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‘Precedent’ and fundamental rights in the CJEU’s case law on family reunification immigration*

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Abstract: This paper reviews the incidence of precedent-based practices in the Court of Justice of the European Union’s (CJEU) case law on family reunification immigration. Particular attention is paid to the use of fundamental rights considerations, and the extent to which they guide the Court’s judicial deliberations in this sovereignty-sensitive area of law. Our review of *de facto* ‘precedents’, and the extent to which they interact with fundamental rights-related concerns enables us to take stock of the long-term development of the Court’s judicial authority. This longitudinal exercise also enables us to transcend the traditional dichotomy of ‘the CJEU vis-à-vis the member states’ that typically characterizes academic discussions on the role of the Court in processes of EU integration. The paper first considers the relevance of reviewing precedent in the context of the EU legal order. Next, we provide a novel dataset of the CJEU’s

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jurisprudence in the area of family reunification immigration, as it evolved from 1974 up until today. We deal with the methodological implications of studying 'precedent' by presenting a model which numerically structures the incidence of precedent-based patterns. This numerical information allows us to organize our data for a subsequent qualitative in-depth analysis of those precedent-based patterns with the strongest discursive influence on the overall evolution of the case law. Our analysis demonstrates that fundamental rights-based arguments exerted a strong influence on the ideational course of the Court's jurisprudence in this area, albeit in a non-linear manner.

Keywords: European Court of Justice; immigration policy; fundamental/human rights; judicial review; national autonomy; law; political science.

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Introduction

Much has been written on the authority of the Court of Justice of the European Union (CJEU) over processes of European integration. It is clear that the progressive scope expansion of EU competences into ever more domestic areas of law owes much to jurisprudential dynamics. What is a matter of debate however, is whether or not these jurisprudential dynamics, and their competence-expanding outcomes, have taken place at the expense of member states' intentions. This question has in fact typically been at the core of debates in the literature on the role of the CJEU. Particularly during the 1990s, scholarship in this area could, *mutatis mutandis*, be positioned in either of two opposing points of view. The first centred around the argument that the CJEU had been accorded such an authoritative status within the EU's institutional set-up that it easily and consistently pushed for extensions to the scope of EU legislation, even beyond member states' original intentions (e.g. Burley and Mattli 1993). The second claiming, conversely, that where the CJEU had been 'activist', member states had intended and supported this (e.g. Garret 1992). Within recent scholarship, the terms of the debate tend to be purported in a more nuanced manner. Most scholars nowadays agree that the CJEU often has to steer the course of its case law between sometimes opposing prerogatives and has, in that sense, an incentive to take account of all affected interests, including those of member states. The extent to which such considerations constrain the Court in its decision-making remains, however, a matter of debate.

The topicality of these questions has only augmented in recent years. As EU legislation continues to extend into areas of law that are particularly sovereignty sensitive (e.g. the policies covered by the EU's Area of Freedom, Security and Justice, or AFSJ), the CJEU's judicial review activities thread, in parallel, ever more into domains that are particularly politically sensitive (Kelemen and Schmidt 2012). In the legal literature, first, a number of recent scholarly works (e.g. Muir 2013; Iglesias Sanchez 2012) focus on how the CJEU is likely to give effect to the reinforced fundamental rights mandate bestowed upon it with the Lisbon Treaty[1], in light of the politically sensitive nature of the policy areas within which this mandate is likely to be of most relevance, that is: the AFSJ (see Carrera, De Somer and Petkova 2012). Similarly, within recent political science analyses of fundamental rights-sensitive policy areas, questions often revolve around whether an increased involvement of the CJEU can be expected to change the member state-dominated governance processes on these policies at EU level. Especially the area of immigration and asylum legislation has recently seen an upsurge of scholarly interest in the effects of increased judicial review activities, and the extent to which this is likely to mark a shift away from previous, control-oriented EU policy-making dynamics (Kaunert and Leonard 2012; Bonjour and Vink 2013; Thielemann and Zaun 2013).

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) OJ C 306/O1, 17.12.2007. See in particular Article 6 TEU which, amongst others, confers binding legal effect on the EU Charter of Fundamental Rights (Article 6.1. TEU).

What confounds these debates, is the difficulty to empirically classify the CJEU's case law as either favouring pro-integrative objectives, at the expense of member states' interests, or *vice versa*. First, the CJEU's rulings, like those of other courts, typically consist of multiple legal issues, and a single decision may provide various, sometimes apparently conflicting, answers to related, but distinct judicial questions (Carruba, Gabel and Hankla 2008). This may render the classification of a certain judgment as ruling in favour or counter to a certain interest difficult. In connection, and of particular importance, the CJEU's case law is notoriously non-linear, particularly in the short-term. Whereas a certain ruling may appear to favour a certain policy outcome over another, a next judgment may redress the previous policy implications, typically leading to the matter being picked up again in yet another case; and so on. As a result, scholars can formulate opposing answers to the question whether and to which extent the CJEU is constrained by dominant member state interests, depending on which judgments they base their analyses on.[2]

This article provides an analysis of long-term precedent-based developments in the CJEU's case law on family reunification. Such developments have hitherto remained understudied in the context of the CJEU's jurisprudence. This is unsurprising as precedent holds no binding authority in the EU legal order. For the purposes of this research, however, we conceptualize precedent in broad terms as referring to repetitive discursive structures – consisting of argumentation frames built up over several lines of sequential Court decisions – that underpin judicial deliberations in the context of EU law litigation. We thus conceive of precedent in a wider sense than that which is usually employed in academic evaluations of common law systems, where it denotes the formally binding nature of a prior judgment on future judicial decisions that deal with similar subject matters. The next section puts forward a number of arguments as to why *de facto* precedent-based practices may reveal much about the evolution of the CJEU's judicial authority. In addition, an analysis of precedent-based processes allows us to bridge the dichotomous divides in the literature on the CJEU by taking stock of the long-term patterns that guide the ideational orientation of the Court's jurisprudence (see also Schmidt 2012). In line with the perspectives of other scholars who have taken a broad temporal approach to the study of the CJEU's case law (see in particular Alter 2009; McCown 2003), this longitudinal analysis feeds into the overarching institutionalist theoretical approach of this special issue.

The article's second section discusses the choice for the Court's case law on family reunification immigration as the empirical basis to ground our analysis on.[3] First, this jurisprudence record, on account of its partial grounding in free movement law (a peculiarity that is often overlooked), can be traced back to 1974 providing a sufficiently long-term dataset to review precedent-based

[2] As an example, by emphasizing the outcomes of different rulings over others, Garrett, Kelemen and Schulz (1998), and Cichowski (2004), have reached opposite conclusions regarding the CJEU's zone of discretion vis-à-vis the member states in the area of EU gender equality legislation.

[3] We take 'immigration' in the context of this article to refer to the cross-border movement of third-country nationals only. In other words, we do not consider intra-EU mobility as falling under this term.

patterns which are longitudinal by nature. Second, our choice is also based on both the (i) fundamental rights sensitivity and the (ii) politically contentious nature of this case law. In that sense, this jurisprudence provides a 'most likely case' to observe the playing out of opposing prerogatives of, on the one hand (i) rights-protecting imperatives vis-à-vis on the other, (ii) potentially conflicting member states' border control interests. In order to review whether, and to what extent, the CJEU's jurisprudence indeed controlled for dominant member state border control interests (ii), our assessment of precedent-based developments pays particular attention to assessing – conversely – whether and how the Court referred to the protection of migrants' fundamental rights (i). In so doing, this contribution also provides further empirical content to the above mentioned discussions on the effects of the CJEU's strengthened fundamental rights' mandate, and the extent to which this is likely to affect EU governance processes in the AFSJ.

Section 3 deals with the methodological implications of our argument and presents our empirical data. We first review the CJEU's family reunification jurisprudence and then develop a model that facilitates the systematic identification, and mapping, of precedent-based patterns within the selected case law record. This quantitative modelling enables us to narrow down the number of observations on precedent-based practices, in order to, in a next step, proceed with an in-depth content analysis of the overall ideational direction of the jurisprudence. This qualitative analysis provides a detailed documentation of the evolution of the CJEU's argumentative structures wherein original free movement 'effet utile' logics became, over time, ever more infused with fundamental rights considerations as the Court strategically referenced back to the rights-based arguments it had employed in prior rulings. The paper's final section returns to the importance of evaluating precedent-based developments in the context of studies on the CJEU's judicial authority.

1. Precedent-based patterns and family reunification immigration case law

1.1. Precedent-based patterns

To date, surprisingly few scholarly analyses have reviewed the role of precedent in the CJEU's case law. They comprise the writings of Shapiro and Stone Sweet (2002), McCown (2003) and Stone Sweet (2004). A handful of other studies have considered practices associated with precedent against the background of other, though relatable, research agendas (e.g. Garrett, Kelemen and Schulz 1998; Schmidt 2012). Overall however, whilst the need to analyse cases within the context of previous judgments is often recognized, the role of precedent is rarely considered amongst the range of explanatory variables that account for the development of the Court's judicial authority. This is in sharp contrast to academic studies on the role of courts in common law systems, where the importance of analysing precedent is commonly attested to. Literature on the role of the US Supreme Court, a judicial body to which the CJEU is often

compared to assess its performance in the 'federal' context of the EU, has in particular developed a strong body of knowledge around the role and impact of precedents in explaining the evolution and impact of the Supreme Court's case law.

In a sense, this shortage of scholarly interest is not surprising given that one of the defining differences between common and civil law systems is the non-binding nature of precedent in the latter. As a result, it could be expected that the influence of precedent-based processes is marginal, or at least incomparable to the one it exerts, for instance, in the context of the US Supreme Court. This perception is mistaken however, for at least two reasons. First, the legal principle that 'like cases are to be decided in like fashion' (*cf. stare decisis)*, which is generally acknowledged as underpinning the formation of precedent, is not exclusive to common law systems. To the contrary, in all legal systems the authority and legitimacy of any court decision depends, principally, on its common perception as a logical and consistent application of pre-existing legal norms (Schimmelfennig 2006). As a result, the legal practice of referring back to prior case law has been recorded within all court systems whether operating at domestic or international level.[4] Considered specifically against the background of the complex multilevel, multi-actor judicial environment of the vertically integrated EU legal order, Garrett Kelemen and Schulz (1998), and Schmidt (2012) point out that the CJEU has a specific interest in paying attention to its prior case law as a means to ensure the overall consistency of its jurisprudence. The more coherent the CJEU's case law, the easier the multiple actors operating across the different levels of the EU polity (most notably national courts) will be able to apply it independently and uniformly, and – ultimately – the stronger also the overall authority that emanates from the Court's decisions.

Second, recent research has highlighted that the influence of precedent lies not so much in the compulsory nature of any individual precedent, but rather, relates to the manner in which practices associated with precedent come to bear on the overall course of a certain body of jurisprudence over time (see in the context of the US Supreme Court for instance, Gerhardt 2005). By repeatedly reinforcing certain arguments over time, precedent-based patterns come to progressively structure, and constrain, the argumentative settings that underpin any judicial environment (*ibidem*). Shapiro and Stone Sweet (2002), Stone Sweet (2004) and McCown (2003) have reviewed such considerations specifically in the context of the CJEU's case law. Their research establishes that by referring selectively to judgments in previous cases, the Court holds a discretionary power to control the overall ideational orientation of its jurisprudence in the long run. Such practices associated with precedent amount, for instance, to the use of 'self-citation' (i.e., when the CJEU cites its own, prior rulings) (Stone Sweet 2004), or can also be observed in more informal customs such as the Court's habit of repeating verbatim passages of text from previous decisions (McCown 2003). By repeating certain argumentative settings on the basis of such methods, the Court allows for some discursive choice-settings to gradually gain an

[4] See for an interesting recent review of the use of precedent in the context of the ECtHR for instance Lupu and Voeten 2010.

advantage over others. In this manner, the CJEU also provides discursive analogues that can subsequently be picked up by other actors in the judicial environment; most notably litigants and referring national courts which are usually keen to take cues from the lines of reasoning advanced by the CJEU as a means to maximize the effectiveness of their own legal strategies.

Such precedent-based argumentative settings that operate within the litigation environment tend to grow more robust and dense over time. On the basis of iterated litigious interactions, they become ever more sophisticated, creating, in the long run, entire sequences of arguments and standards that should be adhered to in the court room (Stone Sweet 2004; McCown 2003). This can be observed empirically by the increases in the number of rulings that cite past decisions, as well as in the 'density of citation'; or: the number of references to prior rulings used to construct each new decision (*ibidem*). In that manner, practices associated with precedent progressively come to structure, and limit, the argumentative settings that underpin continuous judicial disputes. In the long run, on the basis of constant reinforcement, certain lines of argumentation become 'locked-in' as a taken-for-granted state of affairs. They are then referred to less and less within the contexts of judicial disputes, as this no longer serves a purpose, but instead 'mutate' into the building blocks that dictate the premises of new dispute settings (*ibidem*). All in all, by carefully curating precedent, the CJEU holds a discretionary power to progressively shape the weight accorded to certain argumentative settings over others, which enables it to 'channel' (McCown 2003: 980), with cumulative authority, the premises that underpin the ideational, normative orientation of its jurisprudence.

Finally, precedent-based practices also serve as a legitimizing tool in that they gradually forge an ever stronger acceptance of the arguments advanced by the CJEU. Over time, they create an ideational climate within which the Court's arguments are ever less received as novel or radical. In that sense, these sequential effects also camouflage potentially far-reaching outcomes of the Court's decisions, and, crucially, allow the CJEU to assuage, or even avoid all together, head-to-head political confrontations with, for instance, national governments (Stone Sweet 2004).

1.2. Family reunification immigration case law

We expect that an analysis of precedent-based patterns will provide important insights into the manner in which the CJEU developed its judicial authority in the area of family reunification immigration. This expectation is arrived at by linking the foregoing considerations on the role of precedent to observations regarding, first (i) the particular politically contentious as well as, second, (ii) fundamental rights-sensitive nature that characterizes family reunification contexts.
First, family reunification immigration is a strongly politicized area of legislation. This political sensitivity derives directly from its numerical importance. Statistically, family reunification amounts to the single largest immigration inflow into Europe, with an estimated 40 to 60% of all third-country nationals gaining entry into EU territory doing so through the route of family reunion (Groenendijk 2006). As a result, any EU-level developments that touch on the regulation

of this type of immigration invariably hold strong implications from the perspective of national governments' ability to control the entry and residence of non-nationals into their territories. As a consequence, CJEU decisions that have the effect of constraining national governments' control over this type of immigration will meet with strong levels of political criticism. The CJEU may therefore have incentives to act with caution, and avoid pronouncing rulings which could be perceived as 'brusque' intrusions into member states' domestic border control competences.

Second, litigation in the area of family reunification tends to raise strong fundamental rights concerns as family reunification legislation, at both domestic and EU level, commonly contains references to the requirement of ensuring the protection of the fundamental right to family life (Joppke 1998; Carens 2003). This particular fundamental right, it is to be noted, holds an especially prominent standing in all Western, liberal societies. In most domestic legal orders it is constitutionally protected, and all major human rights instruments contain clauses attesting to its importance (*ibidem*; Guiraudon 2000). At EU level, the prominence of the right to family life has found its translation in a number of different EU Charter provisions[5], and the strong recognition enjoyed by Article 8 ECHR as a general principle of EU law. Against that background, litigation on family reunification legislation before the CJEU is likely to hold strong fundamental rights implications.

These considerations regarding the issue area's fundamental rights sensitivity are important from the perspective of analysing precedent-based developments in that fundamental rights are commonly considered as 'highest-order' statutes which hold a special moral primacy in court rooms (Schimmelfennig 2006). As a result, CJEU discourses that invoke fundamental rights – and as highlighted, especially the right to family life – are likely to be particularly amenable to practices associated with precedent as they render the Court's arguments especially legitimate and authoritative. They can therefore be expected to easily be picked up by other actors in the judicial environment and conversely, difficult to tone down by those actors that seek to contravene the established discourse.

In sum, (i) the particular political contentiousness, and (ii) fundamental rights-sensitivity of family reunification legislation is likely to provide the CJEU with both (i) 'incentives', as well as (ii) 'tools' to curate precedent in its jurisprudence on family reunification immigration. In that light, family reunification immigration is considered as a 'most likely' issue area to observe the incidence and influence of precedent. We expect that the documentation of any such precedent-based patterns and, in particular, the extent to which they are built around fundamental rights considerations, will contain a rich array of information on the manner in which the CJEU constructed, and sustained its judicial authority in this area.

[5]Article 7 CFREU, but see also the closely related provisions of Article 9 CFREU and Article 33 CFREU and the clauses relating to children's rights, most importantly in Article 24 CFREU.

2. Data and Methodology

2.1. CJEU case law on family reunification immigration

2.1.1. Legal bases

We collected the CJEU's entire case law record on EU family reunification legislation. For the purposes of our research, EU family reunification legislation was conceived of broadly as consisting of all provisions dealing with the rights of entry and residence for family members, as well as any conditions placed on the enjoyment of any of these rights (see for a similar conceptualization Peers 2004). Such a broad conceptualization is necessary in order to cover the plethora of EU legal instruments that contain family reunification-relevant rights. We proceed with a brief overview of the main legal bases which enclose provisions of this kind.

In chronological order, the first provisions on family reunification can be found within free movement legislation. Already the earliest legal instruments designed to secure the free movement of workers contained clauses which bestowed these moving workers with the right to be joined by their family members in the receiving member state (Regulation 15/61/EEC[6]; Regulation 1612/68/EEC[7]). Such joining family members were granted parallel rights of entry and residence, and enjoyed equal access to employment and/or education.

As over the course of the following decades the personal and material scope of EU free movement law widened, the personal and material scope of related family rights grew in parallel. At present, the different legal instruments have been grouped together and consolidated in the Citizenship Directive[8] which simultaneously reinforced a number of family reunification-related rights.[9] In addition, the Directive's preamble makes reference to a wide range of humanitarian considerations (see Paragraphs 6, 15, 23 and 24), including explicit fundamental rights references in the closing paragraph (Paragraph 31).

[6] Regulation (EEC) (1961), No 15/61 of the Council of 16 August 1961 on initial measures to bring about free movement of workers within the Community, OJ 57/1073, 26.08.1961.
[7] Regulation (EEC) (1968), No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community OJ L257/2, 19.10.1968.
[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States 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, OJ L 158/77, 30.04.2004.
[9] The Directive for instance repeals the prior accommodation requirements, and grants an automatic right to permanent residence after five years of lawful residence (Article 16.2).

Importantly, these free movement law provisions do not impose any requirements regarding the nationality of the joining family members. Some of the first instruments even made clear that the family provisions were to apply to family members even 'if these are not nationals of any Member State'.[10] As a result, from the very outset, free movement legislation has held an inbuilt potential to intersect with immigration contexts, and hence national immigration law. In order to ensure such an intersection with immigration contexts, we selected only those Court rulings on free movement family reunification provisions which involved *at least one third-country national*.

In addition, a review of EU free movement law and its relevance from a family reunification immigration perspective merits referencing to the Treaty provisions on EU citizenship (Articles 20 and 21 TFEU). These are relevant in so far as legal questions arise regarding the extent to which the status of EU citizenship in and of itself (Article 20 TFEU) can provide for the application of the rights (*in casu,* family reunification rights) enjoyed on the basis of free movement legislation (adopted itself on the basis of Article 21 TFEU). This occurs typically when rights-claimants have difficulties establishing a sufficient link with the scope of application of free movement law. In such contexts, EU citizenship is then invoked as a sort of 'backstop legal status' which can be used when no other legal instrument is of avail (Shaw 2011: 34).

The third set of legal instruments of relevance are the family reunification provisions provided on the basis of EU immigration legislation. The main instrument of interest in this regard is the Family Reunification Directive[11].Due to the fact that the EU Commission based itself on the provisions in place within EU free movement law when drafting the Directive, the substantive provisions of the two legal instruments overlap to a considerable extent (Strik 2011: 65-66). The Directive differs in two ways however. First, its definitions of who can qualify as either a 'sponsor' or a 'joining family member' (scope *ratione personae*) are much more restrictive. On the other hand, the Family Reunification Directive contains a much more robust fundamental rights language (*cf.* Paragraphs 2, 4, 6 and 11 of the preamble, Article 2.1, Article 5.5 and Article 17).

The overall body of EU immigration legislation also contains a number of 'special regimes' on the family reunification rights of certain categories of third-country nationals that derogate, to a greater or lesser extent, from the general rules set out in the Family Reunification Directive. To begin with, Chapter V of that same Directive grants refugees more favourable conditions than those generally provided for. In addition, other EU legal instruments in the area of immigration and asylum contain specific clauses on the status of family members (the Qualification

[10] See for instance Articles 10 and 11 of Regulation 1612/68/EEC.
[11] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 03.10.2003.

Directive[12], the Directive on Temporary Protection[13], the Blue Card Directive[14], the Long Term Residents Directive[15] and the Single Permit Directive[16]).[17]

2.1.2. Numbers and trends

In total, 50 cases were collected on the basis of the two selection criteria. They are set out chronologically in Table 2 in the annex to this paper. Of the 50 collected cases, only 11 concerned proceedings on the basis of immigration law. The largest bulk of the CJEU's case law relating to family reunification immigration – 42 cases – in fact consists of proceedings arising on the basis of free movement law. This has often, wrongfully, been overlooked in the literature. As free movement legislation does not expressly reference to immigration matters, its link with family reunification contexts is not intuitively obvious. By considering only the small volume of CJEU cases on the basis of EU immigration law, the incorrect conclusion would then be that the Court's role in this area is, as yet, 'limited' (e.g. Labayle and De Bruycker 2012).

Of the 42 family reunification cases on the basis of free movement, 11 contained additional references to Treaty provisions on EU citizenship. Three of the cases combined all three different legal bases (*Dereci & Others*, C-256/11; *Iida*, C-40/11; *O&S*, C-356/11 and C-357/11). They were counted in each respective category. One case focused solely on the interpretation of EU citizenship rights as provided under Article 20 TFEU (*Ymeraga*, C-87/12). Table 2 further specifies the exact legal instruments referenced to in each of the proceedings.[18]

[12] Council Directive 2004/38/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30.04.2004.

[13] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 2012/12, 07.08.2001.

[14] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.06.2009.

[15] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.01.2004.

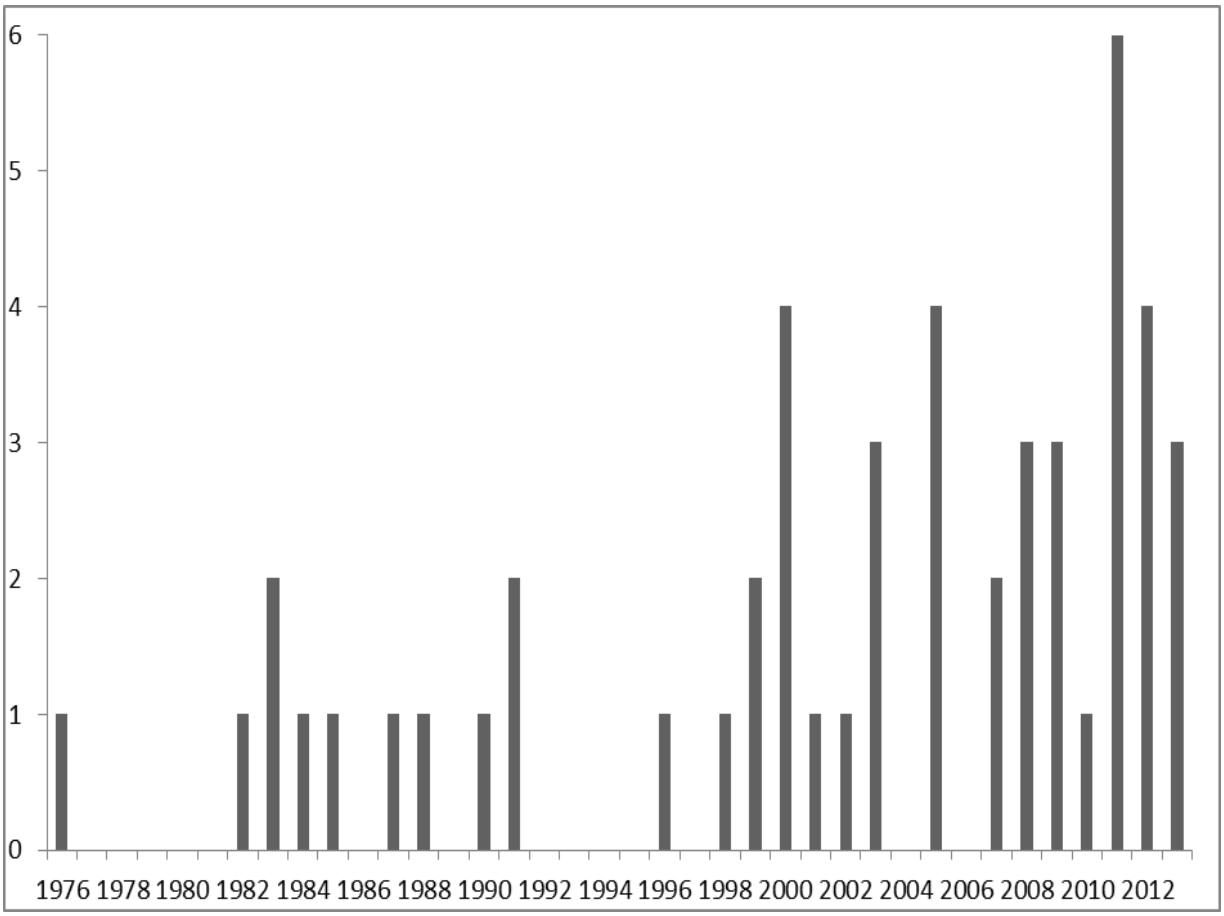
[16] Directive 2011/98/EC of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1, 23.12.2011.

[17] This contribution does not take stock of the family reunification provisions provided for on the basis of EU Association Agreements. Including the enormous volume of the CJEU's case law record in this area would lead to an unworkably large amount of cases. In addition, in contrast to the combined family reunification jurisprudence on the basis of the legal instruments described above, this case law record has been the subject of much scholarly attention already (see for a recent overview for instance Eisele 2014).

[18] This short breakdown into the different legal bases only serves the analytical purpose of illustrating trends within the internal set-up of the collected dataset. In no way however is this disaggregation a

The overall time span of our collected record covers a period of 38 years, from the 1976 *Kermaschek* ruling (C-40/76) to the present day. This longitudinal nature of the selected dataset corresponds to the paper's long-term analytical focus. Figure 1 below plots the breakdown of cases per year. The most noticeable trend therein is the exponential growth in the CJEU's caseload on family reunification immigration matters. This increase can rather straightforwardly be linked to the overall increase in the CJEU's caseload from the 1970s onwards following the establishment of the doctrines of direct effect and supremacy (Stone Sweet and Brunnell 2004). In addition, this trend is strengthened by a parallel running increase in relevant EU legislation as free movement law expanded, and harmonization measures on immigration policies were adopted.

Figure 1: Number of questions on family reunification immigration before the CJEU (1976-2013)



Source: own compilation from www.curia.eu

reflection of the actual state of affairs. To the contrary, the collected case law record is to be conceived of as one coherent body of jurisprudence. This will be further illustrated in the empirical section below (3.1).

2.2. Analysing precedent-based patterns: A structuring model

In order to chart the incidence and role of precedent within the collected case law record, we advance a structuring model that allows for the systematic identification of the 'precedential weight' held by each case in the collected dataset within a certain timeframe. On the basis of these individual 'precedential weight' assessments, we are able to document the structure of precedent-based patterns, as they evolve over time, within the jurisprudence record as a whole. In this section, we present the different steps and principles that underpin our quantitative structuring model. They will be applied to the selected jurisprudence record, and in that manner further illustrated, in the next section (3.1.). This quantitative structuring exercise enables us, in a second step, to proceed with a qualitative in-depth assessment of those lines of argumentation that were numerically identified as most influential (section 3.2.).

As a first modelling step, building on Stone Sweet (2004: 98), we employ self-citation – defined as citations of the CJEU to its own prior rulings – as an indicator to empirically observe precedent-based practices. We expect those judgments that were frequently cited in follow-up rulings to hold a strong 'precedential weight' in the sense that, with the benefit of hindsight, they must have provided elements that merited repetition over the course of new lines of case law. By counting how many times a case has been cited by other cases in the domain, we seek to gauge its precedential weight (*ibidem*).

Collecting information on CJEU 'self-citation' is relatively straightforward, provided that the research is embedded in a 'closed dataset', that is, that all relevant cases in the domain have been identified and collected. On the Court's website (www.curia.eu) all references to prior rulings are listed for each judgment in the 'case information' page. By gathering for each relevant case all references to prior judgments, it is possible to obtain information on the 'subsequent citation' of all cases in the same dataset. That is, by reviewing all citations to 'prior rulings' for all cases in the record, we can analyse how many times a certain judgment has been cited in sequence within that record by tracking how many times it appears in our data on citations to 'prior rulings'.

Such raw counts of subsequent citations, or 'citation scores', however, do not, in and of themselves, control for differences in the number of times a certain judgment could have been cited depending on the time that has lapsed, and the number of subsequent judgments that were rendered, since it appeared. This is important, as an equal amount of references to a given judgment x rendered about a decade ago, for instance, is likely to carry less weight than that same amount of citations for a judgment y that was rendered only a few years ago. After all, the earlier judgment had much more opportunities for reinforcement than the later one. In that sense, all else equal, *cases which are cited in the judgments of an equal number of subsequent cases within a shorter time period are likely to have a stronger precedential weight than those which have been cited in a longer time period.* We control for this by weighing, in a next step, the citation score of each judgment against the number of cases that followed in sequence. In this manner we can calculate a case's 'relative' citation score, or 'percentage citation incidence'. A judgment x with for instance 5 subsequent citations out of 30 following cases holds a lower

'relative' citation score (5/30: 16.6% citation incidence) than a judgment y with 5 references out of 10 following cases (5/10: 50% citation incidence).

This, however, leads to a second reservation. Our dataset is inevitably biased in terms of such temporal considerations as it is impossible to include citations that may arise in the context of cases that are yet to be decided in the future. In order to control for this, we limit ourselves to analysing the relative citation score of each case within restricted timeframes defined by the first subsequent citation to a case as the beginning point, and the last subsequent citation as the end point. In other words, the citation score of a judgment is weighed only against the number of cases that followed on from it within a time period bordered by its first and last subsequent citations. In that sense, the for instance 5 subsequent citations to a judgment x are not considered against all cases following in sequence, but only against the number of judicial decisions between citation 1 and citation 5. We exclude all cases with a subsequent citation count of '0' or '1' from our assessment, as it would not be possible to apply border lines of last (or even first) citations. The exclusion of these cases, however, does not affect the research findings as an incidence of 1 subsequent citation, or none at all, excludes them *a priori* from having any significant precedential weight at all. These final calculations provide us with a measure of the relative citation incidence of all cases in the dataset within defined time periods. This, in a final step, allows for a comparative assessment of which cases hold the strongest citation score in the overall jurisprudence record.

Bringing everything together, the final measures provide numerical *indications* of the precedential weight held by certain cases *during a certain time period.* The two italicized indications correspond to two important, final disclaimers. First, starting with the latter, our measurements do not hold any claims regarding the numerical precedential weight of a case for the jurisprudence record on the whole, but only indicate the precedential weight of judgments *within defined periods of time*. Taken together however, the different measures for each case, within their respective time periods, allow us to assess the progressive sequencing of precedent-based developments within the entire jurisprudence record. Second, and of particular importance, the self-citation measures arrived at are taken to provide mere *indications* of where important precedent-based patterns are most likely to be found. The actual precedential authority of a certain judgment depends of course on the substance of the arguments that were being reinforced through self-citation practices, and the exact weight these arguments held in the newer decisions. In other words, self-citation measures are necessary but insufficient indicators of precedent, and the quantitative assessments need to be complemented by qualitative content analyses.

3. Precedent-based patterns and fundamental rights in the CJEU's case law on family reunification immigration

3.1. Quantitative observations

3.1.1. Precedent-based patterns

Applied to our own case law record, we start modelling our data by identifying, first, for each Court decision how many times it was cited in subsequent rulings within the selected case law record. This is done by tracking how many times it appeared in our overall dataset on 'prior citations'. Figure 2 in the Appendix illustrates the identified self-citation patterns. In this figure, we positioned all of the cases in chronological order on both the horizontal and vertical axis. We then marked each citation to a prior ruling by a dot, which allows for the simultaneous identification of (i) all cases a certain judgment refers to, as well as (ii) all cases that have referred to that judgment afterwards. Phrased differently, a given judgment x located on the vertical axis can be traced along the horizontal axis to check all the past judgments that are referenced in it. The other way around, and of most relevance for our purposes, that same judgment x on the horizontal axis can be traced along the vertical axis to record all the cases that have referred to it subsequently. The diagonal line indicates where a case meets itself on the other axis (see Figure 2 in Appendix).

Three analytical observations can immediately be taken away on the basis of this figure. To begin with, the CJEU's family reunification immigration jurisprudence appears to be characterized by a strong incidence of self-citation practices. By implication, we can infer that the selected case law record is likely to be marked by a strong reliance on precedent-based practices. This connects to the expectations formulated above. As a measure of comparison, Stone Sweet defines the CJEU's case law on gender equality as a domain within which the 'Court cites more than in any other' (Stone Sweet 2004: 188-189). The compiled data on self-citation on which this claim rests, show a rising trend of citations to prior rulings from an average of '4' per case going up to '10' in later years (*ibidem*). Our dataset shows numerically equal, if not stronger, trends. Second, the above graph also clearly shows that differences in legal bases do not amount to borders which demarcate different domains within which these self-citation practices develop. To the contrary, from the emergence of the very first proceedings on the basis of immigration legislation onwards (*EpvCouncil*, C-540/03), we observe an increasingly mixed citation record, confirming that this case law is a coherent body of jurisprudence. The Court does not hesitate to cross-reference to, and build on earlier cases when developing its argumentation in new, similar litigation contexts, independent of whether or not the legal bases concur. Third, Figure 2 also illustrates an increase over time in both (i) the number of rulings that refer to previous cases to construct their argument, as well as (ii) the 'density' of citation, or, the number of citations used to construct each decision. This is rendered visual by tracking the growth in the number of dots along the horizontal axis, and following their

steady increase along the vertical axis. These observations confirm and illustrate the tendency of precedent-based patterns to grow ever more dense and robust as they accrue over time on the basis of iterated interactions. Figure 2 can be found at the end of this document.

Next, we calculate, in line with the principles outlined above, the 'relative' citation score for each case within the timeframes defined by their first and last citations. Table 1 provides an overview of the calculations for each case.

Table 1: Relative citation incidence per case

	CITATIONS	SUBSEQUENT CASES	CITATION INCIDENCE %
Kermaschek C-40/76	4	11	**36**
Morson & Jhanjan C-35/82	5	9	**56**
Meade C-238/83	0	0	0
Diatta v Land Berlin C-267/83	3	25	12
Deak C-94/84	0	0	0
Gül C-131/85	1	0	0
Zaoui C-147/87	2	3	**67**
Dzodzi C-297/88 & 197/89	2	10	20
Singh C-370/90	7	35	20
Koua Poirrez C-206/91	2	5	**40**
Taghavi C-243/91	2	3	**67**
Uecker & Jacquet C-64/96	1	0	0
Kaba I C-356/98	1	0	0
Baumbast & R C-413/99	6	23	**26**
Carpenter C-60/00	9	32	**28**
MRAX C-459/99	4	9	**44**
Ruhr C-189/00	0	0	0
Givane & Others C-257/00	0	0	0
Kaba II C-466/00	0	0	0
Akrich C-109/01	4	8	**50**
Zhu & Chen C-200/02	6	20	**30**
Comm v Spain C-157/03	1	0	0
Comm v Spain C-503/03	1	0	0
EP v Council C-540/03	2	9	22
Jia C-1/05	1	0	0
Mattern and Cikotic C-10/05	1	0	0
Comm v Luxembourg C-165/05	0	0	0
Eind C-291/05	7	18	**38**
Comm v Luxembourg C-57/07	0	0	0
Metock & Others C-127/08	8	16	**50**
Ibrahim C-310/08	1	0	0
Sahin C-551/07	0	0	0
Chakroun C-578/08	1	0	0
Zambrano C-34/09	4	12	**33**
Xhymshiti C-247/09	0	0	**0**
McCarthy C-434/09	7	11	**63**
Comm v Netherlands C-508/10	1	0	**0**
Dereci & others C-256/11	6	10	**50**
Iida C-40/11	4	4	**100**
Rahman C-38/11	0	0	0
Imran C-155/11	0	0	0
O & S C-356/11 & C-357/11	1	0	0
Alarpe & Tijani C-529/11	0	0	0
Ymerga & Others C-87/12	2	2	**100**
Alopka & Others C-86/12	2	2	**100**
O & B C-456/12	1	0	0
S & G C-457/12	0	0	0
Dogan C-138/13	0	0	0
McCarthy & Others C-202/13	0	0	0
Noorzia C-338/13	0	0	0

Source: *own compilation from www.curia.eu*

Third, as a final step, we organize the information by selecting those judgments with the comparatively highest relative citation scores. For the purposes of the subsequent qualitative discussion we select the cases within the top 30%, or around one third, of cases with the highest relative subsequent citation incidence. This was arrived at by selecting all the cases with a citation percentage of 25% or more, or, put differently, those cases that were, on average, cited in 1 out of the 4 cases that followed. Their relative citation scores are highlighted in bold in Table 1. In addition, the frames in Figure 2 indicate those highest citation scores, within the timeframes set by their first and last subsequent citations. These frames, and their sequencing, represent, in essence, a structure that indicates, for our jurisprudence record, the cases that held a high citation score during a certain time period; or, indications of those cases that held, within a certain time frame, a strong precedential weight.

3.1.2. Fundamental rights

Before proceeding with the qualitative content analysis of the identified patterns, we provide a final, supplementary structuring to our dataset by numerically reviewing the connections between fundamental rights' considerations on the one hand, and strong citation scores on the other. This allows us to gain insights with regard to our additional research objective of reviewing whether, and to what extent, references to fundamental rights interlink with precedent-based practices. As a first step, we identify all references to fundamental rights-based arguments within the selected case law. These references are interpreted broadly as all references to the protection of the fundamental right to family life, and/or any other closely related rights (e.g. children's rights) that found their way into the final text of the judgment. These references could be made in connection to Article 8 ECHR and/or any of the relevant EU Charter provisions. They include references made by the CJEU itself, but also citations by, for instance, referring courts or parties involved in the dispute (including, possibly, member states that submitted written observations).

The identified cases are marked by an asterisk (*) in the annexed Table 2. What can be observed at a first glance is the remarkable growth of fundamental rights references over the years. Whereas no such references are to be found prior to the 2002 *Baumbast and R.* ruling, from that moment on, the number of references within the number of cases increased exponentially.[19] From no observations in the 13 cases prior to *Baumbast & R.*, of the subsequent 36 rulings, 22 contain fundamental rights considerations. Put differently, from *Baumbast & R.* onwards, more or less two-thirds (61%) of the rulings pronounced by the CJEU in the area of family

[19] Note that this first ruling with a fundamental rights' reference is also the first ruling in the dataset to be pronounced after the formal declaration of the EU Charter of Fundamental Rights by the European Council in December 2000. This first reference does not cite the EU Charter, and there is no manner to empirically establish that the coinciding is more than incidental. It is however not implausible that the clear signalling of a wish to increase the visibility and protection of fundamental rights from the highest political level may have rendered the Court more prone to strengthen its fundamental rights' discourses.

reunification immigration contained references to fundamental rights. This points to a strong reliance on fundamental rights considerations in the Court's case law on family reunification from the early 2000s onwards.

Next, we merge these observations with the above structure on the incidence of precedent-based patterns as presented in Figure 2 (Appendix). The first appearance of fundamental rights considerations (*Baumbast & R.*) is marked by an additional vertical line in the Figure. All of the cases that include fundamental rights references are indicated, along the vertical axis, in grey. This provides a further illustration of the steady increase in fundamental rights' considerations from the early 2000s onwards. It also enables us to review to what extent the incidence of fundamental rights considerations, in grey, overlaps with identified strong relative citation score cases, as indicated with frames. What emerges is that the presence of fundamental rights considerations does not appear to necessarily incite the development of strong precedent-based patterns; but the other way around, from the moment fundamental rights considerations entered in the jurisprudence, all cases with a high relative citation score contained fundamental rights references. The only exception in this regard is the 2011 *McCarthy* ruling, an observation to which we return below.

Once more, these indications provide us with a modelling of the data, now structured to represent both (i) those cases with a comparatively high citation score, and (ii) second, those sequences of precedent-based developments within which we can possibly find interactions with fundamental rights considerations. We proceed in the final section, with an in-depth content analysis of precisely those patterns that indicate both (i) high citation scores (marked with a frame) and, at the same time also include (ii) fundamental rights references (marked in grey).

3.2. Content analysis

3.2.1. Prior to Baumbast: 'Effet Utile' of EU citizens' rights

None of the citation-clusters preceding the 2002 *Baumbast and R.* decision (the patterns left of the above defined vertical line in Figure 2), were based on fundamental rights considerations. Instead, the argumentative structures that underpin these earliest cases are all grounded in discourses that relate to the need to ensure the 'useful effectiveness' of EU free movement provisions. Such 'effectiveness' or *effet utile* considerations are known to characterize the CJEU's free movement jurisprudence overall (Schmidt 2012). Arguments typically refer to the requirement of not interpreting the legislation restrictively, prohibitions of discrimination, or the need to abolish obstacles to free movement. None of the highlighted high-citation-score clusters in this early period, however, relate to the reinforcement of any of these discursive structures. Instead, the subsequent citations to, in chronological order, *Kermaschek, Morson & Jhanjan,*

Zaoui and *Kouia Poirrez* were all based on overlaps in the material subject matters of the judicial questions that followed in sequence (e.g. questions on the application of the 'derived rights' rule as established in *Kermaschek*).

3.2.2. From Baumbast: 'Effet Utile' and fundamental rights

From the *Baumbast and R.* ruling onwards these *effet utile* discursive structures were complemented with fundamental rights-related arguments. In this first fundamental rights-related case the CJEU came to the conclusions that (i) non-economically active EU citizens can derive residence rights directly on the basis of Treaty citizenship provisions, and (ii) that children who have enrolled in education in another member state following the exercise of free movement rights of one of their parents continue to enjoy such a right to education even after the parents have ceased their economic free movement activities. In order for these latter rights to education to be rendered 'effective', parents who are those children's primary carers are to enjoy the right to continue residing with those children in the host member state. This last conclusion signified a vast expansion of the scope of application and overall weight of family rights under free movement law. The derivative rights that could be enjoyed by moving EU citizens' family members (*in casu*, children's' rights to education) were now held to continue having effect even beyond the application of the 'original' rights, and could – in turn – give rise, anew, to rights for family members of the 'first' family members.[20] The Court's interpretation conferred, in effect, rights on persons that were 'two steps removed' from the individuals enjoying the original free movement rights (Barrett 2003: 389).

The deliberations of the judgment leading to this remarkable outcome combined both (i) *effet utile* arguments with reference to earlier case law[21] and (ii) fundamental rights considerations[22]. These two sets of arguments held an independent weight, yet were also intertwined in that, according to the CJEU's interpretation, safeguarding the 'effectiveness' of the reviewed legislation consisted precisely of ensuring that there were no obstacles to the *effective* exercise of the right to family life.[23]

Similar observations hold for the *Carpenter* ruling (C-60/00) that followed shortly after. In this case on the residence rights of a third-country national spouse of a UK national (Mr. Carpenter), the CJEU was quite explicit:

[20] Note as well that on more than one occasion in the judgment the CJEU reiterated that these considerations held independent of the fact that the children 'are not themselves citizens of the Union', and irrespective of the nationality of the primary carer.
[21] See, for example, Paragraph 74: 'Having regard to the context and objectives pursued by Regulation No 1612/68 (...) the provision cannot be interpreted restrictively'.
[22] See for example, Paragraph 72: 'Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention'.
[23] See, in particular, Paragraph 68, and more generally the entire line of argumentation developed from Paragraphs 68 to 75 (see in this regard also Cambien 2012).

> '(T)he separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse' (Paragraph 39).

Next, in *MRAX* (C-459/99) the CJEU condoned the restrictive administrative practices of the Belgian government vis-à-vis third-country national family members of EU citizens by noting, amongst others, with reference to *Carpenter*: 'the Community legislature has recognised the importance of ensuring protection for the family life of nationals of the member states in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty (*Carpenter*, cited above, Paragraph 38)' (Paragraph 53).

In essence, the first citation-patterns in the dataset following *Baumbast and R.* constituted discursive 'building blocks' for the doctrinal establishment, and subsequent reinforcement, of an argumentative connection between (i) guaranteeing the 'effectiveness' of free movement law, and (ii) providing respect for the right to family life. The two elements were taken to be intertwined in that the latter enabled the former.

3.2.3. From Akrich: Fundamental rights

In a following phase, the CJEU's fundamental rights-based arguments progressively 'emancipated' in that they gradually started outgrowing the *effet utile* language within which they had originally entered the jurisprudence. In *Akrich* (C-109/01) the CJEU established the (rather restrictive) criterion of 'prior lawful residence' in a first member state as a condition for third-country national family members of moving EU citizens to be able to avail themselves of derived free movement rights in another member state. The Court did, however, bring in an additional line of argumentation which held that in cases where the 'prior lawful residence' condition was not met, 'regard must be had to respect for family life under Article 8 of the ECHR' (Paragraph 58). In this additional line of reasoning, the fundamental right to family life was firmly disconnected from any free movement 'effectiveness' reasons. The principal argument developed here is, essentially, that the fundamental right to family life is to be protected independent of whether or not EU free movement legislation, and/or the effectiveness thereof, is at stake.[24] This argumentation was subsequently reinforced in, amongst others, *Commission v Spain* (C-503/03) and *EP v Council* (C-540/03) which both cited the fundamental rights arguments established in *Akrich* - paradoxically a ruling with not too rights-enhancing an outcome – to support their own fundamental rights-protecting discourses and outcomes.

[24] In this light some scholars have pointed to a scope extension of fundamental rights' protection under EU law following *Akrich* (Schiltz 2005; Tryfonidou 2009).

This rupture with the earlier lines of 'mixed' reasoning was not established in an absolute, abrupt manner however. Instead, the CJEU was careful to emphasize its grounding in previous, 'mixed' legal discourses. This is evident, for instance, in the subsequent paragraph in *Akrich* where the Court adduces further support for its fundamental rights arguments by referencing back to the requirement to have regard to Article 8 ECHR as established in the earlier *Carpenter* case (Paragraph 59). The gradual transition is also observable, on an overarching level, in the mixed record of discourses that followed in the proceedings after *Akrich.* To illustrate, the landmark *Zhu & Chen* (C-200/02) case on the rights of the third-country national parents of a minor EU national, was largely constructed on the reasoning developed in the prior *Baumbast and R.* ruling (see Paragraphs 20 and 45). No independent status was accorded to the fundamental right to family life in and of itself, in spite of the fact that the appellants to the case had invoked this right in such a self-standing manner (Paragraph 15, question 7). The same holds for the *Eind* judgment (C-291/05) on the family reunification rights of a Community worker upon return to his home country where he would stop being economically active. In this rights-enhancing decision, the Court built its reasoning, amongst others, on the arguments established in *Baumbast and R.*, *MRAX* and *Carpenter* (see in particular Paragraph 44).

Later on, in *Metock* (C-127/08) the CJEU came to the far-reaching conclusion that the 'prior lawful residence' requirement established in *Akrich* – and since then inscribed in the national legislation of a number of Member States – was to be abolished. The Court reasoned that such a requirement had not been inserted in the Citizenship Directive which had then recently entered into force (Paragraphs 49-54). In that light, it ruled that an 'additional' condition of prior lawful residence contravened EU law.[25] In order to support this far-reaching, and politically contested, reversal of its own prior decision, the CJEU strongly emphasized fundamental rights considerations by, paradoxically, referring back to its (other) prior case law. It fell short of re-citing the fundamental rights' arguments of the *Akrich* case – of which it would come to overrule the final conclusion – but apart from that referenced to around 6 prior judgments (including *Carpenter, MRAX* and *Eind*) to underline the importance of protecting the fundamental right to family life as a means to guarantee the effective exercise of free movement rights (Paragraph 56). In its deliberations in *Metock* the CJEU also made reference to the protection of the fundamental right to family life as an argument 'in and of itself' (Paragraph 79), though without reference to *Akrich,* or any of the follow-up cases that built on *Akrich* to support such an argumentation.

The findings of *Metock* were subsequently reinforced in 8 of the cases that followed so far. This strong subsequent citation record is, however, not grounded on the fundamental rights

[25] Moreover, the CJEU also referred to the fact that the Family Reunification Directive did not inscribe such a requirement either. Should national governments therefore apply a condition of prior lawful residence to the spouses of EU nationals, this would lead to the paradoxical outcome that EU law would discriminate EU citizens against third-country nationals (Paragraph 69) (see for a discussion, Peers 2009). These considerations further testify to the coherence of the CJEU's case law on family reunification immigration which does not have regard to differences in legal bases.

considerations of the judgment, but instead underpinned by a mixture of arguments. That is, first, in the 'earliest' of cases that followed on, *Metock* was quoted in order to strengthen 'non-restrictive' readings of the legislation (*cf.* also the earliest *effet utile* discourses used by the Court), and/or readings that took the legislative provisions to lay down the rights (and conditions thereupon) 'exhaustively'. In chronological order, the cases in which the CJEU built on *Metock* to reinforce such rights-strengthening discourses are *Sahin,* C-551/07; *Ibrahim,* C-310/08; *Chakroun,* C-578/08; *McCarthy,* C-434/09; *Iida,* C-40/11 and *Dereci & Others.;* C-256/11. Later on however, these arguments were supplemented by references to more 'restrictive' elements in the *Metock* decision. The judgments in *McCarthy, Iida, Dereci & Others.* and *O&S* (C-356/11 & C-357/11) all additionally, or only (*O&S*), referenced to those parts of the *Metock* ruling in which the Court stressed arguments such as 'it is not all nationals of non-member countries who derive rights of entry and residence in a Member State from Directive 2004/38, but only those who are family members within the meaning of point 2 of Article 2 of that directive'. (Paragraph 73). These references to the liberal *Metock* decision were made to, in contrast, construct narrow readings of the reviewed legislation's scope of application (*McCarthy,* Paragraph 45; *Dereci & Others,* Paragraphs 56 and 60; *Iida,* Paragraph 51; *O&S,* Paragraph 41).

3.2.4. From Zambrano: Fundamental rights?

The mixture of observations with regard to the subsequent citations to *Metock* herald the blurry image that characterizes the most recent phase of the reviewed jurisprudence. In contrast with the previous highlighted citation patterns, none of the identified high citation scores post-*Metock,* that is those of *Zambrano* (C-34/09), *McCarthy,* and *Dereci & Others,* were geared towards reinforcing fundamental rights considerations. For the *McCarthy* ruling this is evident as no fundamental rights considerations featured in the judgment in the first place. Instead, the elements of *McCarthy* that were reinforced in subsequent decisions contain, like those of *Metock,* a mixture of more restrictive and more liberal elements. These arguments constitute building blocks used by the CJEU to balance out different elements and reach conclusions which – so far – have not led to a definite judicial closure of the questions raised. This is evidenced by the continued inflow of preliminary references on similar subject matters (see *Dereci & Others.*; *Iida*; *O&S*; *Ymeraga & Others,* C-87/12; *Alopka & Others,* C-86/12). In fact, the current stage reached in the CJEU's case law on family reunification immigration appears to be characterized by a high degree of confusion.[26]

This confusion relates most importantly to the precise scope of application of EU law after the Court established in the seminal *Zambrano* ruling that EU Treaty citizenship rights can provide

[26] Besides the continued inflow of preliminary references, the confusion is also attested to by a veritable 'boom' of academic analyses that seek to take stock of the legal implications of the *Zambrano* case and the Court's follow-up decisions (e.g. Van Elsuwege and Kochenov 2011; Lenaerts 2011; Hailbronner and Iglesias Sanchez 2011).

for family reunification rights in and of themselves if, in the absence thereof, the 'genuine enjoyment of the substance' of those citizenship rights would be hampered. This is groundbreaking in that the Court bypassed the traditional 'cross-border' requirement, opening the doors for an extension of its jurisdiction – and thereby the scope of EU law overall – into situations that would previously be considered as 'purely internal situations'. In light of the fact that the 'cross-border' requirement functions, *mutatis mutandis*, as the judicial reformulation of the EU's cornerstone principle of conferred competences (Article 5 TEU) (Lenaerts 2011), these latest jurisprudential developments can be interpreted as touching, in essence, on the core of the EU legal order, or even the EU's Treaty regime overall. The implications of the new 'genuine enjoyment test' could therefore have enormous consequences for the manner in which the vertical allocation of powers between the Member States and the EU is administered.

The subsequent citations to *Zambrano* in fact all relate to questions on the interpretation of the 'genuine enjoyment test' in new factual situations (*McCarthy*; *Dereci & Others*; *O and S; Ymeraga; Alopka & Others*). Implicated in these questions are uncertainties regarding, how, and the extent to which, fundamental rights provided by the EU legal order are to be related to the new genuine enjoyment test. So far, the CJEU has formulated its answers to such questions very carefully, avoiding the establishment of a direct connection between the new conceptualization of EU citizens' rights' scope of application, and fundamental rights safeguards. The absence of explicit fundamental rights considerations is, however, 'manifest' in that the material circumstances of the situations within this newest line of case law contain clear fundamental rights implications (see also Van Elsuwege and Kochenov 2011; Hailbronner and Iglesias Sanchez 2011). The fundamental rights references that made their way into the *Zambrano* judgment for instance, are in fact a residue of the original claims as formulated by the appellant of the case, Mr. Ruiz Zambrano, who had invoked an infringement of his rights under Article 8 ECHR (Paragraph 31). The fundamental rights references in *Dereci & Others.*, on the other hand, were adduced by the CJEU itself. In introducing these considerations, however, the Court was careful to emphasize that such fundamental rights' implications had to be considered in separation from considerations regarding the application of the genuine enjoyment test. It emphasized that fundamental rights-related questions 'must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case' (Paragraph 69). The judgment then continued to consider the scope of EU Charter rights (applicable only in situations governed by EU law), and those covered by the ECHR (to which all member states are parties), eventually passing the 'hot potato' over to national courts which ought to decide between either of the instruments depending on whether or not they consider the situation as falling within the scope of EU law (Paragraphs 69-73; see by analogy the above fundamental rights considerations in the *Akrich* ruling). This separative reading of the relation between EU citizenship rights and fundamental rights was subsequently reinforced in *Iida* (Paragraph 78), *O&S* (Paragraph 58) and *Ymeraga* (Paragraph 40). In one of the most recent judgments on these questions, rendered in October 2013 (*Alopka & Others.*, C-68/12), the CJEU blatantly evaded any considerations regarding the applicability of fundamental rights in spite of the fact that the

referring court had explicitly requested a clarification on whether citizenship rights provided in Article 20 TFEU 'read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights' was to be interpreted as precluding a member state from refusing a third-country national mother of two minor EU-citizen children (from another member state) a residence permit (Paragraph 19).

The Court's reticence to connect fundamental rights considerations to the new genuine enjoyment test is understandable given the potential implications. Should the 'rights conferred by virtue of the status of citizen of the European Union' of which the 'genuine enjoyment' is to be safeguarded, come to include fundamental rights, one could effectively wonder in which situations, henceforth, it would *not* be possible to identify a link with the scope of EU law. In other words, it could be questioned what would then, *de facto,* be left of the cornerstone principle of conferred competences as enshrined in Article 5 TEU.

The non-referencing to fundamental rights does however mark a significant paradigm shift with the CJEU's earlier lines of argumentation. Prior to *Zambrano*, the Court's judicial discourses, and the precedent-based developments that underpinned them were all focused – in contrast to the current logics – on establishing a link between fundamental rights arguments and the application of EU citizens' rights; including citizenship rights from primary Treaty provisions (e.g. *Baumbast & R.*, *Zhu & Chen*). Over the years, and in line with our theoretical expectations, lawyers and referring courts learned to modulate their own legal strategies and interpretations on the premise that the two sets of rights under EU law are to be considered as interlinked. As a result, at least for now, the claims and questions that have arisen before Luxembourg post-*Zambrano* are still grounded within such earlier CJEU-curated premises. This explains, to a considerable extent, the current confusion as the Court has failed to make clear, for the time being, how the newest outcomes of its decisions are to be interpreted in relation to its earlier judicial discourses.

The situation illustrates in that sense the long-term constraining influence that precedent-based developments come to exert, as they accumulate over time, on the argumentative structures that underpin the ideational evolution of the jurisprudence. In addition, the ambiguities that mark the analysis of the case law when reviewed within a short-term perspective (inevitable for the most recent period), connect to our general theoretical perspectives on the requirement of studying the CJEU's case law within a broad temporal scope. In line with these perspectives, it seems fair to conclude – as studies of EU law often do – that the answers to the most recent judicial questions will only emerge with time as the Court gradually shapes, and clarifies, its judicial discourses on the basis of repeated litigious interactions.

Conclusion

Our analysis shows that the CJEU did not, on all occasions, uphold fundamental rights considerations. To the contrary, when reviewed within a short-term temporal scope we observe a non-linear use of fundamental rights-based arguments within the Court's case law on family reunification immigration; sometimes enforcing the right to family life, on other occasions, seemingly being swayed by considerations relating to member states' border control concerns. If limited to such an 'up-close' review our analysis would not have allowed for definite claims regarding the authority of the CJEU, and the extent to which it strengthens a rights-based approach to family reunification immigration.

Our research was aimed, however, precisely at overcoming these analytical difficulties which typically arise from the renowned non-linearity of the CJEU's case law; and which have traditionally fuelled, and to a certain extent limited, academic discussions on the authority of the Court's jurisprudence. Building on findings regarding the role of 'precedent', as adapted from scholarship on common law systems to the context of the CJEU by Stone Sweet (2004), McCown (2003) and others, we adopted an explicit longitudinal research design geared towards examining the precedent-based structures that underpin the long-term ideational evolution of the Court's jurisprudence. By applying a mixed quantitative-qualitative methodological approach we numerically structured observations on 'self-citation' patterns in such a manner as to allow, in a second step, for a qualitative content analysis of the most influential precedent-based lines of argumentation.

Our analytical findings largely borne out the expectation that the non-linearity which characterizes the case law record in the short run, gives way to a clearer image of the implications of the Court's decisions when they are examined in the long run. In fact, we clearly observed a linear reinforcement of fundamental rights' arguments, rendered ever more authoritative over time on the basis of continuous discursive repetition through precedent-based practices. In the most recent period, fundamental rights considerations have even acquired such a strong weight that they constrain the possibility of deciding cases on other premises. Recent attempts by the CJEU to do so nevertheless post-Zambrano have at present led to an ambiguous legal situation, generating new judicial questions and corresponding academic debates. One can expect that the implications of this most recent line of case law will, as always, only emerge over time as its judicial logics mature and settle within the precedent-based discursive reinforcements of later jurisprudential developments.

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Appendix

Table 2: Chronological overview of CJEU case law in the area of family reunification immigration

Case Number	Name	Jurisdiction	Legal Base	Legislation under review
C-40/76	*Kermaschek*	PrelimRef	Free Movement	R 1408/71, Art. 67 et seq.
C-35/82	*Morson & Jhanjan*	PrelimRef	Free Movement	Art. 177 EC (3rd para) R 1612/68, Art. 10
C-238/83	*Meade*	PrelimRef	Free Movement	Art. 48 EEC R 1408/71, Art. 1(a), 2(1), 73(2)
C-267/83	*Diatta v Land Berlin*	PrelimRef	Free Movement	R 1612/68, Art. 10(1), 11
C-94/84	*Deak*	PrelimRef	Free Movement	R 1408/71, Art. 2(1), 3(1) R 1612/68, Art. 7(2)
C-131/85	*Gül*	PrelimRef	Free Movement	R 1612/68, Art. 3(1), 11 D 75/363
C-147/87	*Zaoui*	PrelimRef	Free Movement	R 1408/71 R 1612/68

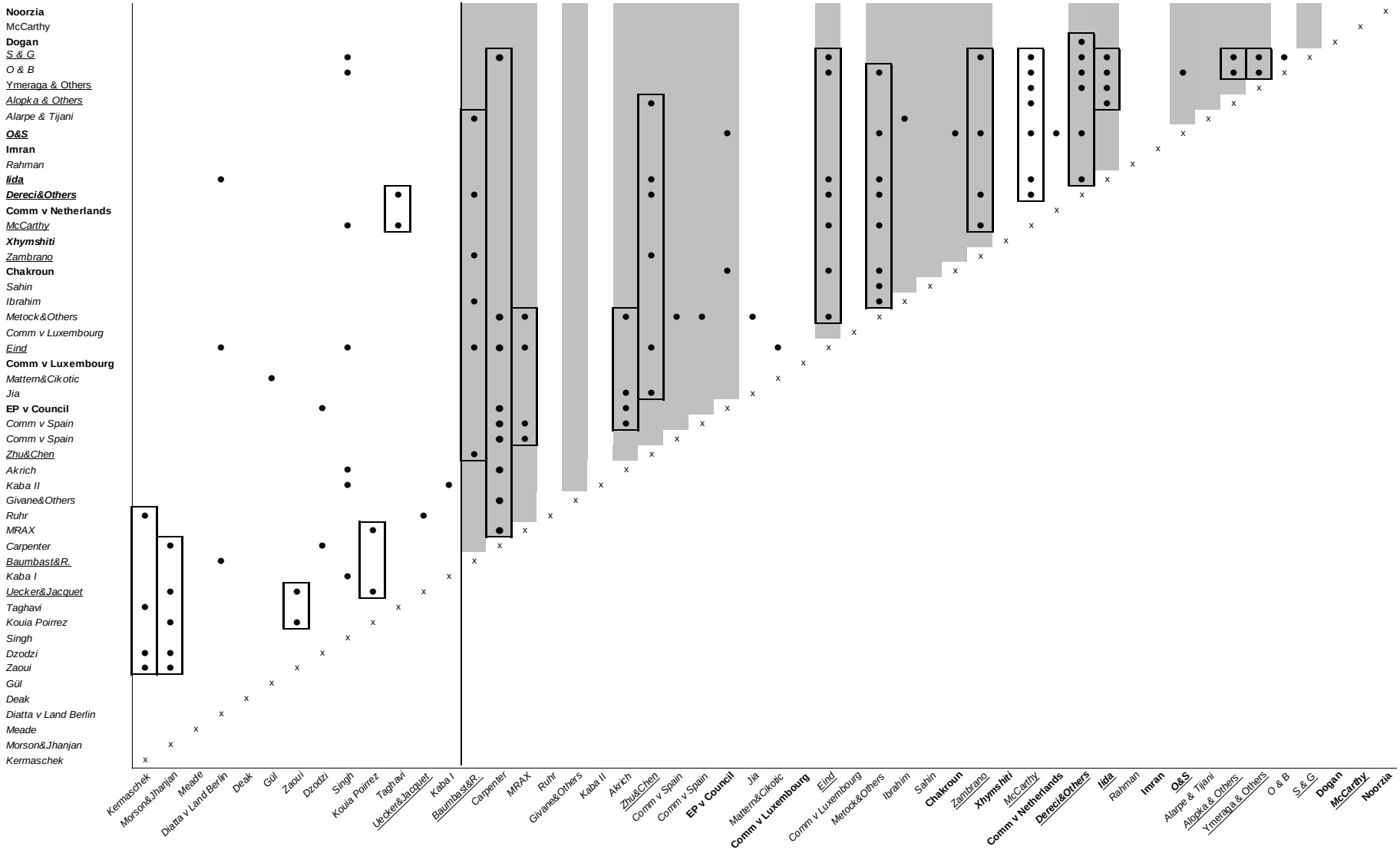
C-297/88 & 197/89	*Dzodzi*	PrelimRef	Free Movement	R 1612/68 D 68/630 R 1251/70 D 64/221, Art. 8, 9
C-370/90	*Singh*	PrelimRef	Free Movement	Art, 52 EEC Art, 48 EEC D 73/148
C-206/91	*Kouia Poirrez*	PrelimRef	Free Movement	Art, 7 EEC Art, 48 (2) EEC R 1612/68 R 1251/70
C-243/91	*Taghavi*	PrelimRef	Free Movement	R 1408/71, Art. 2, 3 R No 2001/83
C-64/96	*Uecker & Jacquet*	PrelimRef	Free Movement + Citizenship	Art. 48 (2) EC Art. 8 EC R 1612/68, Art. 7(1), 11
C-356/98	*Kaba I*	PrelimRef	Free Movement	R 1612/68, Art. 7(2) Art. 48 EEC
C-413/99*****	*Baumbast and R*	PrelimRef	Free Movement + Citizenship	R 1612/68, Art. 12 Art. 18 EC
C-60/00*****	*Carpenter*	PrelimRef	Free Movement	Art. 49 EC D73/148
C-459/99*****	*MRAX*	PrelimRef	Free Movement	D 68/360, Art. 3, 4, 10 D 73/148, Art. 3, 6, 8 D 64/221, Art. 1(2), 9(1), (2), 3(3) R 2317/95
C-189/00	*Ruhr*	PrelimRef	Free Movement	R 1408/71, Art. 2(1), Art. 67-71(a)
C-257/00*****	*Givane & Others*	PrelimRef	Free Movement	R 1251/70, Art. 3(2)
C-466/00	*Kaba II*	PrelimRef	Free Movement	R 1612/68, Art. 7(2) Art. 39 EC
C-109/01*****	*Akrich*	PrelimRef	Free Movement	Art. 39 EC R 1612/68, Art. 10
C-200/02*****	*Zhu & Chen*	PrelimRef	Free Movement + Citizenship	D 90/364 D 73/148 Art. 18 EC
C-157/03*****	*Commission v Spain*	Infringement Action	Free Movement	D 64/221 D 68/360 D 73/148 D 90/365

C-503/03*	*Commission v Spain*	Infringement Action	Free Movement	D 64/221, Art. 1, 2, 3
C-540/03*	*EP v Council*	Annulment Action	Immigration Law	D 2003/86, Art. 4 (1), (6), Art 8
C-1/05	*Jia*	PrelimRef	Free Movement	R 1612/68, Art. 10 D 73/148, Art. 1(1)d, 6(b)
C-10/05	*Mattern & Cikotic*	PrelimRef	Free Movement	R 1612/68, Art. 11
C-165/05	*Commission v Luxembourg*	Infringement Action	Free Movement	R 1612/68, Art. 11
C-291/05*	*Eind*	PrelimRef	Free Movement + Citizenship	R 1612/68, Art. 10 Art. 18 EC
C-57/07	*Commission v Luxembourg*	Infringement Action	Immigration Law	D 2003/86
C-127/08*	*Metock & Others*	PrelimRef	Free Movement	D 2004/38
C-310/08*	*Ibrahim*	PrelimRef	Free Movement	R 1612/68, Art. 12 D 2004/38
C-551/07*	*Sahin*	PrelimRef	Free Movement	D 2004/38, Art. 3(1), 6(2), 7(1)(d), (2), 9(1), 10
C-578/08*	*Chakroun*	PrelimRef	Immigration Law	D 2003/86, Art. 7(1), 2
C-34/09*	*Zambrano*	PrelimRef	Free Movement + Citizenship	D 2004/38 Art. 20 TFEU
C-247/09	*Xhymshiti*	PrelimRef	Free Movement + Immigration Law	R 859/2003 R 1408/71 R 574/72
C-434/09	*McCarthy*	PrelimRef	Free Movement + Citizenship	D 2004/38 Art. 20, 21 TFEU
C-508/10	*Comm v Netherlands*	Infringement Action	Immigration Law	D 2003/109
C-256/11*	*Dereci & Others*	PrelimRef	Free Movement + Citizenship + Immigration Law	D 2004/38 Art. 20, 21 TFEU D 2003/86
C-40/11*	*Iida*	PrelimRef	Free Movement + Citizenship + Immigration Law	D 2004/38 Art. 20 TFEU D 2003/109
C-83/11	*Rahman*	PrelimRef	Free Movement	D 2004/38, Art. 3(2), 10
C-155/11	*Imran*	PrelimRef	Immigration Law	D 2003/86, Art. 7(2)

C-356/11 & C-357/11*****	*O and S*	PrelimRef	Free Movement + Citizenship + Immigration Law	D 2004/38 Art. 20 TFEU D 2003/86
C-529/11*****	*Alarpe & Tijani*	PrelimRef	Free Movement	D 2004/38, Art. 2, 7, 12, 13, 16, 18 R 1612/68, Art. 12
C-87/12*****	*Ymeraga & Others*	PrelimRef	Citizenship	Art. 20 TFEU
C-86/12*****	*Alopka & Others*	PrelimRef	Free Movement + Citizenship	Art. 20, 21 TFEU D 2004/38, Art. 7(1)
C-456/12	*O & B*	PrelimRef	Free Movement	D 2004/38 Art. 21 TFEU
C-457/12*****	*S & G*	PrelimRef	Free Movement + Citizenship	D 2004/38
C-138/13	*Dogan*	PrelimRef	Immigration Law	D 2003/86
C-202/13	*McCarthy & Others*	PrelimRef	Free Movement	D 2004/38
C-338/13	*Noorzia*	PrelimRef	Immigration Law	D 2003/86

Abbreviations: EEC = Treaty establishing the European Economic Community; EC = Treaty establishing the European Community; R = Regulation; D = Directive. 'Legislation under review' refers to the legislation which is the main subject of interpretation in the proceedings. It does not include all legislation referred to in the course of the proceedings. The asterisk mark (*****) denotes the cases which contain a reference to fundamental rights considerations.

Figure 2: Self-citation patterns in the CJEU's jurisprudence on family reunification immigration



X=Immigration law – *X= free movement law* - X=Citizenship Provisions; *Source*: *own compilation from www.curia.eu.*