence," which Stone Sweet and other advocates of modified neofunctionalism have also incorporated to extend the traditional neofunctionalist concept of "spill-over." Path-dependency emphasizes how initial decisions or policy decisions become self-reinforcing over time, as "preceding steps in a particular direction induce further movement in the same direction." Path dependence works in conjunction with the concept of "increasing returns," wherein "the probability of further steps along the same path increases with each move down that path… because the *relative* benefits of the current activity compared with other possible options increase over time."[46] Historical Institutionalists differ from neofunctionalists in placing emphasis on how context and conditions structure the process. As Pollack argues, historical institutionalism's "most important contribution is not that institutions are 'sticky'… but rather their statements about the *conditions* under which we should expect feedback

[44] Paul Pierson. "The Path to European Integration: an Historical Institutionalist Approach." *Comparative Political Studies*. 29. no. 2 (1996): 177-194, 135-140, 156
[45] Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review*. 94. no. 2 (2000): 251-267, 254
[46] Ibid, p.252

effects and path-dependent behavior."[47] The institutions, or rules of the game, structure how actors engage with the process of European integration.

Its emphasis on "lock-ins," "path-dependence," and "increasing returns" makes Historical Institutionalism well suited for discussion of legal integration. Path dependence is a very useful concept for describing the role of precedent created by case law. As Stone Sweet described in his work, the "argumentation frameworks" created by judges in the process of justifying their decisions also incentivizes litigants to pursue similar claims in later cases. Furthermore, as Cichowski theorized in her empirical research, creation of new precedents through successful litigation changes opportunity structures to create new opportunities. This secondary effect can be characterized as the "increasing returns" which incentivize litigants to pursue and expand litigation strategies validated by successful cases. Policy-makers' future decisions can be constrained by the "new rules and procedures that expand rights" as these are institutionally "locked-in."

However, context is also very important in this appreciation of the dynamics of legal integration. Scholars agree that the national courts' use of the preliminary reference ruling system in conjunction with private litigants' use of the EU legal system due to the doctrines of supremacy and direct effect became important factors in the engine of European integration. However, as Alter points out, judiciaries can avoid using the preliminary reference system and acknowledging the supremacy of EU law and private litigants do not necessarily have to litigate on the basis of EU law. Once the necessary conditions are satisfied, the Historic Institutionalist framework can account for how Member State governments find themselves constrained during the policy-making process while private

[47] Pollack, Mark A. "The New Institutionalisms and European Integration." In *European Integration Theory*, 2nd ed., edited by Antje Wiener and Thomas Diez, 125-143. Oxford: Oxford Univeristy Press, 2009, 147

litigants make use of newly created opportunity structures to expand the rights granted through European Union membership.

To explore the legal integration dynamic, this study will use process tracing to follow how institutional "lock-ins" affect decision-making and analyze cases to find the trajectory of "path-dependency" in case law. Emphasizing the impact of the EU legal system on the British judiciary will satisfy several of the necessary pre-conditions Alter has highlighted for individual litigants to be able to engage in the EU legal system. Analysis of parliamentary debates and legislation will track the trajectory of decision-makers' attempts to institute more restrictive migration policies in the twenty-first century, emphasizing moments when policy-makers found themselves "locked-in" by EU legislation and ECJ jurisprudence. Examination of these "lock-ins" will also indicate changes in the opportunity structures available to interest groups attempting to influence policy-making. Analysis of patterns in the preliminary reference rulings arriving from British national courts before the ECJ, relying upon data compiled from the European Court of Justice website, will indicate individual litigants' willingness to rely upon litigation to achieve their aims and take advantage of the "opportunity structure" offered by the EU legal system. Examination of the new opportunities created by successful "argumentation frameworks" validated in ECJ judgments will demonstrate the logic of path-dependence and "increasing returns" as litigants expand the scope of EU law through litigation.

CHAPTER 2

In his comprehensive analysis of the development of British nationality law and the subsequent restrictive turn in migration policy, Hansen placed particular emphasis on "the

institutional origins of British restrictiveness."[48] Eschewing the argument that the United Kingdom has emerged as an anomaly due to its successful limitation of migration flows in the face of other European countries' failure due to "anti-immigrant sentiment, racism, and policians' responsiveness," he highlighted the UK's unique institutional systems as a determinative factor. Hansen focused on a "timid judiciary" and the "absence of a bill of rights" to account for how the United Kingdom's powerful executive could exhaust most legislative avenues to restrict migration.[49] These institutional features, combined with elevated and rising public opposition to legal migration, continue to influence the most recent restrictive turn in migration policy.

However, the Westminster model has also been subject to reform in the late twentieth and early twenty-first century. With the reform of the judiciary and the codification of the European law in the European Communities Act of 1972 and the Human Rights Act of 1998, the British judiciary is no longer silent. Its willingness to challenge the policies laid down by the executive while extending and defending its scope of judicial review, as noticeable in the field of migration policy, creates a far more favorable context for individual litigants to pursue their aims through the EU legal system. Furthermore, decision-makers attempting to enact restrictive migration and naturalization policies repeatedly found themselves "locked in" by EU law and ECJ jurisprudence. Even as the executive made successful inroads upon most migrants' access to the judicial system and introduced a punitive conditionality on most migrants' rights of residence, EEA nationals' recourse to the EU legal system and access to British residency remained more or less intact.

[48] Hansen, 237
[49] Ibid, 237

Judicial empowerment through the EU legal system

European legal integration and the principle of the supremacy of EU law presented a challenge for the United Kingdom's distinct legislative and judicial traditions. In principle, the doctrine of parliamentary sovereignty ensures that parliament cannot bind the actions of any future parliament, such that the courts' scope of judicial review can only assess compatibility of secondary legislation[50] with primary legislation. According to the conservative view of British constitutional doctrine, attempting to "entrench" certain legislation (such as a Bill of Rights) would be ineffectual, as any future ordinary Act passed by Parliament would override it.[51] The European Communities Act of 1972, which provided for the amendment of primary legislation in order to fulfill the United Kingdom's obligations to the European Union therefore presented a challenge to the doctrine of parliamentary sovereignty.[52] The doctrine of parliamentary sovereignty and the principle of supremacy could clash whenever new primary legislation enacted by Parliament came into conflict with previous secondary legislation enacted to transpose EU legislation.

Prior to the famous *Factortame* case, Craig argues that the courts adopted three separate approaches to avoid definitively resolving the conflict between British doctrine and EU principles. The courts may apply the conservative view that national law reigns supreme, read national provisions "in a manner designed to effectuate the dictates of Community law," or interpret the national law in conformity with the EC law.[53] The *Factortame* case *de facto* ceded to the supremacy of EC law, marking a definitive change in UK constitutional doctrine.

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[50] generally referred to as "delegated legislation" in the United Kingdom, rules and regulations passed by a state actor to implement Parliamentary Acts fall into this category

[51] Paul P. Craig, ''Report on the United Kingdom'', in A-M Slaughter *et al*. (eds.), *The European Court and National Courts — Doctrine and Jurisprudence*, 1998, pp. 195-224, 196

[52] Gavin Dewry. "The jurisprudence of British Euroscepticism: A strange banquet of fish and vegetables." *Utrecht Law Review.* 3. no. 2 (2007): 101-115, 101

[53] Craig, 198

The case concerned a challenge by Spanish fishermen of primary legislation restricting their access to British fisheries through the imposition of residency requirements.[54] The Divisional Court referred the question of compatibility with the 1988 Act to the ECJ. On the grounds that they might well go out of business while the ECJ was considering the case, the applicants also sought a temporary injunction of the 1988 Act or damages should the Act remain in effect and the ECJ eventually rule in their favor. The House of Lords referred this second question to the ECJ, asking "whether a 'gap' in the availability of administrative law remedies in the UK was itself a breach of EC law."[55] The ECJ decided in the applicants' favor in both cases, and the British national courts were newly empowered to grant interim injunctions in cases concerning Community law.[56]

The House of Lord's decision implementing the ECJ's preliminary reference ruling regarding the temporary injunction is notable for its justification of ceding to the supremacy of EU law. According to Craig's analysis of this particular case, Lord Bridge's judgment established a tentative contractarian and functional argument for the "loss of sovereignty" implied by recognition of the *de facto* primacy of EU law. His argument rests on the claim that the Parliament itself, in contracting to enter the European Union and accept the legal obligations of Membership, had established the grounds for accepting the supremacy of EU law as the consequences of Membership.[57] According to many legal scholars, as a result of the importance of precedence in the UK's common law system, "the formal supremacy of EC has been entrenched in British law."[58] In *R. v. Secretary of Employment, ex parte Equal Opportunities Commission* concerning the compatibility of national legislation with the Equal

[54] Dewry, 107
[55] Craig, 200
[56]Dewry, 107
[57] Craig, 203
[58] Damian Chalmers, "The Positioning of EU Judicial Politics within the United Kingdom." *West European Politics.* 23 no. 4 (2000): 169-210, 177

Pay Directive, the House of Lords established that it could disapply incompatible legislation itself even without referring the question to the ECJ.[59]

The *Thoburn v. Sunderland City Council Case* marked a cautious re-evaluation of the doctrine of parliamentary sovereignty in light of the *de facto* supremacy of EU law. The case concerned the conflict between primary legislation introduced in 1985 to allow continued use of both imperial and metric systems of measurement and secondary legislation amending this Act adopted through the European Communities act of 1972 transposing the EU Metrication Directive.[60] The court found against the applicants, and Lord Laws' judgment included a tentative attempt at delineating the United Kingdom's "unwritten constitution." The judgment distinguished between "ordinary" statutes, which may be repealed through new legislation, and "constitutional statutes," which cannot.[61] A "constitutional statute" would be one "which conditions the legal relationship between citizen and state in some general overarching manner, or enlarges or diminishes the scope of what we would new regard as constitutional rights."[62] The Human Rights Act and the European Communities Act 1972, along with legislation allowing for devolution of Scotland and Wales, fell in this category.[63] *Thoburn* did not delineate a complete victory for EU supremacy, as the Parliament could still expressly repeal "constitutional statutes" by passing an Act that specifically contradicts it. However, as Elliott argues, "such explicit contradiction of EU law is unthinkable… the "sovereign" ability of Parliament to derogate from EU law is essentially notional."[64]

Acknowledging the principle of the supremacy of EU law and extending its powers of judicial review by accepting that national courts may disapply national legislation found

[59] Dewry, 108
[60] Mark Elliott, "Parliamentary Sovereignty Under Pressure." *International Journal of Constitutional Law.* 2. No. 3 (2004): 545-554, 549
[61] Ibid, 550
[62] *Thoburn* v. *Sunderland City* Council [2002] 4 All ER 156, 185 as cited in Dawn Oliver, "Constitutional Scrutiny of Executive Bills." *Macquarie Law Journal.* 4 (2004): 33-55, 38
[63] Oliver, 37
[64] Elliott, 551

incompatible with EU law had a profound affect on the balance of powers within the United Kingdom. As Chalmers argues in his analysis of the effect of legal integration on the United Kingdom, "the resettlement of power about the application of EC law is essentially redistributive in nature" in which the Parliament constitutes seems to be "disempowered under any scenario through the possible extension of either executive or judicial power."[65] If, as Hansen contends, the weak judiciary and lack of an entrenched bill of rights contributed strongly to the creation of the United Kingdom's uniquely restrictive system of migration control in the twentieth century, policy-makers would face a judiciary empowered by extension of judicial review and litigants who could derive protection from the rights granted through "constitutional statutes" in the twenty-first.

This time period also appears foundational with regard to the British courts' relationship with the European legal system. During this period, the British courts' willingness to accept the *de facto* supremacy of EU law opened up participation in the EU legal system as another avenue for individual litigants' to achieve their aims. A quick glance at historical trends in the use of the preliminary reference procedure reveals that in the nineties the caseload from the United Kingdom began to steadily increase and later approximate that of other larger Member States.[66] In conjunction, these two developments satisfy Alter's necessary precondition for individuals' successful expansion of the scope of EU law that the national court system must support litigants' efforts through exercising its political decision to request a preliminary reference ruling and demonstrate a willingness to apply the more favorable ECJ jurisprudence. As the next section will demonstrate, pro-migrant interest groups found political channels closed and had little influence upon the

[65] Chalmers, 175
[66] European Court of Justice, "General Activity of the Court of Justice." Accessed May 24, 2012. http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-03/ra2011_stat_cour_provisoire_en.pdf.

British government's new restrictive migration legislation while the increasingly attractive option of recourse through the EU legal system remained open.

EU rights "lock-in" protections against restrictive measures

In reaction to a wide spread consensus that Britain's multiculturalist policies for immigrant communities had failed to integrate its substantial minority communities, the New Labour government began to introduce policies increasing the burned of integration borne by the migrant and aimed at limiting "unwanted migration." New Labour's policies incorporated openness towards economic migration and hostility towards asylum and family migration in response to rising public opposition to immigration. [67] The Conservative coalition government that came into power in 2010 continued this trend of increasing migration controls and tightening naturalization. While the government proposed increasingly restrictive legislation, analysis of the decision-making process finds that reference to Britain's obligations under European human rights law has been successfully used to counter some coercive measures. As Somerville argues, "laws have acted as a bulwark, obstructing policies rather than acting as their foundation."[68] During the decision-making process, decision-makers found themselves "locked-in" by EU and ECJ jurisprudence and incapable of restricting policies for this category, providing EU rights protection especially to family members, while imposing heavy restrictions on other Third Country Nationals through migration and naturalization policy. Furthermore, the government's attempts to restrict migrants' access to judicial recourse faced criticism from a judiciary partially empowered through its newly extended scope of judicial review and once again ran into the "lock-in" of the EU legal system.

[67] Will Somerville. 2007. *Immigration under New Labour*. Bristol: Policy Press, 133
[68] Somerville, 98

Restriction in an era of migration securitization

Originally, New Labour attempted to deliver on a campaign promise of easing previous restrictive policies. As an opposition party, they had opposed the Conservative government's attempt to tighten asylum legislation.[69] Accordingly, the government repealed the Primary Purpose Rule, and the number of transnational marriages rose sharply in response.[70] In 1998, Labour introduced a new policy on immigration and asylum in a White Paper entitled "Fairer, Faster, and Firmer" which included an amnesty to clear the backlog of thousands of asylum seekers who had been waiting for a decision since 1993. However, the government's 1999 Immigration and Asylum Act also introduced a reduction in appeal rights for asylum-seekers, a mechanism that New Labour would continue to pursue in later legislation.[71]

However, in the early twenty-first century riots, the Sangate refugee crisis, and the September 11 attacks contributed to a reversal of this open approach in the government's 2002 Nationality, Immigration and Asylum Act (NIAA). Commentators and politicians agreed that these incidents indicated a failure of previous immigration and immigrant integration policy.[72] The government's "Secure Borders, Safe Haven" paper demonstrated a renewed interest in constructing a common sense of Britishness.[73] The Nationality, Immigration and Asylum Act 2002 raised the barriers for naturalization, introducing an English language and "knowledge of life in the UK" citizenship tests, and placing increased

[69] Andrew Geddes, *The Politics of Migration and Immigration in Europe*. London: Sage, 2003, 43
[70] Hannah Cameron, An Examination of the Demographic Impact of 'Transnational Marriage' Between Citizens of the UK and the Indian Subcontinent. Presented at *Political Demography: Ethnic, National, and Religious Dimensions*, September 29-30, 2006, London School of Economics, p.3
[71] Burgess, Harvey. 2010. "Rough Justice: Inside the British Asylum System," Refuge 27(2): 122-132, 123
[72] Shamit Saggar and Will Somerville, *Building a British Model of Integration in an Era of Immigration: Policy Lessons for Government*. Washington, DC: Migration Policy Institute, 2012, 12
[73] McGhee, Derek. 2009. "The paths to citizenship: a critical examination of the immigration policy in Britain since 2001," Patterns of Prejudice 43(2) 41-62, 45

emphasis on citizenship ceremonies and oaths.[74] This naturalization requirement no longer privileged spouses, who previously only had to demonstrate "good character."[75] This naturalization requirement did not make an exception for spouses, who previously only had to demonstrate "good character."[76]

The Act also gave the Home Secretary the discretion to deprive citizens of their British citizenship if "the person has done anything seriously prejudicial to the vital interests of the UK or an overseas territory, provided the person would not become stateless."[77] The NIAA also made inroads onto the right to appeal by limiting appeals to the Immigration Appeal Tribunal (IAT) to points of law.[78] The legislation's provisions regarding the asylum system received the most attention, especially section 55, which denied welfare benefits to asylum-seekers unless they made a claim "as soon as reasonably applicable."[79] The Court of Appeal later found the government to have violated Article 3 of the European Convention on Human Rights in applying section 55 in the case of Limbuela, Tesema, and Adams.[80] This first clash between government policy and an empowered judiciary would mark the beginning of contestation between these two branches of government in the field of migration policy.

Parliamentary debate mostly centered on the NIAA's compatibility with the European Convention on Human Rights (ECHR), but parliamentarians raised several issues concerning

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[74] Sybille Regout . The integration of immigrant communities in France, the United Kingdom and the Netherlands: National models in a European context, Working Paper 2011/09 LSE Migration Studies Unit http://www2.lse.ac.uk/government/research/resgroups/MSU/documents/workingPapers/WP_2011_09.pdf (accessed May 13, 2012), 15

[75] Helen Williams. Crossing the New Institutionalist Divide: an empirical analysis of citizenship and nationality policy in the UK, 2000-2011. Presented at *Political Science Association: Political Studies Graduate Conference*, December 6-7, 2010, 10

[76] Ibid, 10

[77] Dummett, 573

[78] Sarah Craig and Fletcher Mariah. "The supervision of immigration and asylum appeals in the UK- taking stock." *International Journal of Refugee Law*. 24. no. 1 (2012): 60-84, 3

[79] "Nationality, Immigration and Asylum Act 2002." *The Guardian*, January 19, 2009. http://www.guardian.co.uk/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act?INTCMP=SRCH (accessed May 14, 2012).

[80] Secretary of State for the Home Department v Limbuela & Ors [2004] EWCA Civ 540 (21 May 2004)

whether the coercive measures also affected EEA family members benefitting from EU rights. At the Committee level, parliamentarians did ask whether family members of EEA citizens were excluded from the need to fulfill the new spousal requirements. Mr. Simon Hughes indicated that allowing discretion for the family of EEA nationals would counter the legislation's effect of producing a "common experience." The government answer revolved around the technicality that naturalization would require EEA family members to pass the citizenship test, although that would not preclude their right to freedom of movement. [81] It was implicit that this additional test had little bearing on EEA nationals' and their family members' right of residence. Furthermore, the Parliamentary Secretary of the Lord Chancellor's Department made a special dispensation for EEA nationals' and their family members' right to appeal, in order to preserve their existing appeal rights despite other restrictions on the right to appeal.[82] This would mark the first of many occasions where British policy-makers found that they could not restrict EEA nationals' rights to judicial recourse.

The "ouster clause" and the threat of judicial override

A subsequent piece of legislation, the Asylum and Immigration (Treatment of Claimants, etc) Act sparked a great deal of controversy and a heavily publicized clash between the government and the judiciary over the executive's attempt to restrict access to litigation. The Act was especially aimed towards restructuring the judicial system to limit asylum-seekers and migrants' recourse to judicial intervention. The government's consultation paper highlighted the growth of immigration and asylum appeals for judicial review and resulting

[81] H.C. Deb. 30 April 2002 col. 19-21
[82] H.C. Deb 21 May 2002 col 386-387

rise in legal costs.[83] In presenting the Bill before Parliament, the Lord Chancellor described the legislation as an important step in the government's strategy of encouraging "managed" migration while "preventing the abuse of the asylum system and illegal migration."[84] The Bill presented to Parliament intended to replace the previous system with a single-tier asylum and immigration tribunal and, even more controversially, included an "ouster clause" such that cases could not reach higher courts on a comprehensive list of grounds.[85] The eventual Act also made inroads onto family migration by targeting "sham marriages" and requiring non-EEA family members to receive written permission from the Home Office before marrying in Britain, reflecting increasing attempts to restrict family migration.[86] The controversial "ouster" clause met strong opposition from both the pro-migrant NGOs and the judiciary, revealing the salience of enduring parliamentary sovereignty in the age of increasing judicial activism.

The media portrayed the resulting furor and contestation between judiciary and executive as the "immigration wars," remarking that "the government and the judiciary seem on course for a head-on collision."[87] The members of the judiciary came out publicly in opposition to the "ouster clause," demonstrating a continued willingness to challenge the government's coercive measures in migration matters in particular. Two former Lords Chancellor (Mackay and Irvine) and Lord Woolf (serving as Lord Chief Justice of England Wales) criticized the clause heavily in parliamentary debate as well, and Lords Woolf and Steyn intimated that the courts might overrule the controversial clause in order to seek to

[83] Richard Rawlings. "Review, Revenge and Retreat." *Modern Law Review.* 68. no. 3 (2005): 378-410, 397
[84] 659 HL Deb 15 March 2004 col. 49-124
[85] Craig and Fletcher, 3
[86] "Asylum and Immigration (Treatment of Claimants) Act 2004." *The Guardian*, January 19, 2009. http://www.guardian.co.uk/commentisfree/libertycentral/2009/jan/15/civil-liberties-immigration (accessed May 14, 2012).
[87] Jeffrey Jowell. "Immigration wars." *The Guardian*, March 2, 2004. http://www.guardian.co.uk/world/2004/mar/02/law.immigration (accessed May 14, 2012).

uphold the rule of law.[88] John McGarry, in his careful analysis of the ouster clause, characterizes these remarks by the Law Lords as "a warning shot being fired over the bows of the Government, a shot which caused the Government to retreat."[89] The Bill was heavily reformed in Parliament, and the controversial clause itself was withdrawn. The single-tier Asylum and Immigrations Tribunal was later reformed in 2005 to include a mechanism for limited second appeal through "reconsideration," and this mechanism created what has been called a "tribunal within a tribunal."[90]

Analysis of the parliamentary debate on the Bill's limitations on the appeals process reveals that even the most restrictive version of the Bill, including the "ouster clause," would make concessions for the appeal rights of EEA nationals and their family members. The question of whether the limit on judicial review also encompassed references to the European Courts was also raised at the Committee level in the House of Commons on the grounds that allowing a continued right to appeal would create an absurd situation where EEA nationals would be subject to less control than British citizens. The government's response highlighted that "it is possible to petition and to take cases to the ECJ," and relations with European Courts were structured by treaty provisions and therefore not subject to the bill.[91] Even before the judiciary threatened the executive with a judicial override, decision-makers found themselves "locked-in" and incapable of constricting the appeals system made available to EEA nationals and their family members.

Not only did the judiciary contest the "ouster clause" by threatening to use its increased powers of judicial review, but it later overturned a central provision of the restrictions on family migration. In *Baiai and others v. Secretary of State for the Home*

[88] John McGarry. "Parliamentary Sovereignty, Judges and the Asylum and Immigration (Treatment of Claimants etc.) Bill." *Liverpool Law Review.* 26. (2005): 1-12, 9
[89] Ibid, 10
[90] Craig and Fletcher, 4
[91] 20 January 2004 HC column 291-309

Department, the British courts overruled the policy that migrants on limited leave must seek permission in the form of a Certificate of Approval from the Home Office to marry.[92] The policy, which arbitrarily excluded members of the Church of England from the requirement, was found incompatible with the United Kingdom's obligations under Article 12 of the European Convention on Human Rights. The blanket provision was found to be discriminatory.[93] Significantly, the lead case in the joint cases concerned an Algerian national who married a Polish worker exercising her right to freedom of movement as a worker in the United Kingdom. The litigants initially sought protection under both the ECHR and EU law, eventually joining with other litigants to seek remedies solely under the 1998 Human Rights Act.[94] The Joint Council on the Welfare of Migrants acted as an intervener in the case, and the initial attempt using an EEA national and her non-EEA family member indicates pro-migrant NGOs' willingness to use legal arguments based on EU law before the national courts to further their aims.

Immigration, Asylum, and Nationality Bill: constrained by EU jurisprudence

In 2005, the government introduced its "Controlling Our Borders" White Paper, which built on the immigrant integration strategy first introduced in 2002 to limit permanent migration from non-EU countries.[95] Blair's government continued to construe the "problem" of the failed integration of Britain's ethnic minorities as the result of the past failures of the immigration and asylum system.[96] The Immigration, Asylum and Nationality Bill of 2006 enacted the main provisions of the paper, including restricting appeal rights for those refused

[92] Baiai & Ors, R (On The Application of) v Secretary of State For The Home Department [2008] UKHL 53 (30 July 2008)
[93] You Rights: The Liberty Guide to Human Rights, "Immigration law and same sex partnerships." Accessed May 27, 2012. http://www.yourrights.org.uk/yourrights/right-to-receive-equal-treatment/sexual-orientation-and-transgender-discrimination/immigration.html.
[94] Secretary of State for the Home Department v Baiai & Ors [2007] EWCA Civ 478 (23 May 2007)
[95] Derek McGhee, "The Paths to Citizenship: a Critical Examination of the Immigration Policy in Britain since 2001." *Patterns of Prejudice*. 43. no. 2 (2009): 41-62, 53
[96] McGhee, p.52

entry to the UK for work, study, or as dependents.[97] The Act also granted the Home Secretary the right to remove British citizenship from dual nationals if this could be considered "conducive to the public good," as well as several coercive measures intended to further empower immigration officials to control migration.[98]

Debate of the Immigration, Asylum and Nationality Bill in Parliament marked the first occasion policy-makers openly debated the constraint placed on coercive measures not only by EU law but also by EU jurisprudence. At the Committee level, Dr Harris brought the *Chen*[99] case to the attention of the government, arguing that restricting the right of appeal for those who claim rights under Community law "may bring the UK into conflict with Community law and give rise to more expensive litigation, which could be avoided by providing for a right of appeal in such cases."[100] The government confirmed that it would allow continued appeal rights for the narrow category of non-EEA national family members who derive rights from their dependent EEA citizen children, relying upon Section 82 of the Nationality, Immigration and Asylum Act.[101] While the future amendment secured continued appeal rights for a very narrow category, this moment continued a trend of restricting access to judicial recourse for a broad category of migrants while maintaining the opportunity structure offered by the EU legal system for EEA nationals and their family members.

Next in the line of laws aimed at reforming the immigration and asylum system was the Tribunals, Courts and Enforcement Act of 2007, which a two-tier chamber structure,

[97] Mann, Ian. Legal Catch, "The Immigration, Asylum & Nationality Act 2006- Summary of Changes." Last modified March 19, 2007. Accessed May 20, 2012. http://legalcatch.wordpress.com/2007/03/19/the-immigration-asylum-nationality-act-2006-summary-of-changes/.
[98] "Immigration, Asylum and Nationality Act 2006." *The Guardian*, January 19, 2009. http://www.guardian.co.uk/commentisfree/libertycentral/2009/jan/15/immigration-asylum-nationality-act (accessed May 17, 2012).
[99] Chapter 3 will discuss the precedent by the *Chen* case in more detail
[100] HC 10 October 2005 col 112
[101] Home Office United Kingdom Border Agency, "European Casework Instructions." Last modified February 16 2012. Accessed May 20, 2012. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/.

replacing the problematic "tribunal within a tribunal" created earlier within the Asylum and Immigration Tribunal. There is now an Immigration and Asylum Chamber within the First Tier Tribunal and within the Upper Tribunal.[102] However, subsequent secondary legislation restricted rights of appeal by setting stricter time limits on registering an appeal and further restricting the grounds for appeal. Appeal to a higher court must concern an "important point of principle or practice" or "some compelling reason."[103] The UK Borders Act of 2007 substantially increased the authority's discretion and gave immigration officers "police-like powers, including increased detention, entry, search and seizure powers."[104] Most controversially, the Act allows automatic deportation of immigrants found guilty of certain offences or imprisoned for more than one year.[105] The following Criminal Justice and Immigration Act of 2008 built upon provisions introduced in the 2007 Act to introduce harsher penalties for immigrants found guilty of a wider arrange of offenses.

It was in the discussion of the "special immigration status" created by the 2008 Act that policy-makers once again found themselves constrained by EU law. The category was created for those under suspicion of involvement in terrorism or other serious crimes. Debate in the House of Commons questioned whether the category could refer to EEA nationals and their family members. The government response was a simple "no," clarifying that EEA and their family members cannot be designated according to the new scheme.[106]

Maintaining exceptional status for EEA nationals

In 2008, the government introduced "The Path to Citizenship: Next Steps in Reforming the Immigration System" with the intent of expanding conditionality in the

[102] Craig and Fletcher, 4-5
[103] Craig and Fletcher, 4-5
[104] "UK Borders Act 2007." *The Guardian*, January 19, 2009. http://www.guardian.co.uk/commentisfree/libertycentral/2008/dec/16/uk-borders-act (accessed May 20, 2012).
[105] As Chapter 3 will subsequently address, the seminal case of *Zambrano* provided a precedent to challenge this provision
[106] HC 27 November 2007 Col. 646

naturalization process to restrict access to citizenship. It was clear that the new citizenship scheme was to work in concert with a managed migration points system. The White Paper introduced the concept of a "probationary" period during which migrants must not only pass the "knowledge of life in the UK" and English language test introduced in previous legislation but provide evidence of active participation in British life through social and economic activities. [107] During this probationary period, migrants must prove that they have "earned" the right to British citizenship.[108] The Bill also included another revision of the immigration appeals system by aiming to transfer judicial review in certain cases to the Upper Tribunal.[109] The House of Lords reduced the more extensive reform proposed by the government, although judicial reviews considered "fresh claims" for asylum would be transferred from the High Court to the Upper Tribunal.[110]

One of the more vague and controversial aspects in the legislation was an "activity condition," which seemed to suggest migrants must also engage in voluntary service.[111] The effect of this "probationary citizenship," according to Alison Harvey, " is that "all save refugees and persons with humanitarian protection [would lose] many entitlements to services" and "those who fail their 'probation' may be starved out of the country."[112] Furthermore, eligible migrants would achieve "probationary status" after an initial "temporary period," which could also last five years. After successfully completing the

[107] McGhee, 56
[108] Van Houdt, Friso, Semin Suvarierol, and Willem Schinkel. "Neoliberal communitarian citizenship: Current trends towards 'earned citizenship' in the United Kingdom, France and the Netherlands." *International Sociology*. 26. no. 3 (2011): 408-432, p.412
[109] Alison Harvey. "The Borders, Citizenship and Immigration Act 2009." *Journal of Immigration Asylum and Nationality Law*. 24. no. 2 (2010): 118-133, 6
[110] "Borders, Citizenship and Immigration Act 2009." *The Guardian*, January 20, 2010. http://www.guardian.co.uk/commentisfree/libertycentral/2009/feb/13/civil-liberties-immigration (accessed May 20, 2012).
[111] Ibid
[112] Harvey, 6

probation, migrants would be eligible for "permanent residence," although the government included several incentives to apply for British citizenship instead of permanent residence.[113]

Debate in the parliament once again found decision-makers "locked-in" and incapable of extending the same coercive measures to EEA nationals and their family members. As "probationary citizenship" would not include a right to family reunification, there was concern that this could affect entry rights derived by non-EEA family members through EEA nationals. The government's Green Paper, as noted by Baroness Falkner in the House of Lords, did not address this tension.[114] Finally Lord Avebury included an amendment in the House of Lords to ensure that "migrants whose UK partners have a right of abode in the UK or have acquired a permanent entitlement to reside in the UK under European law can apply for citizenship on the same basis as if the UK partner was a British citizen or had permanent residence."[115] In its final form, and after substantial amendments passed by the Conservative opposition, the Act would include an exemption of both EEA nationals and their family members from "probationary citizenship" and allow for application for naturalization through the EEA family member's "permanent EEA entitlement."[116]

Although the Conservative Party successfully opposed substantive provisions of the restrictive 2009 Act while in opposition, it moved swiftly to limit open avenues for migration when elected to office in 2010. "Aware of the harm immigration did to the previous government's standing," it moved swiftly to restrict economic migration.[117] It also began consultation in the summer of 2011 to explore policy options for further constraining family

[113] Bridget Anderson. The Migration Observatory at the University of Oxford, "Citizenshp: What Is It and Why Does It Matter?" Last modified March 28, 2011. Accessed May 5, 2012.
[114] HL Deb 20 February 2008 col. 187
[115] HL Deb 2 March 2009 col. 545
[116] See Sections 39 and 40 of the Borders, Citizenship and Immigration Act 2009
[117] Townsend, Mark. "The Conservatives' immigration cap is a control that seems to suit nobody." *The Guardian*, November 28, 2010. http://www.guardian.co.uk/uk/2010/nov/28/theresa-may-immigration-cap (accessed May 21, 2012).

migration to the UK.[118] However, the new government's most contentiously debated migration reform concerns legislation aimed to introduce harsh cuts on the legal aid system in the United Kingdom. Parliamentary debate regarding this particular bill also demonstrates a growing understanding of the protections offered by the EU legal system to the non-EEA spouses of EEA nationals. The Legal Aid Act of 2012 and its implications will be discussed later.

Throughout New Labour's extensive legislation aiming to restrict avenues for family migration and increasing conditionality throughout the naturalization process, the executive faced opposition from an empowered judiciary and found itself constrained by EU law and ECJ jurisprudence. Decision-makers repeatedly constrained migrants' access to judicial recourse against migration decisions, but they found themselves "locked-in" and incapable of restricting the appeal rights of EEA nationals and their family members. Furthermore, the judiciary proved itself willing and able to use its newly extended scope of judicial review to threaten judicial override in the face of what it considered an unacceptable limitation of migrants' appeal rights. Pro-migrant NGOs also indicated a willingness to take advantage of the EU legal system to challenge restrictive national policies. Nevertheless, pro-migrant NGOs found themselves incapable of substantially influencing the restrictive course of the executive's migration policy. As the next chapter will demonstrate, NGOs' willingness to take advantage of the opportunity structure offered by the EU legal system, which remained largely intact throughout parliamentary efforts to influence the general system of judicial review, also substantially expanded the reach of the protection offered by EU rights.

[118] Home Office United Kingdom Border Agency, "Government launches consultation on family migration." Last modified July 13, 2011. Accessed May 20, 2012. http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/july/20-family-migration.

CHAPTER 3

During the past decade of increasingly restrictive migration and naturalization policies, pro-migrant NGOs have found themselves frustrated in their efforts to counter the domination of the majority's increasing hostility towards "unwanted" immigration. However, the opportunity structure presented by the EU legal system remained more or less intact, as the judiciary demonstrated a willingness to challenge restrictive migration policies by an extended scope of judicial review. Against the backdrop of these two contextual elements, as well as the increasing divergence between the rights protection available through EU law and British law, interest groups turned towards the EU legal system to achieve their policy aims. Through the dynamics of "path-dependence" and "increasing returns," judgments made in response to preliminary references from the United Kingdom contributed substantially to the evolution of an EU legal order in which EU citizenship rights are no longer solely activated by cross-border movement.

NGO Isolation from migration policy-making in the United Kingdom

Recent analyses of the policy-making networks that create migration policy in the United Kingdom find that state actors and political elites retain most of the power, while civil society finds itself marginalized. Paul Statham and Andrew Geddes addressed this issue in their review of political claims-making between 1990-2004. Their initial findings revealed "the dominance of national actors… [who] advance a stance that is clearly restrictionist."[119] Supporting the account presented in the previous chapter about increased judicial assertiveness in the realm of migration policy, they also found the greatest difference in policy preferences between an expansionary judiciary and a restrictive executive and

[119]Paul Statham and Andrew Geddes, "Elites and the "Organised Public": Who Drives British Immigration Policy and in Which Direction?" *West European Politics*. 29. no. 2 (2006): 248-69, 253

government branch. Comparison of this "discursive gulf" between the British judiciary and executive with the positions of both branches in France, Germany and Switzerland indicates much greater polarization between the government branches in Britain.[120] Once again, the data indicate a real evolution from the "timid judiciary" that had remained silent during the restrictionist period in the second half of the twentieth century.

While the state--and within the state the executive--dominates claims-making in Britain, pro-migrant NGOs appear relatively isolated.[121] Furthermore, Geddes and Somerville find that these public interest groups rely heavily on state funding, and the publicly funded Refugee Council is considered the most influential among them. [122] However, they also find a shared perception that the Immigration Law Practitioners' Association (ILPA) is relatively influential and considered an important ally for actors attempting to influence migration policy. [123] Somerville and Goodman come to similar conclusions regarding the exclusion of pro-migrant NGOs from policy-making in areas governing "unwanted" migration. [124] The Home Office dominates policy making in asylum and while the network informing naturalization policy is diffuse but still state-dominated.[125] More recent work by Gray and Statham reveals that pro-migrant NGOs are indeed transforming in response to Europeanization and active at the European level, confirming the hypothesis that "the dominant restrictionist stance of national governments provides a closed

[120] Ibid, 255
[121] Ibid, 256
[122] Ibid, 257
[123] Ibid, 265
[124] Will Somerville and Sarah Goodman, "The Role of Networks in the Development of UK Migration Policy." *Political Studies*. 58. no. 2010 (2010): 951-970.
Somerville, Will. *Immigration under New Labour*. Bristol: Policy Press, 2007, 967
[125] Ibid, 965

opportunity structure for pro-migrant advocacy, which will push NGOs to look for opportunities and resources elsewhere." [126]

Preliminary references from the UK regarding European citizenship

As the European Court of Justice's data indicates, the United Kingdom contributes the largest number of preliminary references using the EU legal framework to derive residence rights for the Third Country National family members of EU citizens (See Tables 1 and 2). This finding is reinforced by a comparison with the preliminary references concerning free movement of workers and citizenship presented from Germany and Belgium, the two other countries that have brought a high number of such cases to the ECJ.. Belgian cases rarely tried to derive residency rights through EU citizenship. Although attempts to derive residency through EU legal status have increased recently in Germany, most of these cases concerned the family members of Turkish nationals who are governed by an entirely different legal framework. By contrast, many of the British free movement cases attempting to expand residency rights through a family member's legal status could also be categorized as EU citizenship cases.

Research on the barristers and solicitors presenting these cases before the ECJ indicates a heavy NGO involvement, as lawyers arguing citizenship cases arriving from the United Kingdom were either instructed by NGOs or demonstrated substantial ties to strong pro-migrant public interest groups (See Tables 3 and 4). Furthermore, among the preliminary references following (and including) the famous *Carpenter* case, every case involved lawyers who were members of the ILPA, with the exception of *Ibrahim*. The *Ibrahim* case was also instructed by another pro-migrant NGO, Shelter, which Statham and

[126] Emily Gray and Paul Statham, "Becoming European? The Transformation of the British Pro-migrant NGO Sector in Response to Europeanization." *Journal of Common Market Studies*. 43. no. 4 (2005): 877-898, 884

Geddes consider one of the less influential.[127] The watershed moment for litigation deriving residency rights for Third Country Nationals through the EU legal status of family members is marked by the cases of *Carpenter* and *Baumbast.* The following section will analyze the dynamics of path-dependence in the *Carpenter*, *Baumbast*, and *Chen* cases, as litigants adopted and expanded successful "argumentation frameworks" to obtain residence for family members through EU rights which created new opportunity structures for future litigation.

The foundation for deriving rights from dependent EU citizen children

In the subsequent cases, the ECJ's judgments attempting to rationalize a derivative right of residence for family members through EU rights created a new opportunity structure allowing parents to derive residency rights through the rights of their children. [128] In the *Carpenter* case, the arguments of the litigants were based primarily on the EU rights of her spouse, but her status as the carer of his children proved determinative. The litigant argued that her deportation would restrict her husband's exercise of his freedom to provide services in the Member States, as she looked after his children in his absence.[129] In its judgment, the ECJ found the deportation order was not proportionate with respect to Mr. Carpenter's "right to respect for [Mr. Carpenter's] family life," and found that Mrs. Carpenter "appears to lead a truly family life [in the United Kingdom], in particular by looking after her husband's children from a previous marriage."[130] The Court stressed the importance of ensuring protection of EU citizens' right to family life by reading Article 49 on the freedom to establish services "in light of the fundamental right to respect for family life."[131] The case of *Carpenter* provided an important precedent for cases to follow, as it protected "the right of

[127] Ibid, 261
[128] Case C-60/00, Carpenter v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-6279
[129] Ibid, para 17
[130] Ibid, para 41-46
[131] Ibid, para 46

residence of a parent on the basis of the consequences of expulsion for the lives of other family members, and in that sense is the foundational case on parental rights beyond the [Citizens' Directive]."[132]

The Court was subsequently criticized for "creating a situation whereby the limits of the application of EC law have become incredibly uncertain," as the pretext The traditional understanding of EU law necessitated demonstration of a "cross-border element" that would engage the EU legal system. This case is considered a prime example of "the rather blurred boundary between situations falling inside or outside the scope of application of EU law" and constitutes one in a series of cases that pressured the Court to abandon the requirement of a cross-border element to engage EU law.[133]

The case of *Baumbast and R v Secretary of State for the Home Department,* which was decided shortly after *Carpenter,* dealt more explicitly with the residence rights that a non-EU national parent can derive through their EU citizen children.[134] The judgment concerned the joint cases of Mr. Baumbast and Mrs. Baumbast, a German national and his Colombian spouse, and R, an American mother who had divorced her French husband. The children of both families were enrolled to study in the United Kingdom. Mr. Baumbast originally entered the United Kingdom as a worker and brought his family with him, but subsequently sought employment with German companies in China and Lesotho. His residence permit and the residence documents of his wife and children were not renewed, as he no longer constituted a worker nor a person who could derive residency from the Directive on the Right of Residence.[135] R also entered and established herself in the United Kingdom

[132] Gareth Davies, "The Family Rights of European Children: Expulsion of Non-European Parents" EUI Working Paper RSCAS 2012/4, 2
[133] Peter van Elswege and Dimitriy Kochenov, "On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights." Accessed April 13, 2012. http://ssrn.com/abstract=1929765, 17
[134] Case C-413/99 Baumbast and R, 2002, E.C.R. I-7091
[135] Ibid, para 18

as the spouse of an EU national, and although they later divorced, he continued to live and work in the United Kingdom. The children lived with R as their primary carer but had regular contact with their father. R remarried a British national, and while her children received indefinite leave to remain in Britain as the children of a legally resident EU migrant worker, R's application was refused. [136]

The ECJ found in favor of the litigants, articulating that the children's right to reside to complete their education was guaranteed by Article 12 of Regulation No 1612/68 on the right to workers' freedom of movement. Their parents subsequently derived a right of residence through their children's right to education, as that right "necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member state during his studies."[137] *Baumbast* was also foundational in finding that the child's right to reside is independent of the migrant EU national's working status, as the fact that Mr. Baumbast was no longer a worker in the United Kingdom had no bearing on his children's right to study in the United Kingdom. The decision in *Baumbast*, as in *Carpenter*, established a derivative right of residence for the parents of children exercising a right granted by EU law in the United Kingdom. The weight accorded to the importance of a parent as a "primary carer" instead of the spousal relationship in determining the proportionality of the deportation order is notable. It is worth note that in both of these foundational cases, the lawyers representing the claimants were members of the ILPA, and the pursuit of a similar line of reasoning in subsequent British preliminary references indicates the instrumentality of this organization in prompting lawyers to take advantage of and expand the opportunity for deriving residency rights through the parent-child relationship.

[136] Ibid, para 26
[137] Ibid, para 73

Failure to expand rights through the spousal relationship

While the cases of *Carpenter* and *Baumbast* offered a new opportunity structure through the EU rights of children, the rulings against litigants in three cases attempting to rely upon a spouse's exercise of EU rights discouraged its continued use. In *Givane and Others*, the spouse and family members of a deceased Portugese national attempted to rely on the right of residence of family members of a deceased worker to repeal the refusal to grant them indefinite leave. The litigants disputed the requirement that the worker must be continually resident in the country before death in order for his family members to derive a right of residence. The ECJ upheld the decision of the Immigration Appeal Tribunal.[138] In *Kaba II*, a Yugoslav national returned to dispute the ECJ's judgment in a previous case considering his to be granted indefinite leave to remain as the spouse of a French national before fulfilling the four years set out by British immigration rules, on the grounds that spouses of people "present and settled in the United Kingdom" received a more favorable one-year waiting period.[139] Once again, the ECJ found against the litigant, upholding that "as Community law stands at present, the right of nationals of a Member State to reside in another Member State is not unconditional."[140] Neither of the "argumentation frameworks" presented in these cases achieved much success in accomplishing their goals, disincentivizing their later use.

The following *Akrich* case has been criticized as "the worst judgment in the long history of the Court of Justice" and appeared to definitively discourage use of the spousal relationship to derive residency rights.[141] The case concerned the spouse of a British national whom the British migration authorities had deported several times and who returned to the United Kingdom illegally before marrying a British citizen. He was detained and deported

[138] Case C-257/00 - Nani Givane and Others v Secretary of State for the Home Department
[139] Case C-466/00 - Kaba II [2003] ECR I-2219
[140] Ibid, para 30
[141] "Free movement, immigration control and constitutional conflict." *European Constitutional Law Review.* 5. no. 2 (2009): 173-196, 4

again, joining his spouse in Ireland. The couple attempted to return to the United Kingdom within seven months, invoking the precedent established in the *Surinder Singh* case allowing the spouses of EEA nationals who exercised their right to freedom of movement to receive a right of residence upon return to the United Kingdom.[142] The Secretary of State for the Home Department refused, on the grounds that the couple's move to Ireland was "designed to manufacture a right of residence for Mr. Akrich on his return to the United Kingdom and thereby to evade the provisions of the United Kingdom's national legislation, and that Mrs Akrich had not been genuinely exercising rights under the EC Treaty as a worker in another Member State."[143] The ECJ decided against Mr. Akrich, finding that "a national of a non-Member State married to a citizen of the Union 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" in order to benefit from the Regulation on the free movement of workers.[144] Following this string of unsuccessful cases aimed at expanding TCNs' right to residence through the EU rights of their spouses, the British national courts would not refer another case attempting to do so until after the precedent set in *Akrich* was overturned in *Metock*.[145] Instead, lawyers focused on the new opportunity structure set forth in *Carpenter* and *Baumbast* to attempt to derive residency rights through the parent-child relationship.

Expanding the right of residence through the rights of dependent children

Building substantially on the precedents established in *Carpenter* and *Baumbast*, in the following years, British courts would refer three seminal cases aiming to expand the residency rights of parents through the rights of their dependent children. The successful and repeated use of the parent-child relationship indicates the logic of "increasing returns" in

[142] Case C-109/01, Sec'y of State for the Home Dep't v. Akrich, 2003 E.C.R. I-9607 para 36-37
[143] Ibid, para 37
[144] Ibid, para 61
[145] See Table 2

litigants' behavior before the European Court. The case of *Chen* will receive the most attention, as it not only continued to expand on the precedent set by previous case law but also proved foundational in providing the "argumentation framework" for the landmark case of *Zambrano* and its subsequent assertion that a cross-border element would no longer constitute a necessary condition for the invocation of EU rights. The cases of *Teixeira* and *Ibrahim* entrenched the principle of deriving residency through the rights of dependent children more thoroughly into ECJ jurisprudence, but were ultimately less influential in paving the way towards expanding the scope of EU law to an internal situation.

By triggering a cross-border element, the family in *Chen* was able to seek protection under European Union law and obtain a guarantee to a right of residence for the parents of children benefitting from attribution of citizenship at birth. In accordance with Irish nationality law, Katherine was attributed Irish citizenship automatically after her birth in Belfast as she was not entitled to citizenship of any other country.[146] Catherine and her mother moved to Cardiff, staying within the United Kingdom. The court emphasized that neither Catherine nor her mother had the right to move and reside in the UK through British law, as Catherine's right to reside was entirely dependent upon her Irish citizenship.[147] The UK Secretary of State for the Home Department refused to give Catherine and Mrs. Chen residence, on the grounds that Catherine was not exercising any rights derived from EU law and her mother was also not entitled to residence.[148]

The ECJ held in favor of the *Chen* family, finding that "a young child can take advantage of the rights of free movement and residence guaranteed by Community law. Striking down the Irish position, the ECJ held that exercising the right to freedom of

[146] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. secretary of State for the Home Department* [2004] ECR I-9925, para. 9-10
[147] Ibid, para. 12
[148] Ibid, para. 14

movement enshrined in EU law is not dependent upon age. The ECJ extended a right to residence to Mrs. Chen through her daughter's access to EU rights as an Irish citizen precisely because at such a young age she was financially and emotionally dependent upon her mother. The court argued that although Mrs. Chen deliberately chose to give birth in Northern Ireland in order to acquire Irish citizenship for her child, the motivations behind did not undermine the legality of Catherine's acquisition of Irish citizenship.[149]

Furthermore, Catherine's right to residence within the UK through her Irish citizenship was therefore guaranteed through both primary and secondary EU legislation; Article 18 EC on the free movement of persons and Directive 90/34 on the right of residence. However, because Catherine is in fact dependent on her mother, Mrs. Chen cannot derive a right of residence through Directive 90/34 as Catherine's 'dependent.'[150] But Catherine's dependency on her mother does imply that depriving a parent of the right to residence would "deprive the child's right of residence of any useful effect."[151] In order for a child such as Catherine to exercise her right to free movement, she is entitled to be accompanied by her primary carer in the host Member State for an indefinite period of time.[152] Here the argument built substantially on the precedent established in *Carpenter* and *Baumbast* to establish the important legal principle that dependent minor children were entitled to be accompanied by their parents, provided that the parent and child were economically self-sufficient, in order for the children to exercise their right to free movement. While the parents of the children in *Baumbast* received their right to residence through secondary legislation, *Chen* found the right to be joined by a "primary carer" was enshrined in the Treaty article itself.

[149] Ibid, para. 38
[150] Ibid, para. 44
[151] Ibid, para 45
[152] Ibid, para 47

The *Teixeira* and *Ibrahim* cases also employed the "argumentation framework" first presented in *Baumbast* to pursue expansion of the derived rights made available to the "primary carers" of children exercising their EU rights. In both cases the family applied for housing assistance based on residence status attributed through EU law, which the British authorities rejected. *Ibrahim* concerned the Somali spouse of a Danish national who joined him with their children after he ceased working in the United Kingdom.[153] He subsequently left the United Kingdom and they separated following his departure while she stayed with the children. Ms. Ibrahim was not self-sufficient and relied on state benefits and state health insurance. In *Teixeira,* Ms. Teixeira was herself an EU citizen as a Portuguese national who arrived to the United Kingdom with her Portuguese husband. They subsequently divorced, and Ms. Teixeira ceased working.[154] The children of both families were enrolled to study in the United Kingdom, and derived a right to reside from Article 12 of Regulation No 1612/68. In both cases, the mothers appealed the decision denying their applications for housing assistance, on the grounds that they had a derivative right to reside based on their status as "the primary carer" of their children. The cases of *Ibrahim* and *Teixeira* contested the stipulation that "the primary carer" of children who derive a right of residence through their right to study in the host-State must demonstrate self-sufficiency, although in the context of residency rights of EU parents, not Third Country Nationals.

The ECJ found in favor of the litigants, reaffirming that children's right to access education in a host-State is independent of the parents' working status. Furthermore, in both cases the court supported the claim of the litigants that children's right of residence and the parents' derivate right of residence is not subject to means-testing and does not require the families to prove self-sufficiency. While the Court's judgment in *Teixeira* and *Ibrahim* did

[153] Case C-310/08 Ibrahim and Secretary of State for the Home Department [2010] ECR I-1065 para 9-11
[154] Case C-480/08 Teixeira [2010] ECR I-1107 para 20-28

not have implications for the continual erosion of the necessity of providing a strong "cross-border" element, the success achieved in these cases confirmed the continued success of "argumentation frameworks" deriving rights of residence for parents through the EU rights conferred upon dependent children and the "increasing returns" of engaging this particular line of reasoning before the Court. Furthermore, we find a heavy NGO presence in these cases, as one of the lawyers representing the Ibrahim family was instructed by Shelter, the pro-migrant NGO, while an active member of the ILPA represented both the Chen and the Teixeira families (See Table 3). This is another indication of interest groups' willingness to expand available opportunity structures to achieve their aims.

Residency rights granted to non-national parents in internal situations

The landmark case of *Zambrano*, a preliminary reference from Belgium, built upon the argumentation introduced in *Carpenter* and Baumbast and substantially expanded in *Chen* wherein a non-national parent's residency rights can be derived from a child's EU citizenship. However, *Zambrano* famously removed the necessity of incorporating a cross-border element in order to trigger EU protection of a child's right to accompaniment by a parent in order to enjoy her rights as an EU citizen. The ruling in *Zambrano* established definitively that the reach of Article 20 and Article 21, which constitute the core provisions of EU citizenship, were not automatically linked to the exercise of the right to freedom of movement. As Wiesbrock notes, "the judgment confirms the existence of a right of residence in certain situations that is distinct from the right to (future) movement."[155]

Mr. Zambrano and his wife were Colombian nationals whose second and third children were born in Belgium. Under Colombian law, they were not automatically granted Colombian citizenship, as they were born abroad. The Belgian nationality law, conforming to

[155] Anje Wiesbrock, "Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case." *European Union Law Review* 36:6 (2011): 861-873, 865

the policies of the majority of European member states, automatically granted citizenship to children born on Belgian territory who would otherwise be stateless.[156] Mr. and Mrs. Ruiz Zambrano applied for residence through Article 40 of the Law of 15 December 1980, which attributed residence to the ascendants of a Belgian citizen. The Belgian authorities rejected his application for residence on the grounds that he had deliberately avoided registering his children with the Colombian consular authorities so that they would have access to Belgian citizenship with the intent of deriving a right to residence through his children's nationality.[157] He was subsequently denied access to unemployment benefits, which he contested in the Belgian courts. The central question addressed by the ECJ in *Zambrano* concerned whether Mr. Zambrano was entitled to residence as the parent of Belgian national children.[158]

The arguments of the plaintiff relied heavily on the derivative right of residency granted to the parents of EU citizen children established in *Chen*.[159] The greatest difference between *Chen* and *Zambrano* appeared to be the lack of a cross-border element, as the plaintiff's children had never left the home State that gave them EU citizenship. The ECJ extended the scope of citizenship rights by interpreting Article 20 to preclude national measures that would have the effect of forcing citizen children "to leave the territory of the Union in order to accompany their parents."[160] In this way, the protection of EU citizens' "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union" extended the reach of EU law to an internal situation. In the wake of *Zambrano*, the continued necessity of coupling EU citizenship with freedom of movement came under question. At the same time, the "normative premise that the law will not consider

[156] Case C-34/09 *Gerardo Ruiz* ***Zambrano*** *v Office national de lémploi (ONEM)* [2011], para 20-22
[157] ECJ para 23
[158] ECJ para 35
[159] ECJ para 34
[160] ECJ, para 44

the abandonment of minor children by the parents who care for them as an acceptable option legitimating the expulsion of those parents" became elevated in the EU legal hierarchy of norms.[161]

Applying Zambrano in the United Kingdom

Following *Zambrano*, the British national courts were tasked with interpreting this new strand of EU jurisprudence in *Omotunde.* This case concerned the automatic deportation of a Nigerian national on the grounds of fraudulent criminal activity. He appealed the deportation order on the grounds that, as the primary carer of his son, he had a derivative right of residence. His minor son (Tolu) received British citizenship several days after the First Tier Tribunal[162] rejected Mr. Omotunde's appeal.[163] However, in its judgment, the First Tier Tribunal had argued that it was not unreasonable to expect Tolu to return with his father to Nigeria.[164]

The decision of the Upper Tribunal overturned the ruling in the First Tier Tribunal, placing priority on Mr. Omotunde's derivative right of residence as the primary carer of a British and EU citizen. In its judgment, the Court built both on British case law from *ZH (Tanzania)* and the precedent set in *Zambrano*. The Court differentiated between the factual circumstances in *Omotunde* and the ones in *Zambrano* by clarifying that "The Court of Justice did not have to consider how Article 20 would be applied if there were strong public interest reasons to expel a non-national parent."[165] The Court concluded that, in the absence of further guidance, the principle of proportionality will continue to apply, and that the determination of proportionality in the interference of a right to family life will follow the

[161] Davies, 8
[162] Introduced in 2007, see Chapter 2
[163] Omotunde (best interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247(IAC), para 15
[164] Ibid, para 14
[165] Ibid

guidance set forth in *ZH (Tanzania).* Nonetheless, Mr. Omotunde's fraudulent criminal activity would not constitute a serious enough offence to justify the interference with the right to family life, while "Tolu has a strong claim to continue to enjoy the support of his father and continue to be brought up in the United Kingdom [which] is in his best interests as a British citizen and a citizen of the European Union."[166]

While the case does not actively engage with the "genuine enjoyments" test set forth in *Zambrano,* it does establish an important precedent.[167] The Court accepted that EU law is now applicable in what would have otherwise been considered an internal situation, and acknowledges that "national courts must engage with the question whether removal of a particular parent will 'deprive [the child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."[168] As this test case concerned factually different circumstances, it remains to be seen how *Zambrano* will be applied in cases that do not require weighing strong public interest reasons for expulsion in the balance.

Nonetheless, it is evident that the strong pro-migrant NGO presence taking advantage of the opportunity structure offered by EU law to seek judicial recourse against restrictive national policies contributed substantially to the development of EU case law that ultimately extended the scope of EU law. The "the argumentation frameworks" provided and expanded by the members of British pro-migrant interest groups before the Court of Justice provided the basis for extending the reach of European law into what was previously an internal situation.

[166] Ibid para 38
[167] Colin Yeo, "Omotunde (best interests - Zambrano applied - Razgar) Nigeria." *Journal of Immigration Asylum and Nationality Law.* 25. no. 4 (2011): 391-393, 3
[168] Ibid para 32

The Politics of legal aid

The heavy NGO presence in the court cases seeking to derive residency rights for Third Country Nationals through the EU rights of their family members indicates that pro-migrant interest groups are using recourse to the EU legal system to counter the restrictive trend in the United Kingdom's migration and naturalization policies. The preliminary reference rulings brought by lawyers who were either instructed by or affiliated with NGOs substantially widened the scope of EU rights protection available to Third Country Nationals through EU citizenship. As Chalmers and Chaves have identified, the willingness to exercise "countermajoritarian politics" through litigation is an important factor in the process of European legal integration.[169] Much of the previous analysis has emphasized the importance of the contextual factors highlighted by Karen Alter in facilitating individual litigants' access to the EU legal system. However, the recent Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) and its vast cuts on the legal aid available to migration and asylum law constitutes a threat to this facet of EU legal integration. As early as 2001, Lisa Conant argued that the generous legal aid system in the United Kingdom facilitates individuals' appeals argued on the grounds of European rights, and may have contributed to the higher proportion of preliminary references aimed at expanding the scope of gender equality rights arriving from the British courts.[170] The trend of increasing cuts, culminating in the LASPO Act, may substantially limit pro-migrant NGOs' ability to access the opportunity structures offered through the EU legal system.

Under the previous government, the Legal Service Commission began a trend of restricting legal aid to migration and asylum cases through changes in the rules governing

[169] Chalmers, Damian and Mariana Chaves. "Variable Influences and Dynamics of Judicial Integration in the Union." Presented at *European Union Studies Association Conference 2011*, March 3-5, 2011, Boston, Massachusetts, 21

[170] Conant, Lisa. "Europeanization and the Courts" in *Transforming Europe*, eds. Maria Green Cowles, James A. Caporaso, and Thomas Risse. Ithaca, NY: Cornell University Press, 2001 pp. 97–115, 112

access. In 2004, the Legal Services Commission (LSC) imposed severe limits on the amount it was willing to dispense for legal advice, paying for only three hours' work on immigration applications and five hours for asylum cases. Lawyers contested these limits and found a measure of success, but found themselves frustrated by the requirement to re-apply to the LSC for further funding.[171] In the same year, the LSC ended "staged billing" and would only provide remuneration once lawyers finished work on cases.[172] In 2007, the LSC implemented reforms to replace the previous system of payment by the hour with a fixed-fee system despite objections from the non-profit sector.[173]

These previous waves of legal aid cuts had vast consequences on the pro-migrant NGO sector. Most famously, Refugee and Migrant Justice (previously the Refugee Legal Centre) went into administration in 2010, faulting the retrospective fee system. The organization claimed that the LSC's refusal to pay the 2 million pounds in fees that it owed contributed to its financial collapse.[174] In 2011, the Immigration Advisory Service (coincidentally the NGO that instructed the solicitor arguing the case of *McCarthy* before the ECJ) also went into administration. While the LSC was quick to claim that the IAS closed due to financial mismanagement, others were quick to draw parallels between the end of RMJ and its sister organization.[175] Frances Weber claims that, beyond these non-profit organizations, "hundreds of legal aid immigration firm have been forced out of business" following the cuts.[176]

The LASPO bill proposed to institute blanket cuts on legal aid for immigration and family reunification, making some exceptions for asylum cases. As in the previous bills

[171] Anne Singh and Frances Webber, 'Excluding migrants from justice: the legal aid cuts', IRR Briefing Paper No. 7, available at: http://www.irr.org.uk/pdf2/IRR_Briefing_No.7.pdf, 2
[172] Ibid, 3
[173] Gabrielle Garton Grimwood "Legal aid in immigration cases: the collapse of Refugee and Migrant Justice." SN/HA/5661 26 July 2010, p.3
[174] Weber, Frances. 2012. "UK: the real 'immigration debate'". Race & Class 53(91): p.91-98, p.93
[175] http://www.guardian.co.uk/law/2011/jul/11/immigration-advisory-service-closes-blames-government
[176] Ibid, 93

before Parliament, the government found itself "locked in" and incapable of limiting recourse to the EU legal system. In response to consultation, the government introduced an "exceptional funding scheme" that would provide legal aid in cases "that would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law."[177] The subsequent amendment, proposed by the government, gave access to exceptional funding in cases making reference to "enforceable EU rights," rather than "under European law."[178]

Even though, once again, a special provision was made to ensure continued access to judicial recourse through the EU legal system, it is uncertain how the scheme will operate once instituted. Furthermore, the LASPO Act successfully enacted vast cuts on legal aid available for migration cases (with the exception of cases concerning victims of domestic abuse) and the fall of RMJ and IAS may be followed by a powerful contraction of the pro-migrant NGO sector in the United Kingdom. While it is worth note that members of the ILPA and not necessarily lawyers instructed by other pro-migrant NGOs presented most of the cases before the ECJ, the contraction of the pro-migrant NGO network could have vast consequences of ILPA membership as well. The next couple of years will serve as a test case of the importance of a generous system of legal aid in allowing NGOs to exercise countermajoritarian politics through the EU legal system.

[177] 2011 June Reform of Legal Aid in England and Wales: the Government Response, 37
[178] HC Deb 08 September 2011 Col. 459

CONCLUSION

As trends in the United Kingdom's preliminary reference rulings suggest, European legal integration has indeed empowered social actors to counter national policies through litigation in the EU legal system. While the United Kingdom achieved notoriety as a country of "zero immigration" during a period when the powerful executive maintained control over the decision-making process, today the European legal integration process has empowered both the judiciary and interest groups to challenge restrictive British migration and naturalization policies. At the same time, the executive finds itself "locked in" at numerous points during the decision-making process, as throughout attempts to harden migration control, increase conditionality during naturalization, and restrict appeal rights, decision-makers cannot extend the same restrictive policies to EEA nationals or their family members. Despite multiple inroads on the appeals system governing immigration and asylum, the avenues to judicial recourse through the EU legal system remain more or less intact.

The pro-migrant NGOs have responded to the new opportunity structure offered by EU legal integration, anchored by activist national courts willing to refer cases to the ECJ, by litigating to expand the scope of rights protection offered to the non-EEA family members of EEA nationals. By reusing and expanding successful "argumentation frameworks," British pro-migrant NGOs have firmly entrenched the primacy of preserving the parent-child relationship in the jurisprudence of the ECJ. This precedent and the subsequent elevation of the parent-child relationship in the EU hierarchy of norms laid the foundation for the seminal case of *Zambrano* and the extension of EU citizenship rights into a domain that would be previously considered an "internal situation" and beyond the reach of EU law. British pro-migrant NGOs, isolated and excluded from the decision-making process in the United Kingdom, have contributed substantially to the expansion of EU citizenship rights. This

account demonstrates clearly that the trajectory of legal integration, even in areas that are at the heart of the national sovereignty such as migration and citizenship, progresses beyond the ambit of Member State control.

There are several areas where this study raises more questions than it presumes to answer. While this account does not attempt to definitively identify the importance of a generous legal aid scheme in ensuring individual litigants' access to the EU legal system, developments in the United Kingdom following the vast cuts on aid to migration and asylum litigation should provide a clear test case for answering that question. It would be interesting to see whether governments that find themselves frustrated in controlling the outcomes of rights-based litigation can reassert their control by cutting down the source of legal challenges. Furthermore, while comparison with preliminary reference rulings from other countries received little attention, a cross-country study comparing pro-migrant interest groups' mobilization and influence in the decision-making process and the subsequent litigation before the courts would surely provide a better understanding of the factors that structure interest groups' pursuit of their aims within the EU legal system.

APPENDIX

TABLE 1

Preliminary references cases closed from 01/01/1990 through 5/5/2012	Citizenship	Citizenship and Free Movement of Workers	Proportion of Citizenship Cases within "Citizenship and Free Movement of Workers"
AT	3	29	0.1034
BE	**9**	**44**	**0.2045**
DE	**14**	**106**	**0.1320**
DK	0	1	
EL	1	11	0.0909
ES	0	8	
FI	2	4	0.5
FR	1	13	0.0769
IE	1	2	0.5
IT	2	29	0.0689
LUX	1	12	0.0833
NL	8	30	0.2666
PT	0	1	

SE	1	5	0.2
UK	**12**	**31**	**0.3870**

Source: the data were compiled using the search tool at the http://curia.europa.eu/jcms/jcms/j_6/ website, specifying closed cases from 01/01/1990 through 05/05/2012 and "preliminary reference ruling," "Citizenship of the Union," and "Free movement of workers" in the search query.

TABLE 2

Trends in Claims for Residency Rights (R) for Third Country Nationals (TCN) in Preliminary Reference Cases Closed from 01/01/1990 through 05/05/2012

UK free movement cases	R for TCN?	UK citizenship cases	R for TCN ?	GE free movement cases	R for TCN ?	DE citizenship cases	R for TCN ?	BE free movement cases	R for TCN?	BE citizenship cases	R for TCN?
c-370/90 Surinder Singh: spouse of EEA national	Y	C-192/99 - Kaur	N	C-227/89 Rönfeldt	N	C-482/01 - Orfanopoulos and Oliveri: parent of EEA national	Y	C-297/88 - Dzodzi	N	C-148/02 - Garcia Avello	N
c-175/94 Gallagher	N	C-413/99 - Baumbast and R: spouse and parent of EEA nationals	Y	C-308/89 - Di Leo	N	C-403/03 - Schempp	N	C-363/89 - Roux	N	C-456/02 - Trojani	N
c-237/94 O'Flynn	N	C-138/02 - Collins	N	C-376/89 - Giagounid	N	C-96/04 - Familiensache : Standesamt Stadt Niebüll	N	C-18/90 - Office national de l'emploi v Kziber	N	C-258/04 - Ioannidis	N

c-65/95 - Shingara and Radiom	N	C-200/02 - Zhu and Chen	Y	C-10/90 - Masgio	N	C-76/05 - Schwarz and Gootjes - Schwarz	N	C-204/90 - Bachmann v Belgian State	N	C-406/04 - De Cuyper	N
c-171/96 Pereira roque	N	C-209/03 - Bidar	N	C-332/90 - Steen	N	C-11/06 - Morgan	N	C-310/90 - Nationale Raad van de Orde der Architecten v Egle	N	C-11/07 - Eckelkamp	N
c-37/98 Savas	N	C-310/08 – Ibrahim: spouse and parent of EEA nationals	Y	C-171/91 Tsiotras	N	C-353/06 - Grunkin and Paul	N	C-153/91 - Petit	N	C-73/08 - Bressol and Others	N
c-356/98 Kaba: spouse of EEA national	Y	C-480/08 - Teixeira: EEA national parent of EEA nationals	Y	C-237/91 - Kus	N	C-524/06 - Huber	N	C-165/91 - Van Munster	N	C-34/09 - Ruiz Zambrano: parent of EEA national children	Y
c-357/98 Yiadom	N	C-162/09 - Lassal	N	C-19/92 - Kraus	N	C-221/07 - Zablocka-Weyhermüller	N	C-166/91 - Bauer	N		

c-63/99 Gloszczuk	N	C-325/09 - Dias	N	C-272/92 - Spotti	N	C-22/08 - Vatsouras and Koupatantze	N	C-243/91 - Belgian State v Taghavi	N		
c-60/00 Carpenter: spouse and parent of EEA nationals	Y	C-434/09 - McCarthy: spouse of EEA national	Y	C-319/92 - Haim	N	C-135/08 - Rottmann	N	C-310/91 - Schmid	N		
c-257/00 Givane and others: family of deceased EEA national	Y			C-132/93 - Steen	N	C-145/09 - Tsakouridis	N	C-415/93 - Union royale belge des sociétés de football association and Others	N		
c-466/00 Kaba - spouse of EEA national	Y			C-279/93 - Finanzamt Köln-Altstadt	N	C-240/10 - Schulz-Delzers and Schulz	N	C-447/93 - Dreessen	N		

c-109/01 Akrich: spouse of EEA national	Y			C-355/93 - Eroglu	N	C-424/10 - Ziolkowski and Szeja	N	C-176/96 - Lehtonen and Castors Braine	N		
c-296/06 Payir and others	N			C-7/94 - Landesamt für Ausbildungsförder ung Nordrhein-Westfalen v Gaal	N			C-93/97 - Fédération belge des chambres syndicales de médecins	N		
				C-164/94 - Aranitis	N			C-262/97 - Engelbrecht	N		
				C-214/94 - Boukhalfa	N			C-9/98 - Agostini	N		
				C-315/94 - de Vos	N			C-224/98 - D'Hoop	N		
				C-171/95 - Tetik v	N			C-184/99 - Grzelczyk	N		
				C-266/95 - Merino García	N			C-393/99 - Hervein and Others	N		

				C-285/95 - Kol	N			C-459/99 - MRAX: spouse of EEA national	Y		
				C-351/95 - Kadiman: Family of Turkish national	Y			C-232/01 - van Lent	N		
				C-386/95 - Eker	N			C-431/01 - Mertens	N		
				C-15/96 - Schöning-Kougebetopoulou	N			C-92/02 - Kristiansen	N		
				C-36/96 - Günaydin and Others	N			C-293/03 - My	N		
				C-64/96 - Land Nordrhein-Westfalen v Uecker and Jacquet / Land Nordrhein-Westfalen	N			C-151/04 - Nadin and Nadin-Lux	N		
				C-85/96 - Martínez Sala	N			C-249/04 - Allard	N		
				C-98/96 - Ertanir	N			C-346/05 - Chateignier	N		

				C-131/96 - Mora Romero	N			C-436/05 - De Graaf and Daniels	N		
				C-160/96 - Molenaar	N			C-364/08 - Vandermeir	N		
				C-291/96 - Grado and Bashir	N			C-379/09 - Casteels	N		
				C-1/97 - Birden	N			C-25/10 - Missionswerk Werner Heukelbach	N		
				C-210/97 - Akman	N						
				C-329/97 - Ergat: family of Turkish national	Y						
				C-340/97 - Nazli and Others	N						
				C-391/97 - Gschwind	N						
				C-424/97 - Haim	N						
				C-102/98 - Kocak and Örs	N						

				C-135/99 – Elsen	N						
				C-162/00 - Pokrzeptowicz-Meyer	N						
				C-188/00 – Kurz	N						
				C-438/00 - Deutscher Handballbund	N						
				C-209/01 - Schilling and Fleck-Schilling	N						
				C-317/01 - Abatay and Others	N						
				C-25/02 - Rinke	N						
				C-35/02 - Vogel	N						
				C-47/02 - Anker and Others	N						
				C-102/02 - Beuttenmüller	N						
				C-275/02 - Ayaz: stepson of Turkish national	Y						
				C-400/02 – Merida	N						

				C-152/03 - Ritter-Coulais	N						
				C-230/03 – Sedef	N						
				C-373/03 - Aydinli	N						
				C-374/03 – Gürol	N						
				C-502/04 - Torun: child of Turkish national	Y						
				C-4/05 – Güzeli	N						
				C-97/05 - Gattoussi	N						
				C-208/05 – ITC	N						
				C-212/05 - Hartmann	N						
				C-213/05 – Geven	N						
				C-325/05 – Derin	N						
				C-228/06 - Soysal and Savatli	N						
				C-349/06 - Polat: child of Turkish national	Y						
				C-438/06 – Greser	N						

				C-325/05 – Derin	N						
				C-228/06 - Soysal and Savatli	N						
				C-94/07 - Raccanelli	N						
				C-208/07 – von Chamier-Glisczinski	N						
				C-337/07 – Altun	N						
				C-22/08 - Vatsouras and Koupatantze	N						
				C-303/08 - Bozkurt: spouse of Turkish national	Y						
				C-371/08 - Ziebell: child of Turkish national	Y						
				C-462/08 - Bekleyen: child of Turkish national	Y						
				C-14/09 - Genc	N						

Source: the data were compiled using the search tool at the http://curia.europa.eu/jcms/jcms/j_6/ website, specifying closed cases from 01/01/1990 through 05/05/2012 and "preliminary reference ruling," "Citizenship of the Union," and "Free movement of workers" in the search query. Cases falling under both "Citizenship of the Union" and "Free movement of workers" were placed under "citizenship cases" in the table above.

TABLE 3

Citizenship Cases	Lawyer and NGO Affiliation
C-434/09 - McCarthy	Simon Cox, instructed by the Immigration Advisory Service and member of the ILPA
C-325/09 - Dias	Adrian Berry, member of the ILPA
C-162/09 - Lassal	Richard Drabble instructed by the Child Poverty Action Group
C-480/08 - Teixeira	Adrian Berry, member of the ILPA
C-310/08 - Ibrahim	Nicola Rodgers instructed by Shelter
C-209/03 - Bidar	Martin Soorjoo, member of the ILPA
C-200/02 - Zhu and Chen	Adrian Berry, member of the ILPA
C-138/02 - Collins	Richard Drabble instructed by the Child Poverty Action Group
C-413/99 - Baumbast and R	Laurie Fransman, member of the ILPA
C-192/99 - Kaur	Richard Drabble and Manjit Gill, founding member of the Discrimination Law Association and frequent contributor to ILPA trainings

Sources: the court cases listed and the barristers' websites, as well search queries on the ILPA website

TABLE 4

Free Movement of Workers Cases	Lawyer and NGO Affiliation
C-109/01 - Akrich	Tim Eicke, member of the ILPA
C-466/00 - Kaba	Tim Eicke, member of the ILPA
C-257/00 - Givane and Others	Unknown
C-60/00 - Carpenter	John Walsh, member of the ILPA

Sources: the court cases listed and the barristers' websites, as well search queries on the ILPA website

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Case C-257/00 - Nani Givane and Others v Secretary of State for the Home Department

Case C-466/00 - Kaba II [2003] ECR I-2219

Case C-109/01, Sec'y of State for the Home Dep't v. Akrich, 2003 E.C.R. I-9607

Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. secretary of State for the Home Department* [2004] ECR I-9925

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