



ARTICLES

PUBLIC ORDER AND PUBLIC SECURITY IN EU LAW

edited by Ségolène Barbou des Places

“PUBLIC POLICY” AS A CHAMELEONLIKE CONCEPT: THE QUEST FOR COHERENCE IN THE CJEU CASE LAW ON MIGRATION AND UNION CITIZENSHIP

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ABSTRACT: Exceptions to the fundamental freedoms are cornerstones of the single market case law. Numerous Court judgments have elaborated upon their meaning over the past 50 years; they take centre stage in university courses across Europe. Much less discussed is a parallel development in the field of migration. More than a dozen cases have explored the meaning of the “public policy” and “public security” caveat in the supranational legislation on migration over the past decade. They exhibit instances of parallelism with free movement law as well as examples of deviation and distinction. Throughout these judgments, the Court gradually established a coherent approach. Judges insist on the uniform meaning of “public policy” and “public security” to start with, while recognising the potential for deviation and context-specific solutions in light of the wording, general scheme, objectives, and drafting history of the instrument under analysis. In the same way as the chameleon lizard adapts its colour to the environment, the interpretation of the public policy and security exception responds to the legal context. Closer inspection of the judicial practice on migration can serve as a case study on the relevant benchmarks for parallelism and divergence in the approach to public policy exceptions in other domains of Union law. In doing so, our analysis will highlight feedback loops with the restrictive twist of the case law on Union citizens. It will also introduce readers to the distinction between an abstract and individualised proportionality test which is rarely discussed by experts of EU law.

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EUROPEAN PAPERS

www.europeanpapers.eu

ISSN 2499-8249

VOL. 9, 2024, NO 3, PP. 1366-1384

doi: 10.15166/2499-8249/813

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Konstanzer Online-Publikations-System (KOPS)
URL: <http://nbn-resolving.de/urn:nbn:de:bsz:352-2-1uoe48iwzjrm3>

KEYWORDS: public policy – public security – free movement – migration – association agreements – proportionality.

I. STARTING POINT: REAFFIRMING SUPRANATIONAL OVERSIGHT

A classic position of the Luxembourg case law is that States cannot define the meaning of “public policy” unilaterally. It must be given a uniform and autonomous interpretation.¹ What may sound self-evident nowadays had originally been less clear-cut. Remember that the French language version employs the term “*ordre public*” – an essential category of private international law. When it comes to the conflict of laws, the *ordre public* authorises States not to apply foreign legislation that contradicts their fundamental principles, since country A pursues a different policy than country B. In the domain of private international law, the *ordre public* mediates discrepancies between legal orders; it allows States to exceptionally override the obligation to apply foreign legislation.²

In the EU context, such deference to national policy preferences would be detrimental to the primacy of Union law and the uniform interpretation and application of Union law. That is why the CJEU emphasised in its foundational judgments that exceptions to the fundamental freedoms are no *domaine réservée* whose contours could be defined by Member States as being within their domestic affairs, since today’s art. 34 TFEU “is not designed to reserve certain matters to the exclusive jurisdiction of Member States”.³ The term “public policy” belongs to the supranational legal order and its interpretation pertains to the authority of the Court in Luxembourg: “its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the [EU]”.⁴ Thus, the CJEU retains authority to decide in individual cases whether and if so to what extent national measures are covered by an exception.

I.1. CURTAILING EXCEPTIONAL NON-COMPLIANCE UNDER ARTICLE 72 TFEU

Supranational oversight over exceptions has been reaffirmed with regard to art. 72 TFEU according to which justice and home affairs legislation “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security” – an ambiguous English formula deviating from the reference to “public policy” in the other language versions. That indicates that the

¹ See S Barbou des Places, ‘Introduction: Public Order and Public Security in EU Law. Time for Reappraisal’ (2024) European Papers www.europeanpapers.eu 1316.

² Note that the CJEU has established limits to state discretion when interpreting the public policy caveat in Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), art.45(1)(a); see Case C-302/13 *flyLAL-Lithuanian Airlines* ECLI:EU:C:2014:2319 para. 47.

³ Case 35/76 *Simmenthal Spa* ECLI:EU:C:1976:180 para. 14.

⁴ Case 41/74 *Van Duyn* ECLI:EU:C:1974:133 para. 18.

provision should be given a similar meaning to start with. The doctrinal implications of art. 72 TFEU and the predecessor provisions in the Treaties of Maastricht and Amsterdam has been subject to controversy, since they could possibly be interpreted to justify unilateral derogations from secondary legislation on migration and criminal matters.⁵

In a remarkable step, the Court of Justice accepted that option when it compared art. 72 TFEU to the derogations under arts 36, 45, 52, 65, 346, and 347 TFEU.⁶ Crucially, however, Member States must prove underlying reasons; governments cannot determine unilaterally whether to introduce a derogation.⁷ Failure to bring forward any reasons entails that the Court will not consider applying the exception.⁸ Despite emphasising that the option of derogation exists qua “settled case-law”,⁹ the Court has not recognised the arguments brought forward by national governments in a single judgment on the migration law instruments so far.¹⁰

One reason for that outcome are *leges speciales* in secondary legislation. Any activation of art.72 TFEU presupposes that the arguments put forward in favour of derogation cannot be adequately addressed on the basis of secondary legislation.¹¹ Along these lines, the Court found provisions on the reintroduction of internal border controls,¹² the public policy exception in decisions on the relocation of asylum seekers,¹³ and the asylum border procedures to accommodate security concerns.¹⁴ Advocates General supported

⁵ See H Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006) 157; and M ter Steeg, *Das Einwanderungskonzept der EU* (Nomos 2006) 150–58.

⁶ Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2019:257 paras 143; contra *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2019:917, opinion of AG Sharpston, points 208–21.

⁷ *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. paras 146–47; emphasis on the need for justification can be read as an implicit rejection of AG Francis Jacobs, Case C-120/94 *Commission v Greece* ECLI:EU:C:1995:109, opinion of AG Jacobs, points 50–51 regarding art. 347 TFEU.

⁸ See, by way of example, Case C-159/21 *Országos Idegenrendészeti Főigazgatóság and Others* ECLI:EU:C:2022:708 paras 72–81; and Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505 paras 72–73.

⁹ Case C-18/19 *Stadt Frankfurt am Main* ECLI:EU:C:2020:511 para. 28.

¹⁰ See D Thym, *European Migration Law* (OUP 2023) 273–75.

¹¹ This solution mirrors the integration of national identity concerns under art. 4(2) TEU into the “regular” interpretation of exceptions to the fundamental freedoms by e.g. Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806 paras 83–84.

¹² Joined Cases C-368/20 and C-369/20 *Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz* ECLI:EU:C:2022:298 paras 87–90; and H de Verdelhan, ‘Art. 72 TFEU as Seen by the Court of Justice of the EU: Reminder, Exception, or Derogation?’ (2024) *European Papers* www.europeanpapers.eu 1330.

¹³ See *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. paras 148–53.

¹⁴ See Case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 paras 222–24.

the same view on the rejection of family reunification and student visas; they also deemed it possible to extend the time limits for border procedures in response to overwhelmed reception capacities.¹⁵ In doing so, EU legislation may be interpreted in light of art. 72 TFEU to accommodate state interests. Moreover, EU institutions can agree on new measures to alleviate public policy or security concerns, including provisional support under art. 78(3) TFEU. This interpretation gives priority to the accommodation of countervailing interests in the legislative procedure.

1.2. DISTINCT POLITICAL CHOICES WITH REGARD TO MIGRATION

For our purposes, deference to the public policy and security caveats in secondary legislation entails that the answer to specific cases will depend, in part at least, on the contents of the EU legislation – in a similar vein as the status of Union citizens was the result of the co-creation of implementing legislation and Court judgments. Remember that the protective elements of arts 27 and 28 of the Free Movement Directive 2004/38/EC¹⁶ had been introduced first by legislation in the 1960s and early 1970s before the Court delivered its first rulings.¹⁷ With regard to migration, the public policy exception received quite some attention during the legislative process. The most telling example is the long-term residence status of third country nationals who have been residing in a Member State for at least five years. In the Tampere Conclusions of 1999, the European Council had famously promised that the legislature should “should aim at granting them rights and obligations comparable to those of EU citizens”.¹⁸

The Commission took this declaration of intent seriously and made ambitious proposals for residence security, equal treatment, and intra-European mobility which were watered down by the Council during the legislative process.¹⁹ Art. 12 of the Long-Term Residents Directive 2003/109/EC²⁰ mirrors the rules for Union citizens in some respect without, however, replicating the famous prescription, in art. 27(2) of the Free Movement Directive

¹⁵ See Case C-540/03 *Parliament v Council* ECLI:EU:C:2005:517, opinion of AG Juliane Kokott, points 34–42; C-544/15 *Fahimian* ECLI:EU:C:2016:908, opinion of AG Szpunar, point 71; and Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:431, opinion of AG Emiliou, points 126–27.

¹⁶ 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/EE, 90/364/EEC, 90/365/EEC and 93/96/EEC.

¹⁷ See S O’Leary and S Iglesias Sánchez, ‘Free Movement of Persons and Services’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2021) 506, 512–16.

¹⁸ European Council Conclusions No. 18 of 15–16 October 1999 Presidency Conclusions.

¹⁹ See D Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill Nijhoff 2011); at the time, the legislation was adopted unanimously by the Council without the consent of the European Parliament.

²⁰ Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

2004/38/EC, that restrictions “shall be based exclusively on the personal conduct” and that “[p]revious criminal convictions shall not in themselves constitute grounds for taking such measures”. Instead, the Long-Term Residents Directive laid down several abstract criteria to be taken into account by domestic courts when deciding on individual cases.

Other instruments are formulated in an open manner. Many measures on migration replicate the public policy and security exception in the abstract, while some instruments indicate how the public policy exception should be interpreted. By way of example, internal border controls can be reintroduced irrespective of the personal conduct for “high profile international events” and in the case of “terrorist incidents or threats, and threats posed by serious organised crime”.²¹ Entry bans for third country nationals residing abroad can result from a previous criminal conviction, notwithstanding the explicit prohibition of such an outcome for Union citizens.²²

An awareness of these specificities prepares the ground for our inquiry into the case law on “migration law” – a term this contribution employs as an umbrella concept covering the legal status of third country nationals, including in the field of asylum. This perspective may enrich our understanding of EU law for at least two reasons. First, migration law is politically salient and practically important. More than 300 CJEU judgments deal with migration, plus another one hundred on association agreements. Secondly, this judicial practice overlaps, thematically and legally, with a core area of Union activity: the free movement of Union citizens. We shall see towards the end of this contribution that one may possibly explain some of the more restrictive tendencies in the recent case law on Union citizens as a feedback loop, with the judgments on the migration law instruments influencing the outcome of controversial court cases on migration.

II. OVERLAP WITH AND DISTINCTION FROM UNION CITIZENSHIP

It did not come as a surprise that the early judgments on migration projected the single market pedigree upon third country nationals without major modification. The focus of the early case law on the association agreement with Turkey supported this outcome from the late 1980s onwards, in light of its orientation at the single market rationale (II.1).

²¹ See Regulation (EU) 399/2016 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), art. 25(1), as amended by Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders; arguably, the legal picture is different as internal border controls are not about restricting individual rights, unlike in the context of free movement or for the refusal of residence permits for third country nationals.

²² Contrast SIS Border Checks Regulation (EU) 1861/2018 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, art. 24(2), and art. 27(2) Directive 2004/38 cit.

Against this backdrop, CJEU judgments on migration after 2010, when all domestic courts obtained the right to make a preliminary reference on migration,²³ can be described as a process of discovery, with judges in Luxembourg gradually recognising the specificity of the legal regime for third country nationals. That process culminated in the *Fahimian* judgment concluding that potential threats are covered by the public policy exception – an outcome for which a coherent explanation was not immediately apparent (II.2).

II.1. ASSOCIATION AGREEMENT WITH TÜRKIYE AS A TEST CASE

Academic commentators embraced the prospect that the legislation on migration would be interpreted in light of the single market case law, since doing so would advance the legal status of third country nationals.²⁴ In that respect, the “public policy” exception was a critical benchmark to challenge entrenched national practices on the expulsion of “unwanted” foreigners. When the first directives and regulations on migration were adopted after the millennium change, several developments indicated convergence: free movement had emancipated the entry and residence rights of Union citizens from unfettered state discretion over aliens; successive rounds of enlargement broadened the protective credentials of the single market to ever more third country nationals; family members of Union citizens were covered by these rules; and the case law on Turkish nationals indicated that convergence may embrace neighbouring states.²⁵

The Ankara Agreement supported convergence with the single market model when it stated that the High Contracting Parties “agree to be guided by [Articles 45–47 TFEU] for the purpose of progressively securing freedom of movement for workers between them”.²⁶ Building upon this proviso, judges advanced parallel interpretation with the single market *acquis* “so far as is possible”²⁷ – with tangible repercussions for the Association Council Decision No 1/80 governing the residence status of Turkish workers and family members who

²³ The Treaty of Lisbon discontinued arts 67 and 68 EC Treaty, as amended by the Treaty of Amsterdam (adopted 2 October 1997, entered into force 1 May 1999).

²⁴ See K Groenendijk, ‘Recent Developments in EU Law on Migration’ (2014) *European Journal of Migration and Law* 313, 321–24; and A Wiesbrock, ‘Granting Citizenship-Related Rights to Third-Country Nationals: An Alternative to the Full Extensions of European Union Citizenship?’ (2012) *European Journal of Migration and Law* 63, 85–89.

²⁵ See E Guild, *The Legal Elements of European Identity* (Kluwer 2004) chs 5–8; and D Thym, ‘Union Citizenship and Third Country Nationals: Overlap, Parallelism, or Distinction?’, in A Bouveresse and A Iliopoulou-Penot and J Rondou (eds), *La Citoyenneté Européenne, quelle Valeur Ajoutée? European Citizenship: What Added Value?* (Bruylant 2023) 161, 174–76.

²⁶ Art. 12 Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey establishing an Association between the European Economic Community and Turkey (adopted 12 September 1963, entered into force 1 December 1964) [1977].

²⁷ Case C-434/93 ECLI:EU:C:1995:168 para. 20; and D Thym, ‘Constitutional Foundations of the Judgments on the EEC-Turkey Association Agreement’ in D Thym and M Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements* (Brill Nijhoff 2015) 13, 16–24.

had been admitted to a Member State, oftentimes as “guest workers”. Art. 14 of that Decision rendered residence security subject to a “public policy” caveat, amongst others. Turkish nationals benefited from parallel interpretation in light of the case law on art. 45(3) TFEU.²⁸ That fed the expectation that a “domino effect” would gradually extend the privileges of free movement to different categories of third country nationals.

At the same time, the “so far as is possible” formula had an inbuilt limitation, since it recognised the option that parallel interpretation might not prove possible. Experts of external relations law will find it easier to understand that limitation. Why? International agreements concluded by the EU remain subject to the rules of interpretation in the Vienna Convention on the Law of Treaties.²⁹ Even treaty provisions with wording identical to single market law can have a different meaning if the object and purpose of the international agreement supports divergence.³⁰ Indeed, judicial dynamics were reversed when the Court was asked whether enhanced protection against expulsion under art. 28(3) of the Free Movement Directive 2004/38/EC can be extended to the abstract “public policy” and “public security” caveat in art. 14 of the Association Council Decision No 1/80.

Judges answered that question to the negative, since the higher level of protection for Union citizens cannot be projected upon Turkish nationals in light of the generic wording of the Association Council Decision and the “purely” economic objectives of the association agreement.³¹ The protection of Turkish “workers” does not embrace the membership rationale of Union “citizenship”, since “the two legal schemes in question cannot be considered equivalent”.³² While this outcome did not come as a surprise to external relations scholars, experts on migration were disappointed. They had hoped for an ever-closer improvement of the legal status of third country nationals. That happened within limits only.

II.2. *FAHIMIYAN*: DISCREPANCIES WITHIN SUPRANATIONAL LEGISLATION

In a way, the interpretation of the association agreement with Türkiye was straightforward, since it combined a long tradition in external relations law with differences in the wording of the Association Council Decision and the Free Movement Directive. By contrast, the degree of parallelism is less clear when a directive or regulation on migration uses abstract language. A classic example is the “public policy” and “public security” exception in art. 7(6) of the Students and Researchers Directive (EU) 2016/801, which had

²⁸ See Case C-340/97 *Nazli and Others* ECLI:EU:C:2000:77 para. 56; and case C-467/02 *Cetinkaya* ECLI:EU:C:2004:708 paras 41–48.

²⁹ See Opinion 1/91 *EEA Agreement* ECLI:EU:C:1991:490 para. 14.

³⁰ See Case 270/80 *Polydor and Others* ECLI:EU:C:1982:43 paras 14–21; and C Tobler, ‘Context-Related Interpretation of Association Agreements’ in D Thym and M Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements* cit. 101.

³¹ See Case C-371/08 *Ziebell* ECLI:EU:C:2011:809 paras 64, 68, 72.

³² *Ibid.* para. 74.

also featured in a predecessor instrument.³³ Judges were asked to decode its meaning in the *Fahimian* case on the refusal of an entry visa to an Iranian student who had been admitted to a technical university for pursuing a doctorate in information technology. The aspiring PhD student held a Master’s degree from an Iranian university which cooperates with the government in the field of ballistic missiles and is subject to EU sanctions.

The German authorities argued that enrolment in this university alone was sufficient to justify the refusal of the visa. For Union citizens, that would be illegal. Settled case law requires Member States to rely “exclusively on the personal conduct” and to limit themselves to “genuine [and] present ... threats” in accordance with Article 27(2) of the Free Movement Directive 2004/38/EC. There was no indication, however, that the Iranian national was personally involved in the work on sensitive ballistic missiles. What did the Court say? To start with, it emphasised that the “public security” caveat should be interpreted uniformly within the Union legal order and commanded an individualised assessment.³⁴ Then came an about-turn. The Grand Chamber held “potential” threats to be sufficient in the context of an individualised assessment. It also found that these potential threats need not be based exclusively on the personal conduct.³⁵

As a justification, the Court relied on the difference in the wording between the Free Movement Directive and the legislation on students, which does not explicitly limit the assessment to the personal conduct, in contrast to Article 27(2) of the Free Movement Directive. In addition, a non-binding recital recognised that “potential threats” are sufficient to justify the refusal of an entry visa.³⁶ The underlying specificity of migration law was reaffirmed when another Grand Chamber ruling elevated the obligation to rely on the personal conduct to the rank of primary law for the purposes of Union citizenship, independent of the wording of the Free Movement Directive.³⁷ Migration law towards third country nationals differs.

III. “CHAMELEONLIKE”: OPERATIONALISING CONTEXT-SPECIFIC INTERPRETATION

Individual judgments may result in convincing outcomes without, however, presenting a coherent overall picture. Such an outcome undermines legal certainty. That is why judgments on similar themes in different pieces of legislation should ideally complement each

³³ Cf. Directive 2004/114/EC of the Council of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, art. 6(1)(d).

³⁴ Case C-544/15 *Fahimian* ECLI:EU:C:2017:255 para. 39.

³⁵ *Ibid.* paras 40, 44–46.

³⁶ See Recital 6 Directive 2004/114 cit.; and Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupils exchange schemes or educational projects and au pairing, Recital 6.

³⁷ See Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675 paras 81–87.

other, thus establishing a mosaic rather than a patchwork. It presents as a formidable challenge to connect the pits and pieces of the case law on the “public policy” exception, by way of identifying an invisible net of doctrinal reasoning holding the case law together. It can be summed up as the “chameleonlike” character of the “public policy” caveat (III.1). The defining feature of the chameleon lizard is its capability of colour-shifting camouflage to the immediate environment. A chameleon sitting amongst leaves appears green but turns brownish when it climbs up the trunk of a tree. It is such reaction to the legal context which defines the CJEU case law – an abstract conclusion that can be notoriously difficult to put into practice (III.2).

III.1. IDENTIFYING ABSTRACT CRITERIA FOR THE INTERPRETATIVE EXERCISE

The starting point of the case law is the uniform meaning of the “public policy” exception within the EU legal order as a whole. On one occasion, the Court stated paradigmatically that “the extent of the protection a society intends to afford to its fundamental interests cannot vary depending on the legal status of [a] person”.³⁸ Such generic assertion of uniformity can distract from the search for context-specific outcomes. In the case of free movement, the generous definition of “public policy” and “public security” in the Free Movement Directive and the constitutional significance of Union citizenship and free movement warranted a strict approach.

Entry visas for students are close to the opposite end of the interpretative continuum. The legislation stays vague and embraces “potential threats” irrespective of the personal conduct, as we have seen; moreover, the constitutional status of third country nationals remains weak in the absence of a human right to cross-border movement.³⁹ Long-term residents and family members are somewhere in the middle, in light of art. 7 of the Charter and the wording of the Long-Term Residents Directive 2003/109/EC and Family Reunification Directive 2003/86/EC⁴⁰.

Up until December 2019, the case law on third country nationals had remained fuzzy. Judgments mentioned arguments for each outcome, but they did not merge into an overarching picture. An early ruling recognised that the rationale of the public security exception in the Qualification Directive differed from the Free Movement Directive, without deducting any consequences from that distinction.⁴¹ In three judgments on the Return Directive, the CJEU appeared to advance parallelism in the form of an individualised assessment, while indicating, without further explanation, that rules for Union citizens may be

³⁸ Case C-373/13 *T*. ECLI:EU:C:2015:413 para. 77.

³⁹ Arts 15(3) and 45(2) of the Charter of Fundamental Rights of the European Union do not lay down individual rights to be authorised entry on the territory.

⁴⁰ Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

⁴¹ *T*. cit., paras 77–79.

stricter.⁴² The line of imprecise verdicts initially extended to long-term resident status. One judgment referred to the *Ziebell* ruling, which had distinguished the status of Turkish nationals from Union citizenship, without stating as to what the specific meaning of the “public policy” formula should be for long-term residents.⁴³

That changed in December 2019 in two judgments on the Schengen Borders Code Regulation and the Family Reunification Directive – eight months after the author of this contribution had published an article criticising the fuzziness of the case law and reminding readers of how it could be rationalised.⁴⁴ Judges described in abstract language what they had implicitly done on previous occasions. The standard rule is that an interpretation of the “public policy” and “public security” exception has a parallel meaning for Union citizens and third country nationals to start with, before assessing whether and if so to what extent the legislative and constitutional context supports differentiation.⁴⁵ In order to determine the legislation-specific meaning, the Court considers it “necessary ... to take into account the wording of th[e] provision, its context and the objectives pursued by the legislation of which it forms part.”⁴⁶ We need to apply, in other words, the standard parameters for interpreting secondary legislation.

III.2. CRITERIA TO BE TAKEN INTO ACCOUNT

To apply these criteria is easier said than done, precisely because the legislation often uses the terms “public policy” and “public security” in the abstract, without defining the degree of differentiation. This can result in legal uncertainty undermining the *effet utile* of European migration law if domestic authorities and courts struggle to identify what exactly supranational legislation requires. To be sure, domestic courts can make a preliminary reference, but they retain factual leeway and will often decide not to do so. A statistical survey of all CJEU judgments on migration unearths astonishing asymmetries. While some subject matters reach Luxembourg on a regular basis, others feature rarely in the docket of the Court. Similar discrepancies exist with regard to Member States whose national courts are willing to make a preliminary reference in the first place.⁴⁷

In the absence of supranational guidance by means of detailed legislative prescriptions or CJEU judgments, domestic authorities and domestic courts will often continue entrenched national practices. Such self-inspection may undermine the autonomous in-

⁴² See *Stadt Frankfurt am Main* cit. paras 42–44; Case C-240/17 *E* ECLI:EU:C:2018:8 paras 48–49; and Case C-82/16 *K.A. and Others (Family reunification in Belgium)* ECLI:EU:C:2018:308 paras 90–94.

⁴³ See Case C-636/16 *López Pastuzano* ECLI:EU:C:2017:949 paras 26–27.

⁴⁴ See D Thym, ‘A Bird’s Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases’ (2019) *European Journal of Migration and Law* 166, 179–83.

⁴⁵ The lead judgment is Case C-380/18 *EP (Threat to public policy)* ECLI:EU:C:2019:1071 paras 29–32.

⁴⁶ *Ibid.* para. 33; and joined Cases C-381/18 and C-382/18 *G.S. (Threat to public policy)* ECLI:EU:C:2019:1072 paras 53–55.

⁴⁷ See D Thym *European Migration Law* cit. 83–89.

terpretation and uniform application of Union law. Arguably, the underlying characteristics of the chameleonlike notion of public policy and security facilitates such an outcome. It remains notoriously difficult to determine the degree of parallelism with and divergence from Union citizenship in light of the wording, the general scheme, and the purpose of the directives and regulations on migration which guide the search for context-specific solutions in line with previous comments. That is why most readers will intuitively understand the term “chameleonlike” as an implicit criticism of unpredictability and vagueness, notwithstanding that it is doctrinally coherent and convincing. The idea of a uniform principle changing its meaning depending on the legal context remains confusing whenever the context is not self-evident.

Let me illustrate this briefly with regard to all three interpretative principles mentioned by the Court to guide its case law. First, clear wording will often remain elusive if EU legislation on sensitive topics, such as migration, eschews explicit language, also considering that the institutions held different views. Provisions on refusing entry visas and residence permits have traditionally received much attention in the legislative debate. While the Commission had often promoted enhanced parallelism with Union citizenship, Member States reigned in these attempts.

The “public policy” exception was one subject matter on which interior ministers fought hard to ensure that Europeanisation does not eliminate state interests. This resulted in compromise formulae. To conclude that an abstract reference to “public policy” in the migration law instruments gives Member States more leeway to restrict individual rights than ar. 27(2) of the Free Movement Directive does not provide a positive definition of how the exception should be interpreted.⁴⁸ If you are lucky, the legislation contains some guidance as to the relevant criteria, possibly in the form of a non-binding recital like in the *Fahimian* judgment on students.⁴⁹ In cases of doubt, the drafting history may prove useful when it shows that the Council rebutted a Commission Proposal to emulate language in the Free Movement Directive. Such drafting has been used by the Court on one occasion.⁵⁰ If you want to identify the drafting history, you may consult the Article-by-Article Commentary of which the author of this contribution is an editor.⁵¹

Secondly, the context and general scheme of the legislation in question are relevant. As a rule of thumb, Member States have more leeway when relying on the “public policy” caveat in scenarios of admission to the territory than for expulsion after entry. Moreover,

⁴⁸ Cf. *G.S. (Threat to public policy)* cit. para. 56; and *EP (Threat to public policy)* cit. para. 34.

⁴⁹ See also *EP (Threat to public policy)* cit. paras 33, 38–39 on the Schengen Borders Code Regulation; Case C-752/22 *EP (Élignement d'un résident de longue durée)* ECLI:EU:C:2024:225 para. 45 on the Long-Term Residents Directive; and *G.S. (Threat to public policy)* cit. paras 56–58 with regard to art. 6, and Recital 14 Directive 2003/86 cit.

⁵⁰ See *G.S. (Threat to public policy)* cit. para. 59.

⁵¹ See D Thym and K Hailbronner (eds), *EU Immigration and Asylum Law. Article-by-Article Commentary*, (C.H. Beck, Hart, Nomos 2022).

not all admission scenarios have the same weight: Schengen visas for tourists are easier to refuse than family reunification,⁵² which may be subject to positive obligations under the human right to private and family life.⁵³ In the case of long-term residents, the Court recognised that the obligation to take into accounts several factors mentioned in art. 12(3) of the Long-Term Residents Directive 2003/109/EC builds upon the case law of the European Court of Human Rights, which erects higher hurdles for the expulsion of long-term residents than for the refusal of an entry visa even if they are less protective than the guarantees in the Free Movement Directive.⁵⁴

Finally, the purpose can be relevant. Directives which are interpreted to facilitate family reunification and long-term residence will habitually result in a higher level of protection under the “public policy” exception than legislation which puts an emphasis on the preservation of state interests, notably for border controls.⁵⁵ Note, however, that an interpretation in light of objectives is bound to remain open-ended, also considering that the objectives are often formulated in an abstract manner and can be operationalised in different ways.⁵⁶ That reaffirms our overall conclusion that it can be notoriously difficult to distil predictable patterns from inconclusive secondary legislation whose contours are, unfortunately, often less clear-cut than the real-life setting to which a chameleon adapts its patterns.

IV. FEEDBACK LOOPS WITH UNION CITIZENSHIP

The idea of a “domino effect”, mentioned previously, assumed that the generous interpretation of free movement would influence the case law on third country nationals when the EU institutions started dealing with migration after the millennium change. Such path-dependent projection of established patterns upon a new domain of Union activity suited the experience of the association agreement with Turkey and the indirect protection of family members of Union citizens *qua* free movement law (IV.1). With the wisdom of hindsight, the prognosis of one-sided repercussions of free movement on migration law was incomplete. Both fields are communicating vessels where the case law on migration may similarly have an impact on Court judgments on the expulsion of Union citizens (IV.2).

⁵² See *EP (Threat to public policy)* cit. paras 35–37, 40–41.

⁵³ See *G.S. (Threat to public policy)* cit. paras 66–68.

⁵⁴ *EP (Élonignement d'un résident de longue durée)* cit. para. 45 implicitly closed the loophole which *López Pastuzano* cit. paras 26–27 had left unanswered.

⁵⁵ Contrast *G.S. (Threat to public policy)* cit. paras 60–62; *EP (Élonignement d'un résident de longue durée)* cit. paras 45 and 69; with *EP (Threat to public policy)* cit. para. 44–46; and *Fahimian* cit. paras 41–46.

⁵⁶ See D Thym, *European Migration Law* cit. 160–62.

IV.1. FAMILY MEMBERS WITH THE NATIONALITY OF A THIRD STATE

Free movement in the single market is reserved to Union citizens. Nevertheless, family members with the nationality of a third state can benefit indirectly, on the basis of the explicit guarantees in the Free Movement Directive 2004/38/EC and free movement case law. Unfortunately, the overall picture is complex, with different strands of judicial innovations complementing each other. A first scenario concerns family members accompanying or joining Union citizens residing in another Member State. In such circumstances, the “public policy” exception in the Free Movement Directive applies directly to family members.⁵⁷ This can have practical consequences for the migration law instruments whenever family members are subject to an entry ban based on an abstract public policy or security reasoning that is less strict than for non-admission under free movement law.⁵⁸

Free movement in the single market is a cross-border activity by definition. One of the most tantalising judicial developments in recent years has been the *Ruiz Zambrano* judgment and follow-up rulings on residence rights of family members of immobile Union citizens who are residing in their home state. In practice, these judgments primarily concerned the parents of minor Union citizens whenever the parents are nationals of another country. The substance of rights associated with Union citizenship was found to be at risk when minor Union citizens are bound to leave Union territory as a result of an obligation of the parents to return to a third state under domestic or supranational migration laws.⁵⁹ In spite of the foundation of the *Ruiz Zambrano* judgment in the status of Union citizenship, from which the parents benefit in the form of “derived rights”⁶⁰, the Court concluded that the residence status of the parents may be denied or terminated in accordance with the public policy and security exception.⁶¹

In doing so, judges effectively rendered the “substance of rights” subject to the caveats in the Free Movement Directive, including the legislative prescriptions on the necessity of a present threat based exclusively on the personal conduct.⁶² Again, this high level of protection takes precedence over entry bans issued by Member States in accordance with the migration law instruments.⁶³ This amalgamation of the public policy and security caveat for Union citizens and family members in scenarios within and beyond the scope of Directive 2004/38/EC in the judgments building upon *Ruiz Zambrano* enhances legal

⁵⁷ See arts 2(2), 5(4), 7(1)(d) and 27–33 Directive 2004/38 cit.

⁵⁸ See Case C-503/03 *Commission v Spain* ECLI:EU:C:2006:74; and Case C-528/21 *M.D.* ECLI:EU:C:2023:341 paras 109–11; see also Case C-459/99 *MRAX* ECLI:EU:C:2002:461 paras 53–62.

⁵⁹ For an overview, see N Nic Shuibhne, *EU Citizenship Law* (OUP 2023) 226–58.

⁶⁰ Case C-256/11 *Dereci and Others* ECLI:EU:C:2011:734 para. 55.

⁶¹ See *Rendón Marín* cit. para. 81; and Case C-304/14 CS ECLI:EU:C:2016:674 paras 48–49; see also S Coutts, ‘Expulsion and Article 20 TFEU: Some Practical and Conceptual Issues’ (2021) *European Journal of Migration and Law* 29, 38–44.

⁶² *Rendón Marín* cit. paras 82–87; and *M.D.* paras 66–68.

⁶³ See *K.A. and Others (Family reunification in Belgium)* cit. paras 85–97.

certainty but does not embody a generic tendency, on the part of the Court, to project established patterns of the single market case law on third country nationals. The reverse outcome is similarly conceivable – in theory and in practice.

IV.2. “INTEGRATION” AND ENHANCED PROTECTION AGAINST EXPULSION

In the case law on family members, feedback loops between the single market and the migration law instruments were comparatively straightforward. Several judgments discussed both frames of reference together in the official reasoning.⁶⁴ In several cases, this resulted in the explicit conclusion that the level of protection for free movement is higher than under the migration law instruments.⁶⁵ Other judgments revolve exclusively around Union citizenship and the provisions of the Free Movement Directive, without any indication that the case law on third country nationals played a role in the deliberations. Nevertheless, we cannot exclude indirect influence in such scenarios as well, even if that assertion is bound to remain a plausible hypothesis at best. A fine example is the heightened level of protection of Union citizens against expulsion after 10 years of residence, which EU institutions had introduced when revising the Free Movement Directive.

According to art. 28(3)(a) of Directive 2004/38/EC, expulsion can only be based on “imperative grounds of public security” if a Union citizen has resided in the host country for the previous 10 years. What seemed to be a clear-cut rule turned out to be malleable. Judges interpreted the guarantee to reflect an understanding of integration that “is based not only on territorial and temporal factors but also on qualitative elements”⁶⁶, thus effectively relativising the wording in light of objectives. In doing so, judges promoted a “meritocratic” reading of the integration objective which contrasts with the equality-based reasoning in the original free movement case law. Instead of employing residence security and equal treatment as a means to foster integration into the host society, such “meritocratic” understanding renders enhanced protection subject to a successful trajectory of social integration in real life – an approach which is widely recognised to underlie the general scheme of many migration law instruments.⁶⁷

⁶⁴ See, with regard to other questions than the public policy exception, Case C-40/11 *Iida* ECLI:EU:C:2012:2405; Joined Cases C-356/11 and C-357/11 *O and S* ECLI:EU:C:2012:776; and Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* ECLI:EU:C:2013:291.

⁶⁵ See Case C-718/19 *Ordre des barreaux francophones et germanophone and Others* ECLI:EU:C:2021:505 paras 65–72; *K.A. and Others (Family reunification in Belgium)* cit.; and the judgments in *Commission v Spain* cit., *M.D.* cit., and *M.R.A.X.* cit.

⁶⁶ See Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13 para. 25; and Joined Cases C-316/16 and C-424/16 *B & Vomero* ECLI:EU:C:2018:256 paras 69–82; this integration-centred analysis was developed first in Case C-325/09 *Dias* ECLI:EU:C:2011:498 para. 64.

⁶⁷ See K Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’ (2004) *European Journal of Migration and Law* 111; and D Thym, ‘European Citizenship beyond Free Movement. Socioeconomic Deservingness as a Test Case’ (2024) *Nordic Journal of Social Law* 105, 115–25.

Art. 12(3) of the Long-Term Residents Directive 2003/109/EC shows exemplarily that migration law towards third country nationals embodies “meritocratic” approach. It refers to the criteria the European Court of Human Rights applies when deciding whether expulsion is compatible with art. 8 ECHR in light of “the solidity of social, cultural and family ties with the host country and with the country of origin.”⁶⁸ One cannot prove that this idea influenced the case law on Union citizens but that does not mean that such feedback loops do not exist. It is intuitively plausible that judges are influenced by the more than 300 judgments they have delivered on third country nationals so far when deciding citizenship cases in contemporary Europe. Free movement is no longer the alpha and omega of what Union law has to say about the legal status of non-nationals.

V. PROPORTIONALITY AS A CORRECTIVE TOOL

To find that Member States may rely on a potential threat to public policy without considering the personal conduct, accepted in the *Fahimian* judgment, does not automatically justify the refusal, withdrawal, or non-renewal of a residence permit or an entry visa. Settled case law requires a proportionality test as a second step. Closer inspection shows that judges approach the proportionality test in a similar vein to the “public policy” exception in the migration law instruments: by concentrating on the context as a guidance as to how it should be operationalised (V.1). Contrary to what many assume intuitively, the need of an assessment of the individual case does not necessarily exclude an abstract proportionality test – a distinction that is rarely addressed explicitly by the Court of Justice (V.2).

V.1. CONTEXT-SPECIFIC OUTCOMES

Balancing is, by definition, about the relative weight of the various factors in light of circumstances. Individual interests may have a different weight and so do state interests: to withdraw long-term resident status after a criminal conviction is not the same as the rejection of a Schengen visa for touristic purposes in light of uncertainties regarding the willingness to return home. Readers will be familiar with the allegorical depiction of the goddess Justitia and the ideal of justice with scales. It depends on the weight of both sides of the scales which ones keeps the upper hand at the end of the day. This self-evident conclusion is not always followed through with the necessary attention. Many judgments recognise the context indirectly at best, while some academic contributions ignore the difference.

A telling example where the context was recognised as informing a graded response is a judgment on the pre-removal detention of Union citizens and third country nationals which were subject to the same set of domestic rules in Belgium. The Court found synchronisation to be unacceptable when assessing the legality of the pre-removal detention of a Union citizen in light of the public policy and security caveat in art. 27 of the Free

⁶⁸ Settled case law ever since ECtHR *Üner v. the Netherlands* App no. 46410/99 [18 October 2006] § 58.

Movement Directive. To treat Union citizens and third country nationals alike ignored that Directive 2004/38/EC does “not have the same purpose” as the migration law instruments and that Union citizens “enjoy a status and rights entirely different from those” of third country nationals.⁶⁹ Pre-removal detention was permissible for Union citizens under stricter conditions than the ones applying to third country nationals residing illegally.

Generally speaking, judges tend to leave the legislature more leeway where policy choices do not interfere with individual rights, such as the temporary reintroduction of internal border controls. Similarly, the relative weight of individual rights may differ. By way of example, settled human rights case law holds that Article 8 ECHR does not usually involve an obligation, on the part of States, to grant entry visas for purposes of family reunification, whereas the Family Reunification Directive 2003/86/EC goes further by establishing a clearly defined statutory right to entry.⁷⁰ As a result, Member States will find it more difficult to justify the refusal of entry or the expulsion of family members under the Directive than under human rights law. Along similar lines, state interests can be reinforced by constitutional obligations, such as the objective of a high level of public health protection as a justification for travel restrictions during the Covid-19 pandemic.⁷¹

V.2. ABSTRACT OR INDIVIDUAL ASSESSMENT?

A horizontal survey of the case law unearths an astonishing discrepancy that is rarely discussed. Does proportionality generally prohibit the use of legislative provisions that lay down exact thresholds, without leaving domestic authorities some leeway to consider the individual case? Several judgments on migration can be read to thwart such abstract rules. Very often, not only when it comes to “public policy”, proportionality served as a door-opener for individualised assessments instead of legislative categorisation.⁷² Most judgments do not reflect openly on why that is the case, even though need for administrative fine-tuning in the context of an individual assessment is not self-evident. A classic example to the contrary is formed by traffic rules: we are not allowed to cross the street while a traffic light is red, even if the factual situation leaves no doubt that there would be no risk whatsoever.

Upon closer inspection, the case law is more ambivalent than the standard reference to an individual assessment suggests. Several rulings accepted abstract legislative standards as being proportionate, without considering personal circumstances. Examples include a time limit of fifteen days for legal remedies and a minimum age of twenty-one

⁶⁹ See *Ordre des barreaux francophones et germanophone and Others*, paras 65–72.

⁷⁰ See Case C-540/03 *Parliament v. Council* ECLI:EU:C:2006:429 paras 59–60; and D Thym, *European Migration Law* cit. 163–69.

⁷¹ See Case C-128/22 *NORDIC INFO* ECLI:EU:C:2023:951 para. 78.

⁷² Examples include pre-departure language tests as a precondition for family reunification and the definition of stable and regular resources; see D Thym, *European Migration Law* cit. 256–57, 487–92.

years for family reunification with spouses.⁷³ Numerous other abstract rules are being applied by the Court on a daily basis, in the domain of migration law and elsewhere, without judges even considering the idea of individualised fine-tuning by administrative authorities in light of proportionality. Just one example: the five-year residency requirement for permanent residence and long-term residence status under art. 16 of the Free Movement Directive 2004/38/EC and the Long-Term Residents Directive 2003/109/EC.

To be sure, most of these judgments did not concern the “public policy” exception, but the argument can be relevant for its application as well. It even comes up in free movement cases with regard to Union citizens, which had traditionally put much emphasis on an individualised assessment. Judges accepted the generic exclusion of Union citizens studying in another Member State from study grants during a five-year period and of jobseekers from social assistance. To justify that outcome the Court emphasised that the legislative process “itself takes into consideration various factors characterising the individual situation of each applicant”, thus substituting the need for an individual assessment by an abstract categorisation.⁷⁴

German judicial practice, from which the proportionality test was borrowed, similarly recognises the option of categorisation, especially when the legislature defines abstract criteria to accommodate countervailing interests.⁷⁵ Along these lines, the German judiciary interpreted the Court’s proportionality requirement in *Rottmann* on the loss of nationality to require abstract balancing.⁷⁶ Along similar lines, the abstract call for an individual assessment in CJEU judgments need not be as clear-cut as it may seem at first. After all, the application of an abstract rule also requires an assessment of the situation of each person’s case. By way of example, authorities will have to determine whether a traffic right was red when someone started crossing the street. It might be more appropriate, therefore, to distinguish between an individual assessment in the form of an administrative fine-tuning and the mere factual application of an abstract rule.

If proportionality may support both solutions, we are left with the question as to when and why legislative categorisation must give way to administrative fine-tuning. At present, the question often comes up indirectly, since it is mentioned by one of the parties or an Advocate General.⁷⁷ Judges, by contrast, hardly ever explain their preference.

⁷³ See Case C-69/10 *Samba Diouf* ECLI:EU:C:2011:524 paras 66–69, also highlighting that an exemption from the strict rule may exceptionally be necessary; and Case C-338/13 *Noorzia* ECLI:EU:C:2014:2092 paras 15–19.

⁷⁴ See Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597 paras 59–60; and Case C-158/07 *Förster* ECLI:EU:C:2008:630 paras 51–60.

⁷⁵ See Bundesverfassungsgericht (BVerfG) order of 17 December 2013 1 BvL 6/10 paras 84–85; and L Plappert, ‘Der Unionsrechtliche Verhältnismäßigkeitsvorbehalt’ (2020) *Europarecht* 364.

⁷⁶ See Bundesverwaltungsgericht (BVerwG) judgment of 19 April 2018 1 C 29/17 para. 61.

⁷⁷ See Case C-221/17 *Tjebbes and Others* ECLI:EU:C:2018:572, opinion of AG Mengozzi, points 51–118.

The case law remains fuzzy. A telling example is an ECtHR judgment on family reunification in the field of migration which found an unconditional waiting period of two years to be acceptable (abstract proportionality), whereas the situation of the applicant had to be considered thereafter (individualised assessment).⁷⁸ At least, the ECtHR gives us some guidance, albeit at an abstract level. General measures are deemed legitimate when a case-by-case examination “would give rise to a risk of significant uncertainty, of litigation, expense and delay, as well as of discrimination and arbitrariness”.⁷⁹

V. CONCLUSION

Coherence is more ambitious as a concept than consistency. While “consistency” is commonly understood to designate the absence of contradictions between different outcomes, “coherence” hints at an underlying rationale if different parts connect to each other in a sensible way. A classic example of consistent rules lacking coherence is the asymmetric definition of the terms “worker” and “social assistance” in different segments of free movement law.⁸⁰ At first sight, the divergent case law on the “public policy” and “public security” exception in the single market and for the migration law instruments presents another example of incoherence. Upon closer inspection, the divergence can be rationalised as the “chameleonlike” adaption to the legal context. In the same way as the chameleon lizard adapts its colour to the environment, the interpretation of the public policy and security exception responds to the legal context.

The abstract need for context-sensitive interpretation can be difficult to put into practice. In some cases, the wording and the drafting history of EU legislation offer some guidance. By way of example, art. 27(2) of the Free Movement Directive lays down unambiguously that restrictions can only be based on present threats emanating from the personal conduct of the individual concerned. Few migration law instruments embrace similar guarantees; the directive on students even recognises, in a non-binding recital, that potential threats are sufficient. Such discrepancies in the wording are a first indication of interpretative divergence. They can be sustained by the drafting history, the general scheme, objectives, and the constitutional context. By way of example, it is easier to refuse a Schengen visa for tourists than to deny family reunification or expel long-term residents, also considering that the latter two scenarios come within the reach of human rights law. This increases the weight of private interests and renders it more difficult to justify restrictions on public policy grounds.

⁷⁸ See ECtHR *M.A. v Denmark* App no. 6697/18 [9 July 2021] §§ 162, 147–50.

⁷⁹ ECtHR *Animal Defenders International v. the United Kingdom* App no. 48876/08 [22 April 2013] § 108.

⁸⁰ See Case C-85/96 *Martínez Sala v Freistaat Bayern* ECLI:EU:C:1998:217 paras 31–36; Case C-140/12 *Brey* ECLI:EU:C:2013:565 paras 46–58; and E Hancox, ‘Judicial Approaches to Norm Overlaps in EU Law: A Case Study on the Free Movement of Workers’ (2021) CMLRev 1057.

Numerous examples throughout the text have illustrated that the “chameleonlike” interpretation offers a doctrinal explanation connecting the seemingly divergent outcomes. In doing so, the early case law was defined by the path-dependent projection of free movement paradigms on third country nationals under association agreements and with regard to family members of Union citizens. At the same time, feedback loops are no one-way street. A plausible hypothesis suggests that the restrictive twist in recent citizenship judgments presents us with an indirect influence of the migration rationale upon free movement law, notably with regard to enhanced protection against expulsion after 10 years of residence.

The underlying rationale of context-specific interpretation helps identify two expressions of the proportionality test which are rarely distinguished in the abstract. Calls for an “individualised assessment” are less clear-cut than it might seem at first. They can either require an application of an abstract categorisation to the facts of each case or require administrative fine-tuning, with domestic authorities and courts adapting the legal assessment in light of personal circumstances. Even in scenarios where administrative fine-tuning applies, the outcome will ultimately depend on the context, since the relative weight of private and state interests is a dependent variable. That is why our conclusions about the factors guiding the public policy exception have repercussions for the proportionality test. It is easier to refuse a Schengen visa than to deny family reunification or expel long-term residents, with the level of protection for Union citizens being the pinnacle of individual guarantees. The legal context defines the outcome in the same way as the chameleon adapts its colour to the environment.

