A BRIDE RUN: FREE MOVEMENT OF PEOPLE IN THE EU, THE FUNDAMENTAL RIGHT TO FAMILY, FAMILY REUNIFICATION, AND THE CASE OF DENMARK

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Danish legislation has made it increasingly difficult for Danish citizens who have not exercised their free movement (static EU citizens) to have their third country national (TCN) family member(s) reside with them in Denmark under family reunification. On the other hand, EU citizens (mobile EU citizens) who have exercised their free movement and reside in Denmark with their TCN family member(s), have access to far more generous EU family reunification legislation. This article explores the extent to which reverse discrimination effects Danish citizens compared to mobile EU compatriots living in Denmark and how this interacts with EU citizenship rights such as free movement and the fundamental right to family life.

1 INTRODUCTION

The Danish word for wedding is *bryllup*. It has roots in Old Norse, *brúd* meaning bride and *laup* meaning run. The etymology behind this word is said to stem from Viking traditions where the bride would move from her home, running away to the new husband's village – a bride run. Denmark has seemingly veered away from its Viking conceptions of marriage, as the Denmark of today is making it increasingly more difficult for third country nationals (TCN) to reside in Denmark with their Danish spouse, on the grounds of family reunification. Conversely, the European Union (EU) sees free movement of people as integral for the single market, that therefore includes the movement of accompanying TCN family members of EU citizens within Member States through comparatively generous family reunification legislation. Through using Denmark as a case study, the relationship between Danish legislation and EU legislation on family reunification will be analysed. Some claim this relationship has birthed a reverse discrimination phenomenon for Danish nationals, who are subject to stricter regulations than their EU compatriots residing in Denmark.[1] The right to family life is protected in a number of different international and European human rights instruments that have been ratified by Denmark. This instance of supposed reverse discrimination in the context of EU citizenship and fundamental rights can be seen in the EU jurisprudence, where the Court has interpreted both primary and secondary EU law, to in some instances broaden the right of free movement of EU citizens and their accompanying TCN family members, while in other instances placing limitations. Danish legislation for family reunification will then be examined alongside EU legislation to then ultimately assess the extent of this supposed discrimination.

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[1] Peter van Elsuwege, 'The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?' in Lucia Serena Rossi and Federico Casolari (eds), *The EU After Lisbon* (Springer 2014), 163.

2 LEGAL FRAMEWORK

The four freedoms of the European Union, being the freedom of movement of goods, services, capital and people, are considered as the cornerstone to the single market and common currency as well as being seen as one of the greatest achievements of the European integration project.[2] Free movement rights have evolved past their original inceptions as single market components to the 'hardcore of the political project of the EU, providing the basis for powerful, symbolic and functional tools for the construction for supranational identity through the reinforcement of supranational rights'.[3] The legislative protections for the free movement of EU citizens and their families will firstly be outlined, along with the established legislative protections of EU citizenship, followed by the protections for the fundamental right to family life.

2.1 EU CITIZENSHIP AND FREE MOVEMENT OF PEOPLE

The Treaty of the Functioning of the European Union (TFEU) establishes citizenship of the union, and states that 'every person holding nationality of a Member State shall be a citizen of the Union' that shall be 'additional and not replace national citizenship'[4] ensuring the right to move and reside freely within the territory of the Member States[5] subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.[6] The TFEU then sets out to guarantee the freedom of movement of workers to provide services throughout the Union.[7] The TFEU also establishes that discrimination on the grounds of nationality is prohibited, with the European Parliament and the Council to adopt rules designed to prohibit such discrimination.[8]

Directive 2004/38/EC ('the Directive') consolidated all previous regulations and directives on free movement of people within the EU and the greater European Economic Area (EEA).[9] The preamble of the Directive states that 'Union citizenship should be the fundamental status of nationals of the Member States when exercising their right of free movement and residence'[10] and then continues that this right of freedom of movement should, 'if exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality'.[11] The Directive sets out to define a Union

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[2] Jacques Delors Institut Berlin and Bertelsmann Stiftung, 'The four freedoms in the EU: Are they inseparable?' (2017) 1 <https://institutdelors.eu/wp-content/uploads/2018/01/171024jdigrundfreiheitenenwebeinzelseitena4.pdf> accessed 1 March 2021.

[3] Sara Sánchez, 'Free Movement Law within the European Union: Workers, Citizens and Third-Country Nationals' in Marion Panizzon, Gottfried Zürchera and Elisa Fornalé (eds) *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (Palgrave Macmillan 2015), 362.

[4] Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47, art. 20(1).

[5] ibid art. 20(2)(a).

[6] ibid art. 21.

[7] ibid art. 45.

[8] ibid art. 18.

[9] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Directive 2004/38/EC) [2004] OJ L 158/77, preamble.

[10] ibid recital 3.

[11] ibid recital 5.

citizen meaning 'any person having the nationality of a Member State'[12] and a family member as 'the spouse, partner with whom the Union citizen has contracted a registered partnership… the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner… [or] the dependant direct relatives in the ascending line and those of the spouse'.[13] The Directive also defines the host Member State as 'the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence'.[14] The Directive is to apply to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members'[15] and states that the Member State shall facilitate entry and residence' for a 'partner with whom the Union citizen has a durable relationship, duly attested'.[16] EU citizens have the right to reside in another Member State for up to three months without any conditions apart from a valid identity card or passport with the same rules applying 'to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen'.[17] After these three months, the EU citizen and their family members can continue residing in the host Member State if the EU citizen is; a worker or self-employed person, have sufficient resources for themselves and family members as well as comprehensive health insurance or must be a student with sufficient resources and health insurance.[18] Member States also have the right to adopt necessary measures to 'refuse, terminate or withdraw any right conferred by [the] Directive in the case of abuse of rights or fraud, such as marriages of convenience'.[19]

2.2 RIGHT TO FAMILY LIFE

A number of international human rights instruments protect the right of individuals to have their established family life respected along with the right to have and maintain family relationships.[20] On an international law level, this has often come into conflict with immigration policies of states, since deporting family members who are not validly residing in their territory can therefore violate the right to family life for the family members remaining, with international practice usually holding that the right of a State to control immigration outweighs the right to family life except in the most limited circumstances.[21] UN monitoring bodies have emphasised that it's not their task to 'supervise the government's immigration policy, but to examine whether the applicant's right to respect for family life has been ensured without discrimination'.[22] On a European level, the Charter of Fundamental Rights of the European Union protects the right to family life,[23] and gained legally binding

[12] Directive 2004/38/EC art. 2(1).
[13] ibid art. 2(2).
[14] ibid art. 2(3).
[15] ibid art. 3(1).
[16] ibid art. 3(2).
[17] ibid art. 6.
[18] ibid art. 7.
[19] ibid art. 35.
[20] See Universal Declaration of Human Rights [1948] (UDHR) art. 16, along with International Covenant on Civil and Political Rights [1966] (ICCPR) art. 23.
[21] Richard Burchill, 'The Right to Live Wherever You Want? The Right to Family Life Following the UN Human Rights Committee's Decision in *Winata*' (2003) 21(2) Netherlands Quarterly of Human Rights 225.
[22] *Abdulaziz and others v UK* App no 9214/80; 9473/81; 9474/81 (ECtHR, 24 April 1985).
[23] Charter of Fundamental Rights of the European Union [2012] 2012/C 326/02, arts. 7 and 33.

status to Member States after the Lisbon Treaty entered into force in 2009.[24] The European Convention for Human Rights also protects the right to respect for private and family life.[25]

EU citizenship and free movement of people are established EU legal principles that are integral in European integration. The Directive 2004/38/EC, that was then transposed into Member State national legislation, ensures the right of EU citizens to move and reside in other Member States with their family so long as the EU citizen is working, self-sufficient or studying. The fundamental right to family life is protected on an international and European level.

3 LEARNING FROM THE CJEU

Free movement of people and the development of EU citizenship has progressively advanced through secondary law, as discussed above, along with case law from ECJ, meaning that EU freedom of movement is usually considered to be a 'complex succession of legislative and jurisprudential events that continuously interact with each other'.[26] The CJEU has adjudicated on matters relating to the free movement of people within the EU with their accompanying third-country national ('TCN') family members in conjunction with fundamental rights such as the right to family life, establishing a strong foundation of case law on the matter.

3.1 CASE LAW BROADENING FAMILY REUNIFICATION RIGHTS OF EU CITIZENS AND THEIR ACCOMPANYING TCN FAMILY MEMBERS

The CJEU has played an active role in interpreting the treaties, directives, and regulations, that ensures free movement of people with their accompanying non-EU family members within the territories of the EU. As outlined in Chapter 2.1, it is clear that the EU robustly protects the freedom of movement of EU citizens along with their family, however is national law or EU law to apply when an EU citizen and their accompanying TCN family member return to the home EU state? In *Singh*, the Court established that since the couple, in this case, moved together to another Member State to work, then returned to the home state of the EU citizen (the UK), that EU law should then apply to them instead of national legislation on immigration.[27] The Court held that the right in EU law for a person to move to another Member State must also include the right to return, otherwise a person would be deterred from exercising this right in the first place.[28] The right of residence to a dependent family member of a returning EU national to the Member State of origin after exercising the right to free movement was granted by the Court, even when the returning EU national is

[24] Treaty on European Union (TEU) [2016] OJ C202/13 art. 6(1).
[25] European Convention for Human Rights [1950] art. 8(1). See also art. 8(2) where exceptions are listed: 'except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others'
[26] Sanchez (n 3) 362.
[27] Case C-370/90 *Surinder Singh* EU:C:1992:296, paras 21-25. Cf. Cases C-64/96 and C-65/96 *Uecker and Jacquet* EU:C:1997:285, paras 24 and 25, where the Court affirmed that a third-country national spouse could not rely on a Treaty right, since the European spouse was residing in their home state and had not yet exercised their right to free movement.
[28] *Singh* (n 27) para 23.

economically inactive.[29] The Court also affirmed that a TCN spouse of an EU citizen who was residing in a host Member State need not have been lawfully residing in another Member State prior to arrival in that host Member State, therefore being a spouse is sufficient to give derivative residence rights per the holding of *Metock*.[30]

Per Chapter 2.1, the Directive clearly confers the right of dependants to move and reside with the EU citizen, however in *Zhu and Chen* where the EU citizen (sponsor) in this case was an infant child and the dependant was the primary caregiver (her mother who was a Chinese national), the Court held that the mother must be given residence by the host Member State under EU law, as failing to do so would deprive the EU citizen of her right of residence to any 'useful effect' and thereby violate the child's fundamental right to family life.[31] The Chinese couple, working and residing in the UK, moved to Northern Ireland to give birth to their second daughter, who per Irish *jus solis* legislation at the time received Irish citizenship instead of UK citizenship, and therefore per EU family reunification law, claimed residence in the host Member State as a direct family member of the infant EU citizen who had sufficient funds (from the parents) to reside in the UK. The Court interpreted 'dependant' in the Directive as to not include the relationship between mother daughter,[32] as a dependent is characterised by the fact that 'material support for the family member is provided by the holder of the right of residence'.[33] However, the Court's decision rested on the fact that if her mother was denied residence with her daughter, the newborn daughter would not be able to live alone in the UK, thereby effectively upholding the right to family.[34] The reasoning of the Court in protecting the family unit under EU law is interesting here, as the mother only moved to Northern Ireland (still in UK territory) and therefore despite there being some physical movement paired with clever legal counsel through utilising previously generous Irish citizenship legislation, the Court still applied EU law without there technically being any exercise of this freedom of movement by the citizen.[35]

In another landmark decision, the Court goes a step further in *Ruiz Zambrano* to protect the free movement of EU citizens and their accompanying family members, by ensuring a derivative right of residence for Colombian parents who gave birth to two children in Belgium while applying for asylum (gaining Belgian citizenship per *jus solis*).[36] The Court held that the refusal to grant a right of residence to TCNs (the parents) has the effect of depriving citizens of the Union (the two children) of the 'genuine enjoyment' of the substance of the

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[29] Case C-291/05 *Eind* EU:C:2007:771, para 45.
[30] Case C-127/08 *Metock* EU:C:2008:449, para 80.
[31] Case C-200/02 *Zhu and Chen* EU:C:2004:639, paras 42-47.
[32] ibid para 42.
[33] ibid para 43.
[34] ibid paras 45 and 46. Note also that Chinese citizenship legislation does not allow for dual citizenship, hence why if the mother was denied right of residence under family reunification, the child would have to give up her EU citizenship to gain Chinese citizenship in order to live with her family. It would be interesting to know how the Court would have approached a scenario with analogous facts with a third country that allowed dual citizenship.
[35] Case C-34/09 *Ruiz Zambrano* EU:C:2011:124, Opinion of AG Sharpston, para 78. See also Case C-60/00 *Carpenter* EU:C:2002:434, paras 45 and 46, where a self-employed EU citizen who provided some services in other Member States, could confer a derivative right of residence on his third-country national partner, in the interests of protecting the right to family life, as his children from a previous marriage also resided with him in the UK.
[36] See Opinion of AG Sharpston on *Ruiz Zambrano* (n 35) footnote 8 where it is stated that according to Colombian law, children born outside the territory of Colombia do not automatically acquire nationality unless and express declaration is made with the consular officials – which was not made by the parents.

rights conferred by virtue of this status.[37] Interestingly, the Court makes no reference to fundamental rights but instead gives, in my opinion, a short simplistic reasoning, choosing only to look at the potential effects on the genuine enjoyment of the right to freedom of movement, unlike in *Zhu and Chen*. This is a stark contrast to the expansive, inspiring and humanist opinion of AG Sharpston, who claimed citizenship should be distinguished from economic freedoms, stating that 'citizens are not "resources" employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights'.[38] She concludes that Article 21 of the TFEU contains separate rights: the right to reside separate from the right to free movement.[39] She also explores the concept of reverse discrimination in that 'static' union citizens 'were thereby still left to suffer the potential consequences of reverse discrimination even though the rights of 'mobile' union citizens were significantly extended'.[40]

In *Lounes*, the Court further protects the 'mobile' EU citizen, holding that a migrant EU citizen who naturalises to become a dual EU citizen cannot be compared to a native citizen – because they've exercised their free movement, they will continue to enjoy the family reunification rights as EU migrants.[41] Here it was a Spanish woman who had been living in the UK for 15 years who met and then subsequently married her TCN husband after naturalising. He requested derivative residence under the Directive but was denied.[42] How was her situation different to an indigenous Briton? If the Directive is designed to 'give a helping hand' to EU citizens who exercise their free movement and therefore need extra support in having their family members accompany (be they EU citizens or not), it doesn't make sense to allow the naturalised citizen this right but not static native citizens. However, here the CJEU takes a policy and purposive decision, that if EU citizens fear loss of rights when they naturalise, this would ultimately hinder integration.[43]

3.2 CASE LAW RESTRICTING FAMILY REUNIFICATION RIGHTS OF EU CITIZENS AND THEIR ACCOMPANYING TCN FAMILY MEMBERS

Alternatively, the Court has also delivered judgments that have restricted family reunification rights of EU citizens and their TCN national family members. *McCarthy* was a case concerning dual EU citizenship, as in *Lounes,* but with a UK citizen having never exercised her right to free movement and obtaining Irish citizenship (becoming a dual citizen) all before requesting her TCN husband reside in the UK with her per the Directive. The Court affirmed the general rule of EU citizenship[44] but placed limitations on her husband's right to access EU family reunification rights since she was economically inactive having always lived on welfare payments and therefore not satisfying the EU residence requirements.[45] The Court here establishes that even though the EU citizen here had dual EU citizenship, she

[37] Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi* EU:C:2011:124, paras 42 and 45.
[38] Opinion of AG Sharpston on *Ruiz Zambrano* (n 35) para 127.
[39] ibid para 100.
[40] ibid para 133.
[41] Case C-165/16 *Lounes v Secretary of State for the Home Department* EU:C:2017:862, para 62.
[42] ibid paras 14-27.
[43] Gareth Davies, 'Lounes, Naturalisation and Brexit' (*European Law Blog*, 5 March 2018) <https://europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit/> accessed 3 March 2021.
[44] TFEU arts. 20 and 21, see also *Ruiz Zambrano* (n 37) para 41.
[45] Case C-434/09 *McCarthy v Secretary of State for the Home Department* EU:C:2011:277, para 57.

could not access EU family reunification rights through having exercised her free movement as an Irish citizen in the UK, as she did not satisfy the residence requirements of Article 7 of the Directive and was residing in the UK through her UK citizenship, meaning UK family reunification legislation applied. The Court interestingly diverges from *Ruiz Zambrano* and *Zhu and Chen* and establishes that a relationship of a carer-parent is to be considered essential for the continued residence of the citizen on the territory of the Union, whereas in *McCarthy* the same logic did not apply to the company of a spouse.[46]

Continuing with instances of economically inactive citizens, in *Dano*, a Romanian national and her infant son (who although had been born in Germany, was a Romanian national) both lived with her sister who materially supported them, while also receiving maintenance and child support payments from the German Government.[47] When she was denied unemployment benefits from the German Government despite not seeking work, she unsuccessfully claimed this amounted to discrimination as a German national would have been entitled to these payments. The Court, without making any reference to fundamental rights, presumably influenced by the Brexit climate and appeasing eurosceptic fears of 'benefit tourism',[48] held that the economically inactive Ms Dano had moved to Germany for the sole purpose of claiming benefits and was without sufficient resources, meaning she did not have right of residence.[49]

In *Dereci*, the Court offered a limited clarification to the scope of 'genuine enjoyment' test established in *Ruiz Zambrano*, where it held that EU law does not preclude a Member State from refusing to allow a TCN national to reside in its territory with their dependent EU citizen children, so long as this refusal does not lead to the denial of the genuine enjoyment of the substance of rights conferred by the virtue of their status as EU citizen.[50] The Court ultimately held that the desirability of residing together with a family member is insufficient to prove that the EU citizen will be forced to leave the Union territory in the event that the right is not granted.[51]

On the topic of 'genuine and effective residence' the Court has established that when an EU citizen merely makes weekend visits to their TCN spouse residing in another Member State[52] or an initial two-month visit followed by holiday visits to their TCN national spouse working in another Member State,[53] this is ultimately insufficient to be considered as having exercised their free movement and therefore have their family members gain a derivative residence from EU law when returning to the home state.

The CJEU has handed down a number of judgments in the area of free movement of EU citizens and their accompanying family members in conjunction with the fundamental right to family. The Court has established in key judgments that citizens returning to their home state with TCN family members can access EU family reunification rights instead of

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[46] Stephen Coutts, 'Case C- 434-09: Shirley McCarthy v. Secretary of State for the Home Department' (*Globalcit,* 10 May 2011) <https://globalcit.eu/case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department/> accessed 5 March 2021.
[47] Case C-333/13 *Dano v Jobcenter Leipzig* EU:C:2014:2358, para 33.
[48] Case C-333/13 *Dano* EU:C:2014:2358, Opinion of AG Wathelet, para 131.
[49] *Dano* (n 47) para 84.
[50] Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, para 76.
[51] ibid para 67.
[52] Case C-456/12 *O v Minister voor Imigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* EU:C:2014:135, para 61-63.
[53] ibid para 61.

sometimes stricter national legislation, that the TCN spouse need not have resided in another Member State with the EU citizen, that a TCN primary care-giver (parent) can access EU family reunification rights as not doing so would deprive the young EU citizen of their right to family and their potential for genuine enjoyment of the right to free movement, regardless of whether this young child is still only a 'static' EU citizen. On the other hand, the Court has placed some limitations (particularly in instances of economically inactive citizens) holding that an EU citizen must at very least not be a burden on social assistance of the host Member State in order to gain genuine residence in the host Member State and therefore access EU family reunification rights, that if a dual EU citizen is economically inactive in their home state and hasn't actively exercised their free movement previously they will be unable to access EU family reunification rights, and that when exercising free movement, the residence must be genuine and effective in order to access EU family reunification rights when returning to the EU citizens home state.

4 THE CASE OF DENMARK

Denmark is considered to have some of the strictest immigration policies in Europe.[54] Historically, immigration to Denmark can be categorised from the 1970s as initially having concern for human rights of the immigrants, yet then changing after increased immigration throughout the 80s and 90s, where the new concern became integration to Danish society and adopting fundamental Danish values, with a gradual reduction to residence rights for TCNs and TCN family members.[55] In the 2000s, Denmark began taking the neoliberal route of immigration by further restricting the entry of unprofitable migrant segments, but also going further to significantly restrict pathways to citizenship, intensifying employment and education incentives, along with withdrawing the legal right to family reunification and introducing the controversial 24-year rule.[56] The notorious 24-year rule was introduced in the 2000s and required the couple (foreign spouse applying for residence with Danish resident) to have aggregate ties to Denmark stronger than to those of any other country[57] in a purported effort to prevent forced involuntary marriages.[58] In the ECtHR case of *Biao*, a Ghanaian born man moved to Denmark to work and later naturalised as a Danish citizen, where he attempted to bring back his spouse who he married in Ghana. The spouse was denied residence as the couple could not satisfy the 24-year rule as although he naturalised, the couple had greater ties to Ghana than to Denmark, which the couple claimed was indirect discrimination per Article 14 ECHR as it discriminates against Danes of non-ethnic Danish origin, which the Court confirmed, along with his right to family life per Article 8 ECHR, which the Court found there to be no violation.[59] Although the Article 14 a key deciding

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[54] Nikolaj Nielsen, 'EU court: Denmark's family-reunification law "unjustified"' (*euobserver*, 10 July 2019) <https://euobserver.com/migration/145411> accessed 6 March 2021.
[55] Per Mouritsen, Tore Vincent Olsen, 'Denmark between Liberalism and Nationalism' (2013) Ethnic and Racial Studies 36(4), 693-694 <https://doi.org/10.1080/01419870.2011.598233>.
[56] ibid, 697-698.
[57] *Udlændingeloven* (Aliens Act) (Consolidation) [2015] art. 9(1).
[58] Panu Poutvaara and Ilpo Kauppinen 'Family Migration and Policies: Lessons from Denmark' (2012) CESifo DICE Report 9, 38 <https://www.researchgate.net/publication/227345931_Family_Migration_and_Policies_Lessons_from_Denmark> accessed 6 March 2021.
[59] *Biao v Denmark* App n. 38590/10 (ECtHR, 24 May 2016), paras 58-60.

factor in the Court's reasoning, and despite the Court confirming that nationals of a country do not have an unconditional right to family reunion with a foreigner in their home country,[60] the Court did look to other EU states along with the EU Convention on Nationality finding a 'certain trend towards a European standard',[61] to which the 24-year rule was, to an extent, inconsistent with.[62]

Currently in Danish law, if a non-EU national wishes to reside in Denmark with their partner already living in Denmark, a residence permit on the grounds of family reunification will be issued to a foreigner if the following conditions are met. Both spouses must be over the age of 24,[63] along with cohabiting at a shared residence either as being in a legally valid voluntary marriage or cohabitation of prolonged duration.[64] The foreign spouse must actively participate in Danish language lessons, pass two Danish tests, must have visited Denmark at least once and completed their part of the integration requirements[65] that replaced the 24-year rule after it was repealed. The spouse already living in Denmark must be a Danish national or have held permanent residence for the past three years,[66] must have an adequate level of Danish,[67] must live in an independent residence (but not in an area mentioned in the current regulation about housing requirement list pertaining to certain levels of employment, crime, education, and income)[68] with specific requirements on the size and amenities of the owned or rented residence, be self-supporting, fulfil their parts of the integration requirements,[69] not have committed any criminal offenses, and pay collateral in the form of a financial guarantee, which at the current level is DKK 106,120.80 (€14,268) but increases with inflation annually, whereby any social benefits paid to the foreign spouse will come from this guarantee.

In order to be granted a residence permit for a foreign national child under family reunification, the child must be unmarried and not have started their own family, the family

[60] *Biao* (n 59) para 29. See also *Abdulaziz* (n 22).
[61] *Biao* (n 59) para 138.
[62] See also case C-89/18 *A v Udlændige- og Integrationsministeriet* EU:C:2019:580, para 47, where the Court similarly ruled that the attachment restriction constitutes a 'new restriction', within the meaning of that provision and such a restriction is unjustified.
[63] Aliens Act, art. 9(1)(i).
[64] ibid art. 9(1)(i).
[65] There are 6 integration requirements: 3 for the foreign spouse and 3 for the partner in Denmark, with a total of 4 of 6 met between the couple. The foreign spouse must have passed a Danish level 1 test (Prøve i Dansk1) or English B1 level, worked full-time for at least 3 of the last 5 years or completed 1 year of education. The spouse in Denmark must have passed a Danish level 3 (Prøve i Dansk 3) or have the appropriate school exam score to prove Danish proficiency (one of which is mandatory), worked full-time for at least 5 years or have at least 6 years of schooling. See Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 10 March 2021.
[66] Aliens Act, art. 9(1)(i)(d).
[67] ibid art. 10(7)(ii). See also Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.
[68] Aliens Act, art. 9(18). See also Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.
[69] See also Danish Immigration Service, 'Apply for family reunification as a spouse', New to Denmark, 1 August 2020, <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.

reunification must be in the best interests of the child,[70] with the parent having appropriate custody over the child, not having been convicted of child abuse, be self-supporting and have legal residence in Denmark.[71] The application costs DKK 9,460 (€1296) regardless of whether the permit is granted. The visa must also be renewed every second year at the cost of DKK 2960 (€396). The cost of the language tests is a further DKK 5,640 (€760) provided both tests are passed on the first attempts. The expected processing time for a family reunification residence permit is 7 months (the foreign spouse cannot work during this time) but the average processing is considered to actually be closer to 10 months.[72]

The requirements and process for Danish family reunification residence permits have been made increasingly and purposefully more difficult, particularly for family reunification as a foreign spouse. A positive outcome of *Biao* was that the Court unmasked some of the negative stereotypes underlying the Danish Aliens Act as regards the presupposed marriage patterns of Danish nationals of foreign extraction and their (in-)ability to integrate in Danish society.[73] The dissenting judges rightly noted that the only way to eradicate discrimination here would be to abolish the 24-year rule, which followed from the judgment,[74] however as seen above, it has been replaced with further exhaustive integration requirements.

Denmark, having transposed the Directive into national law, allows residence for TCNs accompanying their EU spouse (or Danish citizen who has exercised their freedom of movement). This process requires the EU citizen to have genuine and effective residence in Denmark, per Article 7 of the Directive (work, self-sufficient or study) and must have documentation showing proof of relationship (marriage certificate or proof of partnership) with a processing time between 0 and 90 days along with no application fees.[75]

5 EVALUATING THE EXTENT OF REVERSE DISCRIMINATION

In the comparison between EU legislation and Danish legislation on family reunification, it is by now evident that the Danish route for family reunification is significantly more difficult both financially and in terms of timing. As a financial comparison, Danish family

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[70] Danish Immigration Service, 'Apply for family reunification as a child' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Child> accessed 4 March 2021. The municipality will make an assessment of the parents' ability to care of the child, whether there is a risk the child could have serious social problems in Denmark, risk that the child could be removed from the home after moving to Denmark or a risk of abuse.

[71] Aliens Act art. 9(4). See also Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.

[72] EU Commission, 'Denmark: Cost and criteria for family reunification can amount to discrimination' (2021) European Web Site on Integration, (*EUROPEAN WEB SITE ON INTEGRATION: Migrant Integration Information and good practices*, 21 January 2021) <https://ec.europa.eu/migrant-integration/news/denmark-cost-and-criteria-for-family-reunification-can-amount-to-discrimination> accessed 5 March 2021.

[73] Alix Schülter 'Biao v Denmark: Grand Chamber ruling on ethnic discrimination might leave couples seeking family reunification worse off' (*Strasbourg Observers*, 13 June 2016) <https://strasbourgobservers.com/2016/06/13/biao-v-denmark-grand-chamber-ruling-on-ethnic-discrimination-might-leave-couples-seeking-family-reunification-worse-off/> accessed 27 February 2021.

[74] *Biao* (n 59), Joint Dissenting Opinion of Villiger, Mahoney and Kjølbro, para 50.

[75] Danish Immigration Service, 'EU residence as a family member to an EU citizen' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Residence-as-a-Nordic-citizen-or-EU-or-EEA-citizen/EU-Family-member-EU-citizen> accessed 4 March 2021.

reunification can cost nearly €20,000, while the EU route is free. Timing wise, while EU family reunification residence can take between 0-90 days (with the TCN spouse allowed to work during this processing time), while processing times per Danish family reunification are estimated to take 10 months, where even after a large sum of money has been paid for this application, the TCN spouse cannot work in this processing time. The complex maze of integration requirements, from years of education to years of employment to Danish proficiency, is certainly not an easy task to even navigate through, especially as requirements are frequently updated and complexified. The European Commission has commented on the case of Denmark stating that the cost and criteria for family reunification can amount to discrimination with 'unsurmountable barriers for many couples', favouring economically prosperous couples above a certain age, and EU-nationals over non-EU nationals.[76] The Commission states that even though the bank guarantee is supposed to cover eventual expenses for the foreign spouse, the costs associated with administrating this guarantee is far more than the guarantee actually brings in – in 2020 alone, the Municipality of Copenhagen has not drawn money from the guarantee system at all in 2020 but spent DKK 1.3 million on its administration.[77] Another issue with the financial guarantee is that the family reunified couple may not receive public benefits, but that also applies to the Danish citizen, regardless of the Dane having paid into the social security net their entire life.[78]

Statistically, it is difficult deduce the extent to which Danish nationals are affected by Danish family reunification legislation in comparison to more generous EU legislation. Table 1 below shows statistical information available from the Danish Immigration and Integration Office, where a gradual but significant decrease in applications for family reunification through Danish law by more than half over the past 5 years can be seen. This likely coincides with the near doubling of the financial guarantee required in 2018, along with increase in integration requirements after the changes were made in the aftermath of *Biao*.[79] A steady increase in applications for family reunification under EU law for family members accompanying Danish nationals having exercised their free movement can be seen, however nothing significant enough to conclude that Danish nationals are opting for the 'European route' or the 'Swedish model' (these will be elaborated shortly) to circumvent stricter Danish legislation. Applications from family members accompanying EU citizens seeking residence under EU legislation has also grown steadily, while interestingly EU immigration to Denmark has remained fairly consistent.[80] As an overall percentage of immigration, EU/EEA immigration makes up 50% of total immigration to Denmark, with family reunification residence for accompanying family of EU citizens making up 6% of total immigration and immigration under Danish family reunification legislation making up 3% of total immigration.[81]

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[76] EU Commission (n 72).
[77] ibid.
[78] Michael Barrett, 'How the dizzying cost of family reunification keeps Danes and foreign partners apart' (*The Local*, 21 January 2021) <https://www.thelocal.dk/20210121/how-the-dizzying-cost-of-family-reunification-keeps-danes-and-foreign-partners-apart/> accessed 5 March 2021.
[79] *Biao* (n 59).
[80] See EU/EEA immigration to Denmark in 2015 at 37,366, increasing to 39,079 then decreasing to 36,865 remaining fairly stable per *Udlæninge- og Integrationsministeriet* (Danish Immigration and Integration) Report '*Tal og fakta og udlædningsområdet 2019*' (Figures and Statistics in the area of Foreigners 2019) (2020) <https://uim.dk/publikationer/tal-og-fakta-pa-udlaendingeomradet-2019-1> accessed 6 March 2021, 72.
[81] ibid.

	2015	2016	2017	2018	2019
Applications for residence permits for family reunification per Danish law	5,233	3,825	4,127	3,225	2,206
Applications for residence permits for family reunification under EU law for family of Danish citizens having exercised their free movement	315	296	313	390	466
Applications for residence permits for under EU law for accompanying family members of EU citizens	4,492	4,510	4,475	4,789	4,691

Table 1: Figures and statistics on Family Reunification Residence Permits from Udlæninge- og Integrationsministeriet (Danish Immigration and Integration) Report 'Tal og fakta og udlædningsområdet 2019' (Figures and Statistics in the area of Foreigners 2019) 9 September 2020, <https://uim.dk/publikationer/tal-og-fakta-pa-udlaendingeomradet-2019-1> 27 and 72.

Conclusions that can be drawn comfortably from these statistics are that the number of Danish nationals or residents who are applying for Danish family reunification is decreasing significantly, that as of 2019 Danish family reunification makes up a smaller percentage of total immigration (3%) compared to EU family reunification immigration (6%), and ultimately it could therefore be said EU family reunification residence is now more prevalent than family reunification through Danish legislation.

When comparing the EU legislation and Danish legislation as outlined in Chapter 2, 3, 4 and above, it becomes clear that reverse discrimination exists in the context of family reunification in EU legislation versus Danish legislation. An EU citizen can reside in Denmark with their accompanying family, yet a Danish citizen faces far more requirements, conditions and financial obligations in enjoying their right to family. This is unsurprising, as Denmark has been progressing towards more restrictive family reunification policies as well as general migration policies.[82] Denmark was reluctant to have the citizenship provision incorporated into the treaties per the Edinburgh Agreement.[83]

There is, however, a possible relief to this discrimination, whereby the static Danish citizen can exercise their freedom of movement by genuinely and effectively residing in another Member State in what is referred to as the 'Europe route'[84] or by crossing the Øresund Bridge from Copenhagen to reside in Malmö in Sweden in what is referred to as

[82] Anne Staver, 'Free Movement and the Fragmentation of Family Reunification Rights' (2013) 15(2) European Journal of Migration and Law 69, 83-85.
[83] Protocol (No 22) on the position of Denmark [2012] OJ C236/299.
[84] Hester Kroeze, 'Distinguishing between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination' in Nathan Cambien, Dimitry Kochenov and Elise Muir, *European Citizenship Under Stress*, (Brill 2020), 226.

the 'Swedish model'.[85] However, does this then constitute an abuse of EU legislation, and therefore allow Member States to legislate against this behaviour per Article 35 of the Directive as outlined in Chapter 2.1? With the case law discussed in Chapter 3, the current EU jurisprudential standpoint on this is that so long as the residence is genuine and effective in the other Member State, then regardless of the couple's overall intentions to purely exercise this right only to then benefit from more generous EU family reunification legislation when they return (referred to as a U-turn construction) is generally not considered an abuse.[86] The EU Commission has commented on this alleged abuse stating that although Member States are allowed to pass legislation to combat 'marriages of convenience', they are not to discourage freedom of movement, regardless if the true intent is to circumvent family reunification legislation and only reside in the other Member State for a short period.[87] The Commission makes clear that a marriage cannot be considered a marriage of convenience simply because it brings an immigration advantage and that 'the quality of the relationship is immaterial to the application of Article 35'.[88]

EU jurisprudence has established that reverse discrimination is difficult to reconcile with the notion of EU citizenship.[89] This is based upon the idea that EU citizenship is fundamentally different from the other economic freedoms of the internal market.[90] It seems peculiar that the Court has separated within the right to family life: the right to have a spouse and the right to be in the care of your parent, essentially stating that the latter able to access EU family reunification rights regardless of whether static or mobile, unlike the former. Reverse discrimination within the EU is problematic from the perspective of equal treatment and legal certainty and should be eradicated. However, EU law provides no direct means for doing so as it lies beyond its competence, along with the inability for judicial intervention to fully resolve this phenomenon.[91]

Ultimately, although unable to quantify statistically the exact extent to which 'static' Danish citizens are affected by this established reverse discrimination, it is clear that there is a notable difference in the accessibility to family reunification residence through EU law compared to Danish law. Although the 'European route' may exist as a potential relief to this reverse discrimination, AG Sharpston comments that it would be paradoxical that an EU citizen can rely on fundamental rights under EU law when exercising an economic right to free movement, or when national law comes within the scope of the Treaty, or when invoking EU secondary legislation (such as the services of a directive) but could not do so when merely 'residing' in that Member State.[92]

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[85] EU Commission (n 72).
[86] Kroeze (n 84) 247-248.
[87] Communication from the Commission to the European Parliament and the Council, COM(2009) 313 final, 15.
[88] ibid.
[89] Cases C-80/85 and C-159/85 *Edah* EU:C:1986:426, Opinion of AG Mischo. See also *Ruiz Zambrano* opinion of AG Sharpston (n 35) para 138.
[90] Case C-184/99 *Grzelczyck* EU:C:2001:458, para 31.
[91] Staver (n 82) 70.
[92] *Ruiz Zambrano* Opinion of AG Sharpston (n 35) para 84.

6 CONCLUSION

As outlined, there seems to be a clear instance of reverse discrimination in Denmark, whereby Denmark discriminates against its own nationals in comparison with the generous EU legislation on family reunification for nationals of other Member States who have exercised a free movement right in Denmark.[93] The Directive protects free movement of EU citizens along with their accompanying family members, with the right to family being protected on an international and European level. CJEU case law has interpreted the rights within the Treaties on the right to family life, EU citizenship, free movement of people, and the Directive. The Court has delivered a series of judgments on the interpretation of the right of free movement, EU citizenship and the Directive in conjunction with the fundamental right to family. The Court has broadened the family reunification rights for EU citizens and their accompanying family, however in certain scenarios also limited these rights, particularly in cases involving economically inactive citizens. In terms of national legislation, Denmark has strict legislation on residence for TCN through family reunification, with exhaustive integration, financial, language, residential and employment requirements. On the other hand, EU legislation on family reunification in Denmark transposed from the Directive is far less burdensome in comparison. For Danish citizens who haven't resided in another Member State, they must consider exercising this freedom of movement to genuinely and effectively reside in another Member State to then return and be able to access the rights conferred in the Directive under EU law - the same rights that were already accessible to their EU compatriots already residing in their own country.

Circling back to the 'bride run' etymological analogy from earlier, the bride in this hypothetical, assuming she is from a foreign village outside of the kingdom, would have great difficulties in gaining residence in Denmark under arduous and expensive Danish family reunification legislation. It would require the Viking couple to move outside of the Danish territory to an EU Member State to exercise the Danish spouse's right to free movement thereby becoming a 'mobile' Union citizen, genuinely and effectively reside in this host Member State, to then move back to Denmark where the bride could claim a derivative right of residence through EU law. This 'European route' seems burdensome and overly bureaucratic when the overall goal is to merely have a family unit, living and working together in Denmark. It is understandable that a country with such a strong welfare system could be protectionist, however this also seems to run contrary to the Danish egalitarian disposition, by only prioritising couples with financial means. Conversely, in recent years, Denmark has celebrated a 'bride run' scenario with Mary Donaldson, an Australian immigrant who married Crown Prince Frederik of Denmark. Naturally, Prince Frederik did not need to exercise his freedom of movement to access EU law, nor did Mary apply for residence per Danish family reunification and thus prove a level of Danish, sufficient residence and financial stability (the latter two easily satisfied no doubt). The Danish parliament simply passed a law granting the new bride automatic citizenship – a true fairy tale ending.[94] On a personal level, the author of this article was married to a Danish citizen, but as an Australian immigrant like Mary, was

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[93] Elspeth Guild, 'EU Citizens, Foreign Family Members and European Union Law' (2019) 21(3) European Journal of Migration and Law 358.

[94] Law nr. 212 of 31/03/2004 *Lov om meddelelse af dansk indfødsret til Mary Elizabeth Donaldson* (Law on Granting Danish Citizenship to Mary Elizabeth Donaldson) *Folketinget* (Danish Parliament).

not offered a passport, or even residence, as the financial requirements were too burdensome. Although moving to another EU Member State was considered, the financial and administrational pressure led to the eventual dissolution of the relationship. In my opinion, EU freedom of movement and its relationship to the right to family life cannot be better summarised than by AG Sharpston in her Opinion on *Ruiz Zambrano*:

> When citizens move, they do so as human beings, not as robots. They fall in love, marry, and have families. The family unit, depending on circumstances, may be composed solely of EU citizens, or of EU citizens and third country nationals, closely linked to one another. If family members are not treated in the same way as EU citizens exercising rights of free movement, the concept of free movement becomes devoid of any real meaning.[95]

Although it's not necessarily possible to statistically quantify the full degree to which this reverse discrimination phenomenon effects Danish citizens, what can be deduced is that Denmark is aware and comfortable with the discriminatory outcomes on its own citizens. Instead of relieving the discriminated group by repealing legislation that makes family reunification far more difficult and therefore align with EU legislation, it has chosen to accept and ignore this reverse discrimination on its own citizens – to prioritise immigration control over the fundamental right to family life.

[95] *Ruiz Zambrano*, Opinion of AG Sharpston (n 35) para 128.

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