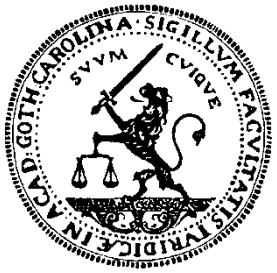

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Union citizenship version 2.0

– effects for Member State citizens and others living in the EU

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Contents

Summary

In a series of fascinating cases decided in 2011, the CJEU modified its classical approach to the scope of application of EU law in the areas of free movement of persons and Union citizenship. The "Zambrano rule" is a narrow exception to the well-known rule of the "purely internal situation". If a Union citizen runs the risk of de facto losing his status as Union citizen and the rights thereto attached, through having to leave the territory of the Union, he or she may invoke Union law against his or her own home Member State – regardless of the existence of any link to Union law other than Union citizenship in itself. No cross-border element is needed since the loss of the rights in itself constitutes a sufficient link to EU law.

What more is, when the forced departure is due to the Union citizen's dependency on a TCN family member, that family member has a derived right of residence in the Union's home Member State.

Persons who cannot invoke Union law under either the traditional cross-border paradigm or the Zambrano rule can be divided into two groups: those who have a real possibility to create a sufficient link to Union law, and those who do not have that possibility because of their inability to provide for themselves. In situations regarding the right of residence of a TCN family member, this leads to disturbing situations of reverse discrimination. Outside the scope of the "Zambrano rule", Union citizen family members are expected to exercise their free movement rights even when they are clearly unable to do so. Thus, where one family can establish a right of residence in the home Member State of the Union citizen on the basis of Union free movement law, another will be split up or be de facto forced to leave the territory of the Union.

The CJEU's evasive attitude towards the latter group's inability to exercise their free movement rights can be understood as an acknowledgement of the Member State's wish to confine free movement of non-economically active persons to those who do not impose a burden on the host Member State's social assistance system.

The Zambrano rule has nonetheless resulted in a de facto expansion of the scope of Union law in order to defend the rights of some of its weakest and more fragile citizens. The CJEU has once again forcefully demonstrated its willingness to defend the spirit and potential inherent in the status of Union citizenship.

Sammanfattning

I en serie omdebatterade rättsfall från 2011 justerade CJEU tillämpningsområdet för EU-rätten på områdena fri rörlighet för personer och unionsmedborgarskapet. ”Zambranoregeln” utgör ett snävt undantag från domstolens regel om rent interna situationer. Om en unionsmedborgare riskerar att de facto förlora denna ställning samt de rättigheter som är knutna till den, genom att tvingas lämna unionens territorium, kan denne åberopa EU-rätten gentemot sin egen medlemsstat – alldeles oavsett om någon gränsöverskridande omständighet i övrigt knyter situationen till EU-rätten. Förlusten av de unionsmedborgerliga rättigheterna utgör i sig en tillräcklig koppling.

Om den påtvingade avresan beror på att unionsmedborgaren är beroende av en familjemedlem utan uppehållstillstånd inom unionen så tillerkänns denna familjemedlem dessutom en härledd uppehållsrätt i unionsmedborgarens hemstat.

Personer som varken kan åberopa unionsrätten enligt den traditionella regeln om gränsöverskridande inslag eller enligt Zambranoregeln kan delas in i två grupper: de som har en verklig möjlighet att själva skapa en tillräcklig koppling till unionsrätten genom att använda sig av sin fria rörlighet, och de som inte kan det på grund av de saknar möjlighet att försörja sig själva. I situationer som berör en härledd uppehållsrätt för en familjemedlem som inte är unionsmedborgare kan detta leda till svårsmälta resultat. Unionsrätten förväntar sig nämligen att unionsmedborgaren ska utöva sin fria rörlighet för att skapa en tillräcklig koppling till EU-rätten, utan att ta hänsyn till dennes faktiska förmåga att genomföra detta. Därför kan vissa familjer lyckas skapa en uppehållsrätt baserad på EU-rätten, medan andra familjer tvingas till splittring eller till att helt lämna unionens territorium för att kunna leva tillsammans.

Domstolens undflyende attityd till denna sista grupps svårigheter att utöva sin fria rörlighet kan förstås som ett erkännande av medlemsstaternas önskan att begränsa den fria rörligheten för icke självförsörjande personer till dem som inte utgör en belastning för den mottagande medlemsstatens sociala stödsystem.

Zambranoregeln har icke desto mindre resulterat i en de facto utvidgning av tillämpningsområdet för unionsrätten, i syfte att försvara rättigheterna för några av de allra mest utsatta unionsmedborgarna. CJEU har på så sätt återigen med kraft visat sin vilja att försvara unionsmedborgarskapets mål och anda.

To Camille, and to all our future adventures.

Cives europae sunt, luckily.

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
FIDE	Fédération Internationale pour le Droit Européen
O.J.	Official Journal of the European Union
OUP	Oxford University Press
SEA	Single European Act
TEU	Treaty of the European Union (post-Lisbon)
TFEU	Treaty of the Functioning of the European Union (post-Lisbon)
TCN	Third country national

1 Introduction

1.1 A newly unveiled dimension of Union citizenship

In 2011, a fascinating development took place in the jurisprudence of the Court of Justice of the European Union (hereinafter "the Court"). Through a series of debated cases,[1] the Court modified its classical approach to the scope of application of EU law in the area of free movement of persons and Union citizenship. An exception to the well-known rule of the "purely internal situation" was unveiled: if a Union citizen runs the risk of being deprived of the "genuine enjoyment of the substance of the rights conferred by virtue of the status as citizen in the Union" – through being de facto forced to leave the territory of the Union – he or she may invoke Union law against their home Member State, regardless of the existence of any link to Union law other than Union citizenship in itself. For the first time, the status of Union citizenship has *in itself* been found to be enough to bring a matter within the scope of Union law.

The new "Zambrano rule" is controversial for several reasons. Firstly, any situation where Union law "takes over" an area which was previously exclusively under national discretion will always be a sensitive matter. Discussions of "the legal activism" of the Court are inevitable. Secondly, the three cases in focus in this thesis all concern a derived right of residence of TCN family members of Union citizens. As such, they highlight the difference between those Union citizens fortunate enough to be able to rely on EU law, and those citizens who are not. Equally, they underline the difference in status between Union citizens and TCNs resident in the Union territory.

Union citizenship is in certain respects a fleeting notion: the idea of a citizenship of a non-state entity is difficult to fit with our normal understanding of the term citizenship. What is a citizenship if it cannot be trusted to protect its owner in all situations? The Zambrano line of case law adds to our understanding of the content and nature of Union citizenship.

The present essay seeks to describe and to review these recent developments. By looking at the role that Union citizenship has played in the Court's approach to the delimitation of the scope of Union law over time, we understand better what Union citizenship really is – what it has to offer in the context of free movement, and to whom. This is all the more important since it seems that few are content with the current state of affairs.

[1] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] O.J. C130/02, Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] O.J. C186/05, and Case C-256/11 *Murat Dereci and Others v Bundesministerium fûr Inneres* [2012] O.J. C25/20.

In all corners of the political spectrum, Union citizenship is found to encompass either too little or too much.[2] The 2011 case law thus offers an opportunity to scrutinize the current state of Union citizenship: for whom and to what prize?

The questions that this essay ultimately seeks to answer are therefore focused on the effects of the recent case law, both from a strict legal point of view and from a wider perspective on the individual and society. What do the developments mean for the status of Union citizenship? What are the effects for the inhabitants in the Union, both Union citizens and TCNs? Do the changes add to the legitimacy of the status itself and to the Union as a whole?

In order to grasp the meaning and importance of the new case law, it is however crucial to place the developments in their legal, historical and political context. With that in mind, the essay starts by taking a good look at how the Court has defined the scope of application of Union law in the area of free movement of persons historically, both before and after the introduction of Union citizenship. Only then is it possible to fully understand in what way, and why, the Court has modified this approach through the Zambrano rule.

The chosen method to answer these questions is the traditional legal method as defined and used in the context of Swedish law. The differences between the legal order of the Union and the Swedish legal system have been taken into due account. For instance, in search of the intentions behind a specific rule, the *travaux préparatoires* so often used in Swedish law are replaced by textual, systemic and teleological methods of interpretation in Union law. Sources consist of the jurisprudence of the Court – cases, opinions and views of the Advocates General – as well as of primary law, secondary legislation and works of legal scholars. Limitations have been necessary due to limited time.

Inevitably, the scholarly debate is coloured by the viewpoints of the particular authors. The intention is however that this thesis will reflect a balanced view on the questions herein treated. To the extent that opinions are expressed, they are either duly attributed to the respective author, or belong to the author of this thesis.

The thesis focuses on the meaning and importance of the 2011 case law on Union citizenship and free movement. It does not seek to give a complete overview of all aspects of the status of Union citizenship. Nor does it seek to explain the state of the law in the areas of economic free movement of

[2] And those who are content still seem to expect developments in the future – see for example Viviane Reading, Vice-President of the European Commission, EU Justice Commissioner, 'Observations on the EU Charter of Fundamental Rights and the future of the European Union' (Speech at the XXV Congress of FIDE, Tallinn 31 May 2012) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/403&format=HTML&aged=0&language=EN&guiLanguage=fr> accessed 30 June 2012.

persons, such as the free movement of workers, service-providers and the self-employed. However, some overlapping between the different areas of free movement of persons is unavoidable, since the earlier jurisprudence in these areas forms the very basis of the case law on Union citizenship of today.

Because it is mainly the Treaty based rights of Union citizenship and free movement that are explored in the Zambrano line of case law, the thesis' focus also lays there. The many extensions of and derogations from these provisions that can be found in secondary legislation are only touched upon briefly and certainly not in any complete manner.

The reader should at all times bear in mind that the outcome of cases on Union law in national courts often depends on particularities in each national system, not least when it comes to procedural law. Thus, this thesis cannot claim to say anything substantial concerning possible results in individual cases.

A key concept in the thesis is legitimacy. It is assumed that legal coherence (and thereby resulting legal certainty) produces legitimacy – which should be understood as the amount of confidence and trust in a legal order among its subjects. Another important notion is that of the third country national (TCN): a person who is not a citizen of any of the Member States, and who is therefore not a Union citizen.

1.2 Points of departure

As in all writing, this text is inevitably shaped by the values and opinions of its author. Since full objectivity is impossible, it is the author's duty to illuminate his or hers points of departure. The following is an attempt to fulfil that duty.

1.2.1 Rights

At the heart of this thesis lies the assumption that the wish to lead life together with the members of one's family in one's home country is a legitimate claim. Such a view echoes natural law and moral universalism, and might therefore sound dated in the ears of some of the result-oriented legal scholars of today. However, in no way does this assumption challenge the fact that if a legal system will not positively grant a particular right to a person, that right will be impossible to legally enforce, and thus quite devoid of any substance.[3] The assumption is simply a point of view which serves as a basis for critique, a useful tool in the examination of law and

[3]While political rhetoric often invokes the "indivisibility" and the "universality" of human rights, this is a view rarely seen reflected in legal reality. Indeed, most – if not all – enforceable human rights law documents allow for (proportional) restrictions to the enjoyment of the rights therein protected. See for example the Charter of fundamental rights of the European Union and the ECHR.

society. Because the Zambrano line of case law is situated at the very intersection of politics and law in the Union, it is important to review its impact with this perspective in mind.

1.2.2 History and politics

The EU system as we know it today is a unique legal polity:[4] a singular mix of a supreme legal order and an international organisation of sovereign member states.[5] The unprecedented position of the Union citizen – citizen of a non-state entity – bears witness to this.[6] This state of affairs did not emerge overnight. Rather, it has slowly materialized through political and judicial efforts over more than fifty years. Many different factors have contributed – for example the will and motivation of the Member States, the political and economic situation at large, as well as the case law of the Court.

With this in mind, the thesis endeavours to keep both a historical and political perspective on the development of Union citizenship law.[7] The Union is viewed as an on-going project, influenced at all times by its political and historical context.

1.3 Outline

In order to introduce the reader to the issue of demarcation of Union law, chapter two presents a short introduction to the primary questions in this area, as well as the Court's methods of interpretation. Chapter three then provides a background to the development of the "cross-border logic" in economic free movement, which has been adopted also in the area of Union citizenship. The crucial notions of the purely internal situation and reverse discrimination are explained. After this thorough background, chapter four depicts the introduction of Union citizenship. The section seeks to explain, to some degree at least, the political ideas driving that introduction. Chapter five describes the impact that the status of Union citizenship has had in the field of free movement of persons, making free movement available – to some extent – also to non-economically active Union citizens. The Zambrano line of case law is referred and analysed in chapter six, where some remaining questions are also described. Conclusions on the effects of the recent case law are discussed in chapter seven.

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[4] Paul Craig 'Institutions, power, and institutional balance' in Paul Craig and Gráinne de Búrca, *The evolution of EU Law* (2nd edn, Oxford University Press 2011) 41.

[5] See for example Articles 1 TEU, 4.1 TEU and 5.1 TEU on the principle of conferral, and the landmark cases 26/62 v*an Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 13 and 6/64 *Costa v ENEL* [1964] ECR 585.

[6] Dimitry Kochenov 'IusTractum of many faces: European Citizenship and the difficult relationship between status and rights' (2009) 15 Columbia Journal of European Law 171.

[7] Keeping this in mind is indispensable for understanding the developments of EU law. For a similar point of view, see Paul Craig & Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (5th edn, Oxford University Press 2011) 1.

2 Drawing the line between Union law and national law

2.1 A delicate duty

The law of the Union coexists with the law of the Member States, and the Court must define where to draw the line between the two.[8] The need for demarcation between the scope of application of EU law and that of national law is thus an effect of the fact that the Union is not a state. Its powers are still based on the principle of conferral, as is affirmed in article 5 TEU. As mundane an observation as this may be, the actual demarcation is not an uncomplicated issue, nor is it an uncontroversial one.

The political sensitivity of the scope of application of Union law is much the same as in the case of the competence of the Union. The broader the scope of Union law, the larger the number of situations where Member State measures may be found to be at odds with Union law. Admittedly, the Member States have conferred (limited) powers and sovereignty to the Union, but they do not respond well to surprises when it comes to the effects of their grand words in the Treaties and other acts of the Union.[9] Ultimately, the Court's handling of these issues is a question of the credibility and stability of the European project. The "masters of the Treaties" must recognize their own creation, and at the same time be held responsible for the promises they have made. Not only do the governments of the Member States need to be satisfied, but so do the "ordinary people of the Union" as well – two things that are not always evident to combine.[10]

In defining the scope of application of the free movement provisions, the Court has sought for a sufficient link to Union law.[11] As is further developed below, the sufficient link in free movement law has traditionally been an element of movement across a border between two or more Member States.

2.2 Methods of interpretation

The Court uses three main methods of interpretation when examining law: textual, systematic and teleological interpretation. The significance of these

[8] The Treaties do not deal with this particular matter. See also Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International BV 2009) 6.
[9] The classical evidence provided for such a claim is the conservative stance towards the interpretation of Union law taken by Member States in cases where there is "a risk" of the revelation of a "new" area of application of EU law. For example, all the intervening Member States in *Zambrano* (n 1) held that the situation in question was purely internal.
[10] See Reading (n 2).
[11] Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, para 33.

principles cannot be overrated, since they are instrumental to the Court's reading of EU law.[12]

Textual interpretation focuses on the literal wording of the provision in question. Systematic interpretation focuses on the rule's context; for example where it is placed in relation to other provisions. Through teleological interpretation, the Court examines the aim and purpose of the rule. What is the object of the rule? What was the fundamental idea and goal behind the rule when it was conceived? The Court's teleological reading (also known as the "effet utile" or "the principle of effectiveness") of Union law has been the subject of much scholarly and political interest.[13] In the words of Advocate General Jacobs:

"...the Court has pursued a consistently purposive approach, and has developed European law, by incremental stages, in such a way as to secure the objectives which it saw as fundamental, thereby frequently supplying the omissions of both the Treaty and the Community legislature."[14]

The Court's "purposive approach" has unquestionably resulted in many seminal cases. In the area of free movement of persons and Union citizenship, this method has enabled the Court to strive towards Union citizenship as the "fundamental status of nationals of the Member States".[15]

[12]See for example the Court's reasoning in *Van Gend en Loos*, (n 5), where it examines the objective and the general scheme of the EC Treaty as well as the wording of Article 12 EC, before coming to the conclusion that the article had direct effect.

[13] Whether this method of interpretation sometimes makes the Court guilty of "judicial activism" or not will, for reasons of limited time, not be treated in this thesis.

[14] F G Jacobs 'The evolution of the European legal order' (2004) 41 Common Market Law Review 303, 315.

[15] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para 31.

3 The 'traditional' approach to the scope of application of free movement

3.1 Market integration through free movement

Free movement of goods, workers, services and establishment was introduced by the Treaty of Rome in 1957.[16] In order to fully appreciate the purpose of the original free movement provisions, one must remember that the founding Communities were created in the aftermath of World War II. As is often repeated, the overarching goal when creating the original Communities in the fifties was to lay the foundation for a prosperous Europe, where economic interdependency between states and regions would provide peace and wealth to a continent torn by two wars and the resulting weak economy. Market integration and economic growth were seen as the primary means to obtain urgently needed political stability, not least between France and Germany.[17]

The introduction of the free movement of goods, workers, services, and establishment was therefore an economical plan. Economically active citizens were endowed free movement rights so that they could contribute to a stronger common market. The unemployed were enabled to move to other countries where there was a shortage of workforce.[18] Workers, service providers, and the self-employed have enjoyed increasing rights to cross-border movement in the interest of European economy ever since.

The free movement provisions are thus aimed to make movement between two or more Member States possible.[19] Traditionally, these provisions were constructed around the prohibition of discrimination (direct as well as indirect) on the grounds of nationality. In most areas of free movement there has however been an evolution also towards the prohibition of *restrictions* to movement, in the sense that measures which are not discriminatory, but none the less hinder access to the freedoms are also prohibited. Broadly speaking therefore, Union law will not allow unjustified or disproportionate

[16] Article 3(c) EEC.
[17] See for example the Schuman declaration of 9 May 1950, leading to the establishment of the ECSC.
[18] Dimitry Kochenov, 'A real European citizenship: a new jurisdiction test: a novel chapter in the developments of the Union in Europe' (2011) 18 Columbia Journal of European Law 55, 59.
[19] Now Articles 20, 21, 34, 45, 49, 56 and 63 TFEU.

restrictions to free movement between the Member States, be it of goods, capital or persons.[20]

3.2 The purely internal situation

The Court's traditional approach to the scope of the free movement provisions was shaped to cater for the economic focus of the EEC. In spite of the fact that the Court never explicitly articulated a rule or a test for determining the scope of application of Union free movement law, scholars seem to agree that the Court's traditional approach to the scope of free movement of persons was to demand a cross-border movement of economic character, providing a sufficient connection to the common market.[21] Situations that lacked a sufficiently economic cross-border movement thus fell outside of the scope of Community law. Such situations became known as purely internal situations, since national law exclusively ruled in such circumstances.[22]

An early example of such a situation was the Saunders case in 1979. A British national invoked the freedom of movement of workers, in order to contest a sanction following her criminal conviction in a British court. The sanction restricted her movement within the UK borders. Saunders held that this was an unlawful restriction of her freedom of movement as a worker. The Court disagreed: since all factors of the case were domestic to the UK, there was no sufficient link with Community law.[23]

The requirement that the cross-border movement had to provide a connection to the common market meant that the purpose of the move itself had to be to enable the person to participate in the common market.[24] This condition led to the – today almost unthinkable – finding that a person who would move across a Community-internal border only for living purposes, but who would keep his or her job in the home Member State, did not qualify as a subject for Community law. Still in the beginning of the nineties, such a cross-border movement did not bring a situation within the scope of Union law.[25] The result of this approach to the application of the freedom of movement of persons was a distinction of Community law vis-à-vis national law clearly based on economic market integration.[26] In fact, the expression "market citizen" was sometimes used already in the sixties to

[20] Admittedly, that this evolution also encompasses the free movement of non-economically active persons is not a entirely uncontroversial statement. Scholars seem to avoid taking a stance in the matter. There are however those who do. See Niamh Nic Shuibhne '(Some of) the kids are all right' (2012) 349-380, 377.
[21] See Eleanor Spaventa, 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects' (2008) 45 Common Market Law Review 13, Tryfonidou (n 8) 9-11, Kochenov (n 18) 59-60.
[22] Case 175/78 *R v Saunders* [1979] ECR 1129, para 11.
[23] ibid.
[24] Kochenov (n 18).
[25] See for example Case C-112/91 *Hans Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-00429.
[26] Kochenov (n 18).

describe the mobile individuals who could now, owing to the seminal rulings on direct effect and supremacy, rely directly on the fundamental freedoms in the court rooms of the Member States.[27]

3.3 Reverse discrimination – a corollary of the purely internal situation

The Court's traditional cross-border approach to the application of the economic freedoms leads to situations of reverse discrimination. This notion describes situations where subjects of the national law of a Member State find themselves in a less advantageous position compared to those persons, in the same Member State, who fall within the scope of more favourable EU rules. Reverse discrimination thus occurs when the purely internal situation proves to be a disadvantage.[28]

Reverse discrimination underlines the discrepancy between the Treaties' promises of non-discrimination and reality of life in the Member States. Therefore it entails legitimacy problems for the idea of an open and integrated market, as well as for the idea of a Union based on equality.[29] With the broader approach towards the prohibition of restrictions of free movement, the number of possible reverse discrimination cases has grown.[30]

In addition to affecting competition by putting otherwise equal economic actors in different positions based only on the geographical reach of their business, reverse discrimination leads to the endowment of different rights to individuals solely based on someone or something crossing a border. In personal and family situations, this sometimes leads to upsetting results.[31] For example, a person's employment history might decide whether he or she can invoke Union law in order to secure a right of residence for family members.

In *Morson and Jhanjan*, two Surinamese women wished to move to their adult children who were Dutch nationals living and working in the Netherlands. Because the adult children had never made use of their free movement rights, their respective situations were purely internal. The

[27] v*an Gend en Loos* (n 5) and *Costa v ENEL* (n 5). Ferdinand Wollenschläger, 'A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European Integration' (2011) 17 European Law Journal 1, 4.
[28] Tryfonidou (n 8) 14-19.
[29] See for example article 2 and 6 TEU, article 8 and 18 TFEU, and article 21 of the Charter, all referring to the principle of equality and non-discrimination.
[30] Camille Dautricourt and Sebastien Thomas 'Reverse discrimination ad free movement of persons under community law: all for Ulysses, nothing for Penelope?' (2009) 34(3) European Law Review, 433, 435.
[31] Tryfonidou (n 8) 15-18.

women therefore did not have the right of residence that they would otherwise have enjoyed under EU law. [32]

Situations of reverse discrimination are purely internal and not governed by Union law. They are therefore neither permissible nor impermissible under that law. The difference in treatment is simply due to different rules being applied in each of the coexisting legal systems. Member States are free to maintain more restrictive rules in purely internal situations.[33] If a Member State wishes to remedy situations of reverse discrimination it must do so within the confines of its own legal system,[34] or work towards Union-wide harmonization of the relevant rules, provided that the EU legislator has the necessary power in the area in question.

Many have suggested that something should be done about reverse discrimination in Union law, for example by recognizing article 18 TFEU as prohibiting reverse discrimination if it results in violations of fundamental rights.[35] Although it is of course not impossible that the necessary elements of such a change will be in place in the future, these demands continue to be wishes, at least for now.

3.4 "Escaping" national law

When Union law provides more extensive rights than those given under national law, it becomes an attractive solution to *create* a link with Union free movement law in order to access those rights. By taking up work in another Member State for example, a Union citizen can gain rights that he or she would not have had otherwise. Although the authorities in the Member States may frown upon this kind of calculated use of Union law, it is a legitimate choice of the person to do so. The Court has drawn the bottom line at abuse, stating in *Centros* that the Member States are entitled to prevent citizens from "improperly circumvent[ing] their national legislation" or to prevent them from "improperly or fraudulently taking advantage of provisions of Community law".[36] Abuse is however a narrow concept in Union free movement law. To underline this, the Court stated that if a person intentionally places him- or herself in a situation where he or

[32] Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] ECR 03723.
[33]See for example Joined cases 314-316/81 and 82/82 *Procureur de la République and Comité national de défensecontrel'alcoolisme v Waterkeyn and others* [1982] ECR 4337, where more favorable Community rules on alcohol advertisement had to be applied to imported beverages only, making it possible for the national legal system to set less favorable rules for domestic producers.
[34] Joined cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-03171, para 23. Some Member States have instated laws forbidding that their own nationals be treated less favorably than foreign ones, thereby banning reverse discrimination in their own legal system, see for example Case C-448/98 *Criminal proceedings against Jean-Pierre Guimont* [2000] ECR I-10663.
[35] *Ruiz Zambrano* [n1], Opinion of AG Sharpston, para 144.
[36]Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459, para 24.

she will gain a right, such behaviour is not enough to presume abuse.[37] The Commission has interpreted this as a requirement that the established link with EU law be genuine and effective, mentioning deception and artificial conduct as examples of abuse. If the Union citizen really does move to, or really does work in another Member State, that will constitute a genuine and effective link.[38]

[37] ibid para 27.
[38] Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' COM(2009) 313 final, 17-18.

4 Introducing Union citizenship

4.1 A deeper committment

Legal citizenship of the Union was introduced in the Maastricht Treaty, which was concluded in 1991 and entered into force in 1993. Though initially perceived by some as a merely symbolic manifestation of the established law on "market citizenship", it has turned out to be of vital importance in the development of free movement in the Union.

The period before the introduction of this new legal status was one of optimism for the Communities. The Member States showed a great deal of enthusiasm for deeper market integration, and the "European project" was popular with the ordinary European.[39] In 1985, the Member States had concluded the SEA, which represented a renewed commitment to the completion of the single market by 1992.

Politically, the world was turning. The authoritarian regimes of Greece, Spain, and Portugal all ended during the seventies. Germany was moving towards reunification in the late eighties and the Soviet Union was showing signs of change. In the midst of these transformations, the Member States were willing to engage in a deeper cooperation than ever before. The Maastricht Treaty's famous pillar structure allowed for the introduction of the European Union and political cooperation in new areas. Articles 8-8(e) EC regulated the new citizenship of the Union.

4.2 Rights of the Union citizen

The original provisions on citizenship stated that every person holding the nationality of a Member State was now a citizen of the Union. The provisions established every citizen's right to move and reside freely, subject to exceptions laid down in the Treaty as well as in secondary law. In addition they also included a number of political rights, such as the right to vote, the right to petition, and the right to consular protection.[40]

Today, Union citizenship and the rights thereto attached are regulated in Articles 20-24 TFEU. Article 20 TFEU establishes the legal status and makes clear that it is still additional to, and conditional upon, the individual carrying the nationality of one of the Member States. Thereafter, Article 20(2) TFEU recites the rights attached to Union citizenship: the right to move and reside freely within the territory of the Member States, the right to vote and to stand as a candidate in elections to the European parliament, and in municipal elections in their Member state of residence, the right to

[39] Desmond Dinan, *Europe Recast – A history of European Union* (Lynne Rienner Publishers 2004) 7, 125-130, 206-220.
[40] Art 8 – 8(c) EC.

diplomatic protection in a third country, and finally the right to petition the European parliament, and to address the European Ombudsman as well as the other institutions of the Union. In its last paragraph, Article 20(2) TFEU repeats that which was stated already in the Maastricht Treaty: that the mentioned rights shall be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

This sentence results in an interesting restructuring of the normal hierarchy of Union law norms: the Treaties' citizenship rights are in fact subject to limits put upon them in secondary legislation. The Citizenship Directive[41] and other directives and legal instruments which deal with the rights of Union citizens are therefore highly authoritative in defining those rights.

The subsequent articles restate the rights mentioned in Article 20 TFEU, with more precision. Article 21 TFEU concerns the right to move and reside freely within the territory of the Member States. The article once again specifies that this right is "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

4.3 Rights of third country nationals

An important and sometimes overlooked aspect of the introduction of Union citizenship is the resulting exclusion of the TCN. Almost twenty million people who are not Union citizens live legally in the territory of the Union today, representing around four percent of the Union's total population. That is about as many people as the total number of inhabitants in Sweden, Finland and Denmark put together.[42]

TCNs were excluded from the scope of the Treaty well before the introduction of Union citizenship.[43] With the introduction of the status of Union citizenship, this fact was incorporated into the Treaties and explicitly entrenched by the Member States. Even though it can surely be argued that there was never any politically viable alternative to this construction of Union citizenship, it is nevertheless important to remember that other solutions could have been chosen.[44] In that line of thought, scholars have remarked that detaching the status of Union citizenship from that of a Member State would enhance the Union's credibility. Today, Union citizenship excludes a large part of the Union's work force: an exclusion

[41] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States […] [2004] O.J. L158/77.
[42] Commission and Eurostat, 'Demography Report 2010 – Older, more numerous and diverse Europeans' (Commission Staff Working Document, 3 February 2012), 49 <http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KE-ET-10-001> accessed 17 July 2012.
[43] Case 238/83 *Caisse d'allocations familiales de la Région Parisienne v Mr and Mrs Richard Meade* [1984] ECR 02631.
[44] R Hansen 'A European citizenship or a Europe of citizens? Third country nationals in the EU' (1998) 4 Journal of Ethnic and Migration Studies 751-768.

which is difficult to legitimize in a Union so strongly based upon the common market. A different, more inclusionary Union citizenship would in this way have rhymed better with a Union founded on the value of equality and on non-discrimination.[45]

Luckily, the situation of TCNs living in the Union has not been completely ignored by the legislature. The European Council did underline the importance of fair treatment of legally resident TCNs at its meeting in Tampere in October 1999.[46]

Instead of treaty-based rights, TCNs enjoy rights established in secondary legislation and in agreements concluded with states outside of the Union. As shown by Kochenov, these various documents and legal instruments have however resulted in a "patch-work" of rights, where TCNs who are fortunate enough to fall within the scope of Union law nevertheless may find themselves in very different legal positions.[47] A TCN whose situation falls within the scope of EU law can for example enjoy his or her rights of movement and residence by virtue of Directive 2003/109/EC on long term residents,[48] as a family member of a migrating Union citizen under Directive 2004/38/EC,[49] or as the beneficiary of an international agreement between the EU and a third country.[50] It would also be possible for one person to fall within the scope of all three of those categories.[51]

[45] Willem Maas 'Migrants, states, and EU citizenship's unfulfilled promise' (2008) 6 Citizenship Studies 583-596. See also Anja Wiesbrock, 'Granting citizenship-related rights to third-counrty nationals: an alternative to full extension of European Union citizenship?' (2012) 14 European Journal of Migration and Law 63-94.
[46] Presidency Conclusions, Tampere European Council, 15-16 October 1999.
[47] Dimitry Kochenov' IusTractum of many faces: European Citizenship and the difficult relationship between status and rights' (2009) 15 Columbia Journal of European Law 169, 233.
[48] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] O.J. L16/44.
[49] n 43.
[50] One well known example of such an agreement is the Association Agreement with Turkey [1964] O.J. 217/3687.
[51] Kochenov (n 47) 222-234.

5 Union citizenship and free movement

5.1 Widening the scope of non-discrimination to the non-economically active

It would take a few years before the legal effects of the introduction of Union citizenship would start to show. The very first judgment directly on Union citizenship, *Martínez Sala*,[52] was delivered in May 1998.[53]

María Martínez Sala, a woman of Spanish nationality who lived in Germany, invoked Union law in order to contest the German authorities' refusal to give her a child-raising allowance. Although she was legally resident in Germany and had been living and working there for many years, at the relevant time Mrs Martínez Sala was not in possession of the required residence permit to be eligible for the allowance under German law. It was not clear whether she could be seen as a worker under Union law. The first question which had to be examined was therefore whether the situation fell within the scope of Union law at all.

The Court held that there was no question that the facts of the case fell within the *material* scope of Union law, since the allowance was both a family benefit in the meaning of regulation no 1408/71 and a social advantage within the meaning of regulation no 1612/68.[54] The decisive matter was therefore whether Mrs Martínez Sala fell within the *personal* scope of Union law. The Court came to the conclusion that since she was a Union citizen, she did.[55]

The case could thus be determined by the Court. It found that Mrs Martínez Sala enjoyed "the rights and duties laid down by the Treaty, including the right [...] not to suffer discrimination on grounds of nationality [when legally resident in another Member State than the Member State of origin]".[56] In a bold, teleological move, the Court thus coupled Union citizenship with the principle of non-discrimination: since German nationals

[52] Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.
[53] Case C-209/03 *Bidar* [2005] ECR I-2119, Opinion of the AG, para 23.
[54] *Martínez Sala* (n 52) para 57. This part of the judgment has been criticized by Spaventa (n 21) 33.
[55] ibid paras 60-61. Admittedly, the Court did not state this outright. After having established that Mrs Martínez Sala was legally resident in Germany, the Court simply stated that there was no need to dwell on the issue whether she could rely on the right to move and reside freely in Article 8a of the EC Treaty. The perceptive reader understands that the Court therefore bases its reasoning on the very status of Union citizenship, which at the time was contained in Article 8 EC. See also Spaventa (n 21) 19.
[56] *Martínez Sala* (n 52) para 62.

did not have to produce proof of their legal residence in order to receive the child-raising allowance, nor did Mrs Martínez Sala.[57]

The personal scope of Union law thus now potentially included all nationals of the Member States, as an effect of the introduction of Union citizenship.[58] A qualified cross-border movement seemed sufficient to trigger the protection of Union law. Migrating Union citizens apparently no longer had to be workers or self-employed in order to enjoy the rights recognised in the Treaties.

The coupling of Union citizenship and the principle of non-discrimination meant that the rights of the non-economically active Union citizen were constructed in a similar way as the economic free movement rights. As a result, the scope of the principle of non-discrimination[59] was broadened.

In *Grzelzcyk*, the Court further underlined the principal importance of the status of Union citizenship by stating that "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."[60]

5.2 A right to move and reside freely – for the self-sufficient Union citizen

Since the *Martínez Sala* judgment, the situations of students, job-seekers and other non-economically active migrant Union citizens have been found to fall within the scope of Union law in a similar way, often in cases concerning the right to claim social benefits.[61] Free movement of the non-economically active citizen has become a reality. In the 2002 case of *Baumbast*, the Court proclaimed that every Union citizen could invoke the right to move and reside freely before national courts, since it was directly effective.[62]

For the sake of accuracy, the first steps towards free-standing rights of free movement for non-economically active Member State citizens were in fact taken in secondary law shortly before the introduction of Union citizenship.

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[57] ibid para 63.
[58] Spaventa (n 21)15, and Kochenov (n 18) 64-68.
[59] Now Article 18 TFEU.
[60] *Grzelczyk* (n 15) para 31.
[61] See for example the famous cases *Grzelczyk* (n 15) (on students' right to minimum subsistence allowance), Case C-224/98 D'Hoop v Office Nationale de l'Emploi [2002] ECR I-6191(on the right of a job-seeker to receive a 'tideover' allowance upon returning to her Member State of origin after having completed her studies in another Member State) , and Case C-456/02 *Trojani v CPAS* [2004] ECR I-7573(on the right to minimum subsistence allowance for a non-working person lawfully resident in the host-state).
[62] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 84.

The Council adopted three directives on the free movement of persons in general, on students and on retirees in 1990.[63] The enjoyment of the rights to free movement in these directives was from the start subject to the condition that the migrating person had sickness insurance and sufficient resources. To date, these conditions still limit the free movement of Union citizens.

When the case law on the free movement of Union citizens and their families was summarized in Directive 2004/38/EC,[64] the older directives were repealed. However, the conditions of sufficient resources and sickness insurance were incorporated in the new directive. The object of these specific limitations is that migrant Union citizens do not become an unreasonable burden on the social assistance system of the host Member State.[65] The condition of self-sufficiency and insurance for non-economically active Union citizens has the effect that residence under one of the provisions of economic free movement is still more beneficial to the individual than residence based on Union citizenship.[66]

5.3 Free movement and family life

Free standing rights of residence are not the only way for a person to enjoy free movement in the EU. Derived rights of residence have historically played an important role in free movement also for nationals of the Member States.

When free movement was still reserved only for economically active Member State nationals, the Union instated a right for those migrants to bring close family members to the host state. Regulation 1612/68/EEC,[67] on freedom of movement for workers within the Community, made it possible primarily for spouses, children and dependant relatives in both the descending and ascending line of a worker, to join him or her in the host country.[68] The rules applied regardless of the nationality of the family members. The motive appears to have been to care for the workers as well as promoting the European single market by making free movement more attractive for the individual.[69]

[63] Council Directive 90/364/EEC of 28 June 1990 on the right of residence, O.J. L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, O.J. 1990 L180/28; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, O.J. L180/30.
[64] n 41.
[65] ibid preamble notes 10, 16, and Article 7 (1) b.
[66] Paul Craig and Gráinne de Búrca, *EU Law – text, cases, and materials* (5th edn, OUP 2011) 847.
[67] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] O.J. L257/2.
[68] ibid Article 10.
[69] ibid, preamble.

Today, all Union citizens may make use of their own free-standing right of residence in the Member States, at least in theory. Derived rights of residence are however continually important for the legal situation of many TCNs. As noticed earlier, TCNs may enjoy a derived right of residence based on familial ties with a migrant Union citizen based on Directive 2004/38/EC.[70] According to Directive 2003/86/EC, TCNs may also enjoy a derived right of residence based on familial ties with a legally resident TCN who fulfils certain conditions.[71]

In situations where secondary legislation is not applicable, the Court has also in some cases granted a derived right of residence for a TCN family member of a Union citizen, based directly on the Treaty provisions. *Ruiz Zambrano* is the latest in that line of cases.[72]

In *Carpenter*[73] and *Zhu and Chen*[74], the Court explicitly endowed a right of residence to a TCN family member upon whom a Union citizen family member was dependent for the exercise of free movement.

In *Carpenter*, a woman of Philippine nationality, Mrs Carpenter, who had overstayed her residence permit in the UK, was granted a derived right of residence based on her family relation to a Union citizen. Her husband Mr Carpenter was a travelling businessman who provided services inside and outside of the UK. Mrs Carpenter took care of his children when he was away and therefore made his free movement in the Union possible. Upon the British authorities' refusal to grant her residency based on her marriage, Mrs Carpenter stated that her husband's rights to free movement would be restricted if she could not stay in the UK. The Court agreed and stated that the expulsion of Mrs Carpenter would indeed hinder Mr Carpenter's right to provide services under Article 49 EC (now Article 56 TFEU). That hindrance could not be justified, since it amounted to a disproportionate interference in the fundamental right to respect for family life. Union law therefore precluded the refusal of residency of Mrs Carpenter.

The judgment in *Carpenter* was surprising from several points of view. For one, Mr Carpenter was not a party to the national case, and yet the Court could establish its jurisdiction on his cross-border movement. Another striking feature was the Court's interpretation of the right to respect for family life. In the judgment, the Court specifically refers to Article 8 ECHR. However, the expulsion of Mrs Carpenter would hardly have amounted to an interference with that article. The Strasbourg court's case law rather

[70] Directive 2004/38/EC (n 41) Article 2 (2).
[71] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] O. J. L251/12. Article 3 states that the Directive applies to sponsors who are "holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence".
[72] n 1.
[73] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.
[74] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004]ECR I-9925.

suggests that the right to respect for family life is not violated by expulsion of a family member, as long as the family has the opportunity to live together *somewhere* in the world.[75] In the case of the Carpenter family, it was most likely possible for them to live together in the Philippines. The Luxembourg Court's judgment thus resulted in wider a protection of family life than that provided by the ECHR: a right for the TCN family member to stay within the Union in order for the Union citizen to enjoy his (economic) free movement.[76]

Today, Article 7 of the Charter of fundamental rights of the European Union ("the Charter") protects the right to respect for family life in the Union legal order.[77] Article 52 (3) of the Charter states that insofar as the Charter rights correspond to the rights guaranteed by the ECHR, those rights shall have the same meaning and scope in the Charter as in that convention. The provision does not, however, prevent a more extensive protection under Union law.

The scope of the Charter and of fundamental rights in the Union legal order is a sensitive subject. Article 51 (2), which regulates the Charter's field of application even states that "[t]he Charter does not extend the field of application of Union law beyond the powers of the Union..." It may be argued that this is a political phrase with little legal value. Nevertheless, it shows the controversy that surrounds the issue of balancing powers in the Union.

5.4 From cross-border movement to cross-border element

After the introduction of Union citizenship, the Court has clearly taken an open view on what constitutes a sufficient cross-border movement in order to bring a situation within the scope of application of the free movement of persons.[78] This evolution followed in the footsteps of much earlier developments in the area of free movement of goods, where restrictions of *potential* cross-border movement was recognised as prohibited by the Treaty already in 1974.[79]

Many scholars have made attempts to depict the Court's broad approach to the cross-border element in cases on the free movement of persons.

[75] Steve Peers, *EU Justice and Home Affairs Law*, (2nd edn, Oxford University Press 2006) 190.
[76] Nic Shuibhne (n 20) 377.
[77] The Charter of Fundamental Rights of the European Union [2010] O.J. C83/389. Since the Lisbon Treaty came into force in 2009, the Charter has the same legal value as the Treaties, see Article 6 (1) TEU.
[78] Spaventa (n 21) 16.
[79] Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837 para 5:"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

Lenaerts[80] points to five kinds of situations where the cross-border element has been deemed to constitute a sufficient link to Union law although it hardly corresponds to the classic cross-border movement in the early case law on economic free movement.

Firstly, the Court has found a sufficient link although the facts of the case concerned a national of the Member State in question who had suffered discrimination based on differences between national regions rather than on actual free movement across Member State borders.[81] In other cases, the Court has accepted tenuous links to Union law when a migrant Union citizen in close relation to a person who is a party to a case might be deterred or hindered from making use of the free movement rights.[82] In a third set of situations the Court has found a sufficient cross-border element when a Union citizen who has made use of the right to free movement returns home to the Member State of nationality.[83] Further, the Court has found sufficient cross-border elements in cases where a Union citizen party has never made use of the free movement rights, but never the less has a "direct link" to a person who has done so, affecting the first Union citizen's legal position.[84]

In these four sets of situations there was arguably some kind of physical movement present at all times, either by a Union citizen party or by someone in a close relationship to a Union citizen. There are however also examples of cases where absolutely no physical cross-border movement did occur, but where the Court still found a sufficient link to Union law. These cases would later form part of the foundation for the *Ruiz Zambrano* strand of case law.

In the case of *Garcia Avello*,[85] the parents of two children of double Spanish and Belgian nationality invoked Union law in contesting a decision taken by Belgian authorities not to register the children under the last name which had been requested by the parents. These had requested the name "Garcia Weber", which was how the children had been registered by Spanish authorities. However, the Belgian authorities held that the children should be registered as "Garcia Avello" or "Garcia" in Belgium, in accordance with the Belgian tradition that children carry their father's last name.

The Court found that the situation did fall within the scope of Union law, even though the children had never made use of their free movement or had

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[80] Koen Lenaerts, '"Civis europaeus sum": from the cross-border link to the status of citizen of the Union' [2011] 3 FMW Online Journal 6, 8. <http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=6193&type=1&furtherPubs=yes> accessed 3 June 2012.

[81] See for example Case C-281/98 *Angonese* [2000] ECR I-4139.

[82] See for example *Carpenter* (n 73).

[83] See for example *D'Hoop* (n 62).

[84] See Case C- 403/03 *Schempp* [2005] ECR I-6421, where a German person living in Germany wanted to deduct the maintenance he was paying to an ex-partner living in Austria from his German taxes.

[85] Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

even left Belgium. The "cross-border element" was constituted by the fact that the children were Union citizens with double Member State nationality. They were Spanish nationals legally resident in Belgium and were as such not to be victims of discriminatory rules.[86] Further, the rules in question put persons with double nationality at a disadvantage, where they risked having problems related to their right to free movement due to their different names under Belgian and Spanish law. The Belgian decision was found not to be in accordance with the principle of non-discrimination, and was therefore not compatible with Union law.[87]

In the case of *Zhu and Chen*,[88] the TCN mother of a Union citizen child who had never left the UK, could rely on Union law in order to contest the British authorities' decision to expel her (the mother). In this case the cross-border element was seemingly found in the fact that the child was a Union citizen of Irish nationality resident in the UK. The girl had acquired Irish nationality at birth in Northern Ireland, and was lawfully resident in the UK because her Chinese mother possessed sufficient resources to support her.[89]

Nic Shuibhne has suggested that the Court's open minded approach to the cross-border condition is in fact a struggle to uphold the nature and purpose of Union citizenship, perhaps to the detriment of legal certainty. By taking a flexible stance towards the scope of application of Union citizenship and free movement law, the Court ensures that Union law protects fundamental rights and freedoms of Union citizens in situation which would otherwise have been seen as purely internal and would have resulted in reverse discrimination.[90]

[86] ibid para 27.
[87] ibid paras 35-37.
[88] *Zhu and Chen* (n 74).
[89] ibid para 19.
[90] Nic Shuibhne (n 20) 349.

6 Unveiling the exception

6.1 The Rottman prelude: deprivation of the status of Union citizenship

The ability of the status of Union citizenship to transcend the cross-border element paradigm, was first signalled by the Court in March 2010, in *Janko Rottman*.[91]

Mr Rottman, a former Austrian national, had moved to Germany in 1995, while an investigation on criminal charges against him was conducted in Austria. An arrest warrant was subsequently issued there. After having resided three years in Germany, Mr Rottman applied for German citizenship. He did not mention the Austrian authorities' criminal investigation in the application, which was granted a year later. Since Austria does not accept double nationalities, Mr Rottman automatically lost his Austrian nationality.[92]

When German authorities eventually learned about the Austrian arrest warrant, Mr Rottman's German nationality was withdrawn on the grounds that he had not been honest and had obtained his new nationality in a deceitful way. As a result, Mr Rottman now risked becoming stateless. He would thus also lose his Union citizenship. During the process of appeal, the question whether the loss of the status of Union citizenship was contrary to Union law was raised. Questions were sent to the Court for a preliminary ruling on the matter.[93]

The German and Austrian authorities, supported by the Commission, took the view that this was a purely internal situation, since the facts of the case concerned a decision by German authorities concerning a German national living in Germany. The six intervening Member States underlined the fact that the acquisition and loss of nationality is the exclusive competence of the Member States. The Court, sitting in the Grand Chamber, however disagreed. It stated that a situation as that at hand, where a Union citizen risked losing the status of Union citizenship and the rights thereto attached, because of withdrawal of a nationality obtained through naturalisation, "falls, by reason of its nature and its consequences, within the ambit of Union law."[94] In other words, even when exercising their exclusive powers, the Member States have to have due regard for Union law, if their actions affect the rights conferred through the status of Union citizenship. [95]

[91] Case C-135/08 *Janko Rottmann v Freistadt Bayern* [2010] ECR I-01449.
[92] ibid paras 22-26.
[93] ibid, paras 27-35.
[94] ibid, para 42.
[95] ibid, paras 45 and 48.

The Court nonetheless regarded the reaction to withdraw the naturalisation because of deceitful conduct as a reason relating to public interest, and as such justifiable, if found to be in respect of the principle of proportionality.[96]

Rottman can be seen as a prelude to the case of *Ruiz Zambrano* which was decided one year later. Even though there was a slim cross-border element in the case (the fact that Mr. Rottman had moved from Austria to Germany at one point), this was not given any attention by the Court, which seems to have based its jurisdiction directly on article 20 (1) TFEU, and on Mr. Rottmans potential future loss of the rights thereto attached.[97] When seen in this light, the *Rottman* case was the first in which a purely internal situation came within the scope of Union law solely based on the Treaty provisions on the status of Union citizenship.

The question remained whether the Rottman rule was going to be an exception confined only to circumstances where a Union citizen might in fact lose his or her status as a citizen, or if it would turn out to be of wider application. The issue of whether Union law would also be applicable when a citizen risked to not be able to enjoy the rights attached to Union citizenship (a de facto loss of those rights) was tried in *Ruiz Zambrano*.[98]

6.2 Ruiz Zambrano: genuine enjoyment of the substance of the Union citizenship rights

Mr Ruiz Zambrano arrived in Belgium with his family, a wife and a son, from Colombia in 1999. Both Mr and Mrs Ruiz Zambrano applied for asylum based on their experiences in Colombia. While those applications were denied by Belgian authorities, the family could not be sent back to Colombia because of the situation there at the time. Thus they found themselves in a situation of non-refoulement, where they, although not in possession of valid residence permits, or work permits, nonetheless could reside in Belgium until further notice.[99]

In spite of his lack of the required work permit, Mr Ruiz Zambrano started working full-time at a Belgian company at the end of 2001. He obtained a regular employment contract and the employer paid the required contributions for his social security. While working at the company, Mr Ruiz Zambrano and his wife had their second son Diego, born in 2003, and

[96] ibid, paras 51-55.
[97] This impression is underlined when one compares the Court's reasoning with the reasoning of the Advocate General Poiares Maduro in his Opinion of the case. Whereas the AG refers to the movement made by Mr. Rotmann as establishing the Court's jurisdiction, the Court refers only to the status of citizenship of the Union. See *Janko Rottmann* (n 91), Opinion of AG Poiares Maduro, paras 11-13.
[98] n 1.
[99] *Ruiz Zambrano* (n 1), Opinion of AG Sharpston, paras 18-20.

their first daughter Jessica, born in 2005.[100] These two children became Belgian nationals because they were not registered for Colombian citizenship. According to Belgian law at the time, children born in Belgium became Belgian nationals if they would otherwise become stateless, no matter the reason for that statelessness.[101]

Mr Ruiz Zambrano had to stop working at the company when the authorities discovered his lack of work permit. In proceedings regarding Mr Ruiz Zambrano's right to unemployment benefits, Mr Ruiz Zambrano held that he had "...a right of residence directly by virtue of the EC Treaty or, at the very least, that he enjoy[ed] the derived right of residence, recognised in Case [...] Zhu and Chen..."[102] The national court recognized the possible authority behind this argument and asked the Court for a preliminary ruling. The questions referred thus concerned whether the children's status as Union citizens meant that their father, a TCN, had a derived right to residence as well as a derived right to take up employment in the children's home Member State, which they had never left.[103]

At first glance the situations in *Ruiz Zambrano* and *Zhu and Chen* may seem very similar. There is however one important distinction. In *Zhu and Chen*, the child was of Irish nationality, legally residing in Britain. In *Ruiz Zambrano*, Diego and Jessica were of Belgian nationality, residing in Belgium. The criteria that (seemingly, at least) constituted a sufficient link to Union law in *Zhu and Chen* could therefore not be satisfied in *Ruiz Zambrano*.

In her Opinion in the case, AG Sharpston made a thorough inventory of the Court's classical approach to the scope of application of Union law in the area of free movement and Union citizenship. She came to the conclusion that Union law was applicable in the situation at hand. After having made clear that she did not think movement was necessary in order to trigger the application of the Union citizenship provisions, pointing to the dilution of the cross-border element in cases such as *García Avello* and *Zhu and Chen*,[104] she laid out two different lines of argument to support her position.

In her first line of argument, the AG pointed to the case of *Rottman*, essentially holding that the way the Court had chosen to look at the possible future loss of the status of Union citizenship, and the rights thereto attached, instead of Mr Rottman's earlier movement, should be used also in this *Ruiz Zambrano*. The two Belgian children would in a similar way to Mr. Rottman be unable to exercise (some of) their Union citizenship right, if they would have to accompany their parents back to Colombia.[105] The second line of argument was based on the position that the non-

[100] ibid paras 23-25.
[101] *Ruiz Zambrano* (n 1) para 19.
[102] ibid para 34.
[103] ibid para 36.
[104] *Ruiz* Zambrano (n 1), Opinion of AG Sharpston , paras 77-78.
[105] ibid paras 94-95.

discrimination principle in Article 18 TFEU could be seen as prohibiting reverse discrimination resulting from the interaction between Article 21 TFEU and national law, if that discrimination violates a fundamental right and the national legal order does not offer an equal solution.[106] The intervening Member States, on the other hand, once again supported by the Commission, held that the situation at hand was purely internal and that it could therefore not fall within the ambit of Union law.[107]

The Grand Chamber's very short judgment stands in stark contrast against the AG's rich analysis. Firstly, the Court stated that Directive 2004/38/EC could not be applicable since the cross-border requirement in its Article 3(1) was not fulfilled.[108] Secondly, it acknowledged that the Ruiz Zambrano children were indeed Union citizens and repeated the famous line from *Grzelczyk*[109] that citizenship of the Union is intended to be the fundamental status of nationals of the Member States. It then held, in a reminiscence of the reasoning in *Rottman*, that:

"...Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[110]

Thereupon the Court simply stated that refusing Mr Ruiz Zambrano a right of residence and a work permit would have exactly that effect on the situation of his two youngest children.[111] In the following paragraph, the Court laconically explained that the children most likely would have to leave the territory of the Union if their parents were refused a right of residence and the permission to work. A refusal would put the parents in a difficult economical position and would make it likely that they would choose to leave the Union, taking their children with them. That departure would make it impossible "to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."[112] It was therefore not in line with EU law to refuse a right of residence and work permit to Mr Ruiz Zambrano. He thus enjoyed derivative rights of residence and work in Belgium, based on his youngest children's Union citizenship.

This short judgment was a sensation. A purely internal situation – one in which there was not the least bit of cross-border element – had been found to fall within the ambit of Union law, the sole connecting link being the genuine enjoyment of the substance of the rights attached to Union citizenship.

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[106] ibid para 144.
[107] Lenaerts (n 80) 13.
[108] n 43, Article 3 (1) of the Directive reads: "This Directive shall apply to all Union citizens who move to or reside in a Member State *other than that of which they are a national*…" (emphasis added).
[109] *Grzelzcyk* (n 60) para 31.
[110] *Ruiz Zambrano* (n 1) para 42.
[111] ibid para 43.
[112] ibid para 44.

The lack of explanation however meant that the judgment raised as many questions as answers. For instance: how did the new rule relate to the earlier case law on Union citizenship, which had always required a cross-border element? Was this a new version of *Carpenter*? Why, in that case, was there no mentioning of fundamental rights? What would count as a deprivation of the "genuine enjoyment of the substance of the rights conferred by virtue of [the] status as citizen[...] of the Union"? Not least, would the rule be confined to the very particular circumstances in the cases of *Ruiz Zambrano* and *Rottman*, or would it affect many different kinds of situations?

Nevertheless, on the basis of the facts of the case it was possible to deduce what the Ruiz Zambrano children were in risk of de facto losing by leaving the territory of the Union. Clearly, the children were not at risk of losing their rights to consular and diplomatic protection, nor their right to petition the European parliament or the Ombudsman.[113] It could therefore be assumed that the Union citizen did not have to lose the enjoyment of all citizenship rights, but only some of them.[114] This gave readers some idea as to the meaning of the "genuine enjoyment of the substance of the Union citizenship rights", this central new concept which not only constituted the sole link to Union law, but also formed the very basis for Mr Ruiz Zambrano's derived rights.

6.3 McCarthy: limits

Already in May 2011, only two months after *Ruiz Zambrano*, came the judgement in *McCarthy*,[115] which shed light on some of the questions.

The case concerned Shirley McCarthy, a resident of the UK of both Irish and British nationality, who had never left the territory of the UK and was living on state benefits with her children.[116] After she married Mr McCarthy, a Jamaican national, Mrs McCarthy applied for an Irish passport for the first time in her life. Her request was granted. With that passport in hand, she then applied – also for the first time – for residence documents for herself and her husband in the UK, on the grounds of her being a Union citizen with accompanying family. As a British citizen, Mrs McCarthy already had an unconditional right of residence in the UK, so that was not the reason for her application. Clearly, Mrs McCarthy was hoping to create a sufficient link to Union law in order to invoke the Union right to live with her husband in the UK. The equivalent would not be granted under British national law. The British authorities however refused her application on the grounds that she was not a worker, nor self-employed or economically self-sufficient. After several appeals, the Supreme Court of the United Kingdom

[113] See Article 20 (b) – 20 (d) TFEU. For a similar view, see Case C-256/11 *Murat Dereci and Others v Bundesministerium fûr Inneres* [2012] O.J. C25/20, Opinion of AG Mengozzi para 38.
[114] Lenaerts (n 80) 14.
[115] *McCarthy* (n 1).
[116] Nic Shuibhne (n 20) 370.

decided to ask the Luxemburg Court for a preliminary ruling on how Mrs McCarthy's situation was to be assessed under Directive 2004/38/EC.[117]

In her Opinion, AG Kokott began by stating that according to the wording of Article 3(1),[118] the directive was not applicable to static Member State nationals who had never made use of their free movement rights. This conclusion was not affected by looking at the overall goal of the directive, nor by its relation to the primary law rights of free movement. However, recalling the case of *García Avello*,[119] there was still some doubt as to whether Mrs McCarthy's double nationality could change that outcome and be enough to bring her situation within the scope of EU law and the directive.[120]

In *García Avello*, double nationality played a crucial role in establishing a connection with Union law. According to AG Kokott, the relevant question was whether a Union citizen of dual nationality found him- or herself in a legally different position compared to other Union citizens who were nationals of the host Member State only. In *García Avello*, the children were in risk of having problems in their future exercise of free movement because of their different names under Belgian and Spanish law. In comparison, other Union citizens who were nationals only of one of those Member States did not face such future difficulties. In *McCarthy*, however, Mrs McCarthy's dual nationality did not lead to any difference in legal situation between Mrs McCarthy and other Union citizens who were nationals of the UK only. Mrs McCarthy risked no future problems related to her right to free movement. AG Kokott drew the conclusion that Mrs McCarthy's dual nationality would not constitute a sufficient link to Union law in the particular circumstances of the case. The situation should therefore, according to the AG, be considered as purely internal.[121]

In dialogue with AG Sharpston's Opinion on *Ruiz Zambrano*, AG Kokott pointed out that the situation of Mrs McCarthy was not a suitable case for revising the Court's case law on reverse discrimination, since she was not economically self-sufficient. Mrs McCarthy's situation was therefore not comparable to the situation of those Union citizens who would be able to exercise their free movement rights. The AG seem to have meant that strictly speaking, this was not a matter of reverse discrimination, or at least not one that Union law should engage with.[122]

Like the AG, the Court found that Directive 2004/38/EC could not be applicable. Mrs McCarthy's double nationalities made no difference in that

[117] Where *Ruiz Zambrano* was completely confined to Belgium, in *McCarthy* the double nationality constitutes a "link" to Ireland. Therefore the court raised issue of the Directive again.
[118] See n 110.
[119] n 85.
[120] *McCarthy* (n 1), Opinion of AG Kokott, paras 24-32.
[121] ibid paras 34-37, 45.
[122] ibid paras 39-44.

respect.[123] The Court then proceeded to examine whether Article 21 TFEU[124] could be applicable independently to Mrs McCarthy's situation. Referring to cases *Schempp*[125] and *Ruiz Zambrano*, the Court underlined that the fact that Mrs McCarthy had never made use of her free movement rights did not automatically exclude her situation from the scope of EU law.[126] However, the Court then presented the conclusion that:

"...no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States..."[127]

What emerges from this and the following passages in the judgment is that there are two ways in which a situation may come within the scope of Union law through the Treaty provisions on Union citizenship. Firstly, there is the traditional, "cross-border element approach", described earlier in this thesis. Following that logic, the relevant question is whether the national measure constitutes an "impediment" to the right of free movement and residence. There is however still a need for a cross-border link. Secondly, there is the exception: the "Zambrano rule", which applies when a Union citizen runs the risk of losing his status as Union citizen, or being de facto deprived of the "substance of the rights" attached to that status. In those situations no cross-border element is needed, since the in fact/de facto loss of the rights constitute a sufficient link to EU law in itself.[128]

After having examined both of these two possibilities in regard to the situation of Mrs McCarthy, the Court came to the conclusion that she was neither *impeded* in her free movement, nor *deprived* of any right attaching to the status of Union citizenship. Her situation therefore lacked any link to Union law.[129] Thus, according to the Court, Mrs McCarthy would not, like the children in *García Avello*, experience any legal problems if she would ever choose move to another Member State. Nor would she, like the children in *Ruiz Zambrano*, be de facto forced to leave the territory of the Union.[130] She was apparently free to bring her situation within the scope of Union law by moving to a different Member State if she wished to do so.

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[123] *McCarthy* (n 1) paras 31-43.
[124] Why the Court chose to examine the applicability of Article 21 TFEU and to ignore Article 20 TFEU (the key provision in *Ruiz* Zambrano) is not clear in the judgment. But, as Lenearts (n 82) points out: "…among the rights attaching to the status of citizen of the Union, there is the right to move and reside freely within the territory of the Member States, which is enshrined in Article 21 TFEU."
[125] n 84.
[126] *McCarthy* (n 1) paras 46-47.
[127] ibid para 49.
[128] For a similar view, see Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, Opinion by AG Trstenjak, paras 60-78.
[129] *McCarthy* (n 1) paras 49-56.
[130] *McCarthy* (n 1) para 50.

McCarthy made clear that the Zambrano rule was a narrow exception to the well known cross-border criteria. However, once again, the lack of general reasoning by the Court meant that it was difficult to discern the exact boundaries of that exception. Clearly, a situation such as that of Mrs McCarthy would continue to fall outside the scope of Union law. But what would it have taken for Mrs McCarthy's situation to have constituted a deprivation of the genuine enjoyment of the substance of the citizenship rights? Was the Zambrano rule restricted to the Zambrano facts?[131]

6.4 Dereci and others: defining the limits

Hardly surprising, the Court soon had to adjudicate yet another case regarding the rights of non-migrant Union citizens. In *Dereci*,[132] the Administrative Court of Austria asked the Court in Luxemburg for a preliminary ruling on four questions related to five separate national cases regarding the right of residence in Austria of TCN family members of Union citizens who had never made used of their freedom of movement. In none of the five cases was the Union citizen dependent on the TCN for their livelihood.

The national cases displayed an array of different familial bonds in all stages of life. Mr Dereci was married to an Austrian national and the father of three minor children, also of Austrian nationality. He was an illegal immigrant of Turkish nationality who had never had legal residence in Austria. Mr Maduike, of Nigerian nationality, was also an illegal immigrant and married to an Austrian national. Mrs Heiml, of Sri Lankan nationality, had entered Austria legally but had stayed on after her residence permit was no longer valid. She too was married to an Austrian national. Mr Kokollari, from Kosovo, entered Austria legally in 1984 as a small child. His application for continued residence had been rejected in 2006. Mrs Stevic, a woman of Serbian nationality, was applying for residency in Austria based on her family relation to her father. She was at the time still living in Serbia with her husband.

In his view on the case, AG Mengozzi began by stating that it was indeed necessary to further examine the effects of *Ruiz Zambrano*.[133] After having recalled the facts and outcomes of both *Ruiz Zambrano* and *McCarthy*,[134] the AG drew the following conclusions. Firstly, Directive 2004/38/EC was not applicable for the same reasons as in the two earlier cases, namely that none of the Union citizens involved had made use of their freedom of movement. Secondly, in none of the five cases did the Union citizen risk to be deprived "of the genuine enjoyment of the substance of the rights attaching to that status", since none of them risked to be "forced" to leave the territory of the EU if the family TCN could not stay in Austria. All of

[131] The risk that more and more cases on this rule would come in to the Court has been mentioned by many. See for example *Dereci* (n 1), Opinion of AG Mengozzi, para 17.
[132] *Dereci* (n 1).
[133] *Dereci* (n 1), Opinion of AG Mengozzi, para 17.
[134] ibid, paras 18-30.

the Union citizens had an unconditional right of residency in Austria based on their nationality and could exercise their free movement if they so wished. Regarding Mr Dereci's young children, they could do so in the company of their Austrian mother. The AG also took the opportunity to clarify his view on the fundamental right to respect for family life, pointing out that that fundamental right was "...insufficient, in itself, to bring [a situation] within the scope of Union law..."[135]

Focusing on the Dereci family, the AG admitted that these conclusions led to the contradictory situation that Mrs Dereci's Austrian nationality was to her family's disadvantage. She would now have to move, together with her children, to another Member State if she wished to create a right of residence in the Union for her husband. In comparison, had she not been of Austrian nationality, her family would have been in a situation comparable to that of the family in *Ruiz Zambrano*, and Mr Dereci would have had an immediate right of residence in Austria, the children's home Member State. Further, the AG held that had Mrs Dereci been economically dependent on Mr Dereci, the outcome of her husband's case might have been different. She would then have had great difficulty to move to another Member State because of the self-sufficiency criteria. In the AG's assessment, the family's situation would under such circumstances have amounted to a deprivation of the genuine enjoyment of the substance of the rights attaching to citizenship of the Union, by forcing the mother and her children to move to the father in Turkey, outside of the territory of the Union. [136]

The AG underlined that in his understanding of the Zambrano rule, it was not "...limited to the case of minor Union citizens who are dependent on one of their parents, who are both nationals of non-member countries..."[137] An adult TCN son or daughter to a Union citizen should be able to rely on the Zambrano rule, given that the Union citizen was "economically and/or legally, administratively and emotionally dependent" on that adult child.[138] AG Mengozzi's definition of the dependency criteria in the Zambrano rule was thus very broad.

The Court assembled once again in the Grand Chamber. It began, just as it had in both *Ruiz Zambrano* and in *McCarthy* by establishing the non-applicability of Directive 2004/38/EC in the cases before the national court. Moving on to the applicability of the Treaty provisions on citizenship of the Union, the Court clarified the key paragraph of *Ruiz Zambrano* by stating that deprivation of the "genuine enjoyment of the substance of the rights attached to the status of Union citizen" refers "to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".[139] This had of course been alluded to in both *Ruiz Zambrano* and in *McCarthy*,

[135] ibid paras 32-38.
[136] ibid paras 44-45.
[137] ibid para 46.
[138] ibid paras 47-48.
[139] ibid para 66.

but here it was spelled out clearly for the first time. The Grand Chamber then specified the rule further, by stating that:

"...the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."[140]

The Court also took the opportunity to clarify the impact of the right to respect for family life, by stating that the Charter would only be applicable if the national court would find that the national cases fell within the scope of Union law.[141] The Court then refrained from making any comments on the outcome in the specific cases.

Dereci read in combination with *McCarthy* implies that the "substance of the rights conferred by virtue of the status as citizen of the Union" refers to the right to reside and to move freely within the territory of the Member states, as stated in Article 20(2) (a) TFEU and Article 21 TFEU. That seems to be the only right attached to Union citizenship that a Union citizen cannot exercise when he or she moves to a country outside of the Union territory.[142] Such a reading would also explain why the Court referred only to the applicability of Article 21 TFEU in *McCarthy*.[143]

"The deprivation of the substance of the Union citizenship rights" is the central new concept in the Zambrano rule which not only in itself constitutes the sole link to Union law, but also forms the basis for the derived rights endowed on the TCN family member. By constructing the rule this way, the Court managed to stay more or less clear of the sensitive subject of fundamental rights and in particular the applicability of the Charter. In *Dereci*, it finally verbalizes what was only implied in *Ruiz Zambrano* and *McCarthy*: the Charter is only applicable in a situation which has already been found to fall within Union law. The result is intriguing: either the fundamental right is not applicable because the situation is purely internal – or, if Union law is indeed applicable, then the fundamental right is not needed. The TCN family member already has a right to residence.

As suggested by Nic Shuibhne, this construction of the rule may have been a way for the Court to avoid stirring further controversy by bringing in fundamental rights to the already sensational *Ruiz Zambrano* judgment. Regardless of the Court's intentions, AG Mengozzi was right in stating that

[140] ibid paras 68.
[141] ibid paras 72.
[142] Admittedly, he or she would also lose the right to vote and to stand as a candidate in municipal elections in their Member State of residence, as stated in Article 20(2) (b) TFEU.
[143] See n 124.

the fundamental right to respect for family life is insufficient to bring a situation within the scope of EU law.[144]

6.5 Remaining questions

Obviously, the mere desire to stay in the Union together as a family is not enough to bring a situation within the scope of the rule and of Union law. As the Court pointed out, the Zambrano rule covers situations where the Union citizen *has to* leave the territory of the Union. When the forced departure is due to the Union citizen's dependency on a TCN family member, that family member has a derived right of residence in the Union's home Member State. But what does *having to leave* really mean? Clearly, this notion implies that the Union citizen is dependent on the TCN in some way, as pointed out by AG Mengozzi. However, any form of emotional dependency is not enough, as the marriage in *McCarthy* was not sufficient to bring that situation within the scope of Union law. The Court has clearly also written off economic dependency as a criterion.[145] So far, only the relationship between minor children and their parents have made the cut in the Court's eyes. It seems that the dependency criterion is high.

Importantly, the Court didn't write off relationships other than those between a TCN parent and a minor Union citizen child in *Dereci*. In line with the reading of AG Mengozzi, it therefore seems reasonable to believe that other kinds of relationships could be included, given that the degree of dependency would be comparable to that between the children and their parents in *Ruiz Zambrano*. For example, the dependency of a handicapped adult Union citizen son or daughter on a TCN parent could fit that description, as well as the relationship between a physically or mentally ill or fragile Union citizen in need of care from a TCN spouse.[146]

An important question from a practical point of view is the situation of the Dereci family. As Davies points out, this situation is probably far more common than that of the Ruiz Zambrano family. When one parent in a family is a Union citizen, the chance that the children will also be Union citizens dramatically increases. If such families were to rely on Union law in order to gain a right of residence for the TCN parent, without having to cross any borders, the practical impact of the Zambrano rule could potentially be enormous. The Court did not point to any specific outcome in *Dereci*, but AG Mengozzi suggested that the mother's Union citizenship meant that neither she nor the children risked losing the genuine enjoyment of the substance of their rights as Union citizens. Their freedom to move within the Union in order to constitute a sufficient link to Union law was not affected by the father's possible expulsion. That does seem to be a rational

[144] See Nic Shuibhne (n 20) 375.
[145] n 140.
[146] Gareth Davies 'The Family rights of European children: expulsion of non-European parents' (2012) EUI Working Paper RSCAS 2012/04 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002706> accessed 5 April 2012.

understanding of the Zambrano rule, which puts such emphasis on the Union citizen being de facto forced to leave the territory of the Union.

The resulting reverse discrimination in cases like *McCarthy* and *Dereci* is however mind-boggling. Where the Zambrano family could rely on Union law in order to gain a right of residence in the Member State of which the children were nationals, the Dereci family has to split up. The father must return to his native Turkey, the mother is left in Austria, possibly with one less salary to feed their children, and the best possibility for the father to gain a right of residence is if the mother and children move to another Member State in order to create a sufficient link with Union law.

Moving to a different country as a single parent with children is not an easy task. It might not even be possible. In order to even have a right of residence in another Member State, the single parent must be able to provide for him- or herself as well as for the children. As AG Mengozzi pointed out, it is not hard to imagine a scenario where the only real choice is between following the father to Turkey, or to remain in the Union without him.[147]

Would that situation constitute a deprivation of the genuine enjoyment of the substance of the Union citizenship rights, as the AG suggested? Or would it at least amount to an *impediment* to movement, as suggested by Nic Shuibhne in her scorching critique of the Court's reasoning in *McCarthy*?[148] In fact, there are great similarities between the situations of Mrs McCarthy and Mrs Dereci. They both have dependent children and are similarly expected to move in order to establish a right of residence in the Union for their respective spouses. But taking their situation as mothers into consideration, it may well be impossible for them to move without the support of their spouses. Yet, in *McCarthy*, the Court said outright that "no element" of Mrs McCarthy's situation was sufficient to bring it within the scope of Union law.[149] It is indeed a conclusion which is difficult to reconcile with the Court's earlier judgments on restrictions on the free movement of persons, such as *Carpenter* and *García Avello*, where hindrance to potential or future free movement seem to have played such a great part in bringing the cases within the scope of Union law. Unfortunately, the Grand chamber did not care to enlighten us on this matter in *Dereci*. Its silence in the face of the AGs clear statements could suggest agreement with his analysis, but that would, arguably, mean that the outcome in *McCarthy* is already partly dated.

As noted by both the AG and the Court, the fundamental rights protected in the Charter are not sufficient to bring a purely internal situation within the scope of EU law. What more is, the situations of the McCarthys or the Derecis would hardly constitute a breach of the right to respect for family life in Article 7 of the Charter or of Article 8 ECHR. It can be held that the McCarthys can move to Jamaica, and that the Derecis can enjoy their family

[147] *Dereci* (n 1), Opinion of AG Mengozzi, para 47.
[148] Nic Shuibhne (n 20) 366.
[149] *McCarthy* (n 1) para 49.

life in Turkey. But that outcome is difficult to reconcile with the derived right of residence which was given to Mrs Carpenter and Mr Ruiz Zambrano so that their family members would be able to enjoy their freedom of movement in the territory of the Union. In *Carpenter* and *Ruiz Zambrano*, Union citizenship simply promises more than what is offered to the McCarthys and to the Derecis if they have to move to a third country in order to lead their family life there: the promise of a right for the Union citizen to stay within the territory of the Union in the company of family.

In the pending case *Iida*,[150] the Court contemplates these issues, albeit in a slightly different way. There, a Union citizen mother and a TCN father of Japanese nationality have divorced, and the mother has moved to another Member State with the former couple's minor daughter, who is also a Union citizen. The question that the Court has to contemplate is whether the father can rely on Union law in order to gain a right of residence in his daughter's home Member State. In such a situation it would be difficult to contend that the daughter's genuine enjoyment of the substance of the citizenship rights would be at risk. AG Trstenjak has however suggested that the threat of the father being expelled might constitute an impediment to his daughter's free movement, and that she might chose to move back to her home state so that her father will be able to stay in the Union.[151] It remains to see what conclusion the Court will arrive at.

In another pending case, *O, S and L*[152], the Court is considering the situations of two families in Finland. In both families, both spouses are TCNs and have a child together. Also in both families, one of the spouses has permanent legal residence in Finland and a child from an earlier relationship who is of Finnish nationality and thus a Union citizen. In one of the families the spouses live together and care for both the Union citizen child and their common child of third country nationality. In the other family, one spouse has been expelled before the birth of the spouses' common child, who now resides in Finland with one of them. In both families, the TCN partners who do not enjoy permanent residence in Finland have been refused residence there because of their lack of adequate subsistence means. The families argue that they will have to leave the territory of the Union, including the children carrying Union citizenship, if the TCN family members do not receive a right of residence in Finland.

[150] Pending Case C-40/11 *Yoshikazu Iida v Stadt Ulm*.
[151] Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, Opinion of AG Trstenjak, para 76.
[152] Joined Cases C-356/11 *O, S* and C-357/11 *L*.

7 Union citizenship version 2.0

7.1 Cross-border elements and the rare exception

Union law has come a long way: from the origins in the aftermath of the World Wars to the completion of the single market and broader aspirations of close political cooperation. It is a political project in constant evolution, where the balancing and allocation of power is a highly sensitive issue. This is evident not least in the Court's case law on the scope of the free movement of persons, where Union citizenship has contributed to a development where all nationals of the Member States, and some TCNs, can move between Member States without being workers or self-employed. The criterion that the migrating Union citizen shall not constitute a burden on the host Member State's social security system however puts an effective limit to that otherwise "limitless" movement.

Union citizenship's conceptual origin in the economical free movement rights meant that the cross-border logic that is applied in determining the scope of that part of EU law is also used in determining the scope of the status of Union citizenship. The Zambrano rule has not changed that. As we saw in *McCarthy* and *Dereci*, a cross-border element will still be required in most situations where a Union citizen seeks the aid of Union law. In some exclusive situations however, when the Union citizen would be more or less forced to leave the territory of the Union in order to accompany a TCN family member upon whom he or she is highly dependent, the Zambrano rule is applicable. The TCN will then have a derived right of residence in the Union citizen's home Member State in order to prevent that the Union citizen is deprived of the genuine enjoyment of the rights attached to that status. In a situation where there is a cross-border element, impediment to the free movement rights should be a sufficient connecting factor to EU law.

7.2 Examining the contradictions

As a result of the Zambrano rule, the right to live with one's family within the territory of the Union, in one's own Member State, is secured for *some* Union citizens who are dependent on their TCN family members. So far, it seems that such dependence is most common between minor children and their parents.

Such a right exceed the standards set out under Article 8 ECHR and the, upon that article dependent, Article 7 of the Charter. However, the reverse discrimination of families who cannot rely on the strict standards of the Zambrano rule is stark. The Court's inconsistent and evasive attitude towards the remaining Union citizens' *actual ability* to make use of their free movement rights after the expulsion of a TCN family member is

unfortunate. It paints an obscure picture of a contradictory Union citizenship which is difficult to grasp. Independent Union citizens who, for one reason or another, are unable to provide for themselves in a different Member State than that of their nationality, or to make use of their free movement in some other way, are de facto shut out from the possibility of creating a link to Union law in order to live in the Union territory with their TCN family members. Union citizens who find themselves in purely internal situations therefore consist of two different groups: those who have a real possibility to create a sufficient link to Union law, and those who do not. Instead of avoiding this subject, the Court should have engaged with it.

Such an approach would have greatly illuminated the existing law in the wake of the Zambrano rule. The Court's failure to do so is all the more problematic considering that the subject of the case law concerns the very core of privacy and family life of so many inhabitants of the Union, not least children.

The unwillingness to acknowledge Mrs McCarthy's and Mrs Dereci's possible inability to make use of their free movement can however be understood as an acknowledgement of the Member State's wish to confine free movement of non-economically active Union citizens to those who do not impose a burden on the host Member State's social assistance system. There has after all been a line drawn in secondary legislation which ought not to be ignored. Recalling that the rights attached to Union citizenship "shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder", it is difficult not to agree that secondary law holds a significant place in the formation of Union citizenship.

The same kind of reasoning applies to the Court's evasive attitude towards the fundamental right to respect for family life which was so thoroughly protected in *Carpenter*, when the issue concerned the impediment of the freedom to provide services. It would seem that in economic free movement, the Member States have less room for manoeuvre than in free movement of the non-economically active.

The Court's teleological understanding of Union citizenship has however resulted in a de facto expansion of the scope of Union law in order to defend the rights of some of its weakest and more fragile citizens. The Court has not abandoned the cross-border criteria, but it has shown that a link to Union law can also be constituted solely by an intrusion into the rights attached to Union citizenship. In doing so, the Court has demonstrated that the foundation of the status of Union citizenship is based on a different kind of logic than free movement on the single market, and that this logic will have consequences in the allocation of power in the Union. At the same time, the Court is treading lightly and has restricted the scope of the new rule to what must be seen as exceptional circumstances.

7.3 Legitimacy, coherence and political pragmatism

It would be difficult to contend that the Zambrano rule adds to the legitimacy of the Union as a whole, if legitimacy is to be seen as a demand for coherence. The Court's case law on free movement of persons, both economic and non-economic, is many things, but "coherent" is not the description that comes first to mind. This is also true for the area of Union citizenship, free movement and residence, as is perfectly illustrated by the Zambrano line of case law.

This state of affairs is most probably less due to any real confusion on the part of the Court than to its pragmatic willingness to downplay certain issues in order to await the (politically) good moment to engage with them. Reverse discrimination is one such issue. The Court treads with the utmost of respect when closing in on an area traditionally perceived as being reserved for Member States only.

A certain element of contradiction is also inherent in the notion of Union citizenship itself. Arguably, the Union has at least two faces: the limit-defending nationalist and the less limit-interested visionary. None can exist without the other, and together they provide for both stability and progress to the Union. As any concept in Union law, the status of Union citizenship results from political compromise between these two forces. This compromise has resulted in a gradual development of the scope and the content of Union citizenship, which is likely to continue.

The Court's wide interpretation of the Treaty provisions of the status of Union citizenship shows its willingness to defend the spirit and potential inherent in that status. The fact that it treads with some delicacy shows its respect for the balance of the Union as a political project. In the eyes of a humble law student, such craftsmanship does, finally, invoke respect and faith in future developments.

Bibliography

EU official documents

Charter of Fundamental Rights of the European Union [2010] O.J. C83/389

Commission 'Communication from the Commission to the European Parliament and the Council on guidance for better transpositionand application of Directive 2004/38/C on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' COM (2009) 313 final

Commission and Eurostat, 'Demography Report 2010 – Older, more numerous and diverse Europeans' (Commission Staff Working Document, 3 February 2012), 49 <http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KE-ET-10-001> accessed 17 July 2012

Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] O.J. C83/01

Consolidated version of Treaty on European Union (EU) [1992] O.J. C191/1

Consolidated version of Treaty Establishing the European Economic Community [1957] 298 U.N.T.S. 3.

Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] O.J. L 180/26

Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] O.J. L 180/28

Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] O.J. L 180/30

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] O.J. L 251/12

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] O.J. L16/44

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC,

68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] O.J. L158/77

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] O.J. L257/2

Viviane Reading, Vice-President of the European Commission, EU Justice Commissioner, 'Observations on the EU Charter of Fundamental Rights and the future of the European Union' (Speech at the XXV Congress of FIDE, Tallinn 31 May 2012) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/403&format=HTML&aged=0&language=EN&guiLanguage=fr> accessed 30 June 2012

International documents

European Convention on Human Rights as amended by Protocols Nos. 11 and 14

Literature

Barnard, C. — *The substantive law of the EU – the four freedoms* (2nd edn OUP 2006)

Craig, P. & De Búrca, G. (eds.) — *EU law – Text, cases and Materials* (5th edn OUP 2011)

Craig, P. & De Búrca, G. — *The evolution of EU law* (2nd edn OUP 2011)

Dinan, D. — *Europe Recast – A History of European Union*, (Lynne Rienner Publishers 2004)

McGlynn, C. — *Families and the European Union – Law, Politics and Pluralism*, (Cambridge University Press 2006)

Peers, S. — *EU Justice and Home Affairs Law* (2nd edn, Oxford University Press 2006)

Tryfonidou, A. *Reverse Discrimination in EC Law* (Kluwer Law International 2009)

Articles

Dautricourt, C. & Thomas, S. 'Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?' (2009) 34 European Law Review 433

Davies, G. 'The Family rights of European children: expulsion of non-European parents' (2012) EUI Working Paper RSCAS 2012/04 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002706> accessed 5 April 2012

Edling, J. 'Unionsmedborgarskapet' (2012) 15 Europarättslig tidskrift, 36

Hansen, R. 'A European citizenship or a Europe of citizens? Third country nationals in the EU' (1998) 24 Journal of Ethnic and Migration Studies 751

Van Eijken, H. & de Vries, S. A. 'A new route into the promised land? Being a European citizen after Ruiz Zambrano' (2011) 36 European Law Review 704

Hailbronner, K. & Thym, D.' 'Case law' (2011) 48 Common Market Law Review 1253

Jacobs, F. G. 'The evolution of the European legal order' (2004) 41 Common Market Law Review 303

Jacobs, F. G. 'Citizenship of the European Union – A Legal Analysis' (2007) 13 European Law Journal 591

Kochenov, D. 'Ius tractum of many faces: European Citizenship and the difficult relationship between status and rights' (2009) 15 Columbia Journal of European Law 169

Kochenov, D. ‘A Real European Citizenship: a new jurisdiction test: a novel chapter in the development of the union in Europe’ (2009) 15 Columbia Journal of European Law 169

Lenaerts, K. ‘”Civis europaeus sum”: from the cross-border link to the status of citizen of the Union’ (2011) 3 FMW Online Journal on free movement of workers within the European Union 6 <http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=6193&type=1&furtherPubs=yes> accessed 3 June 2012

Maas, W. ‘Migrants, states, and EU citizenship’s unfulfilled promise’ (2008) 12 Citizenship studies 583

NicShuiblhe, N. ‘(Some of) the kids are all right’ (2012) 49 Common Market Law Review 349

Spaventa, E. ‘Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects’ 45 Common Market Law Review 13

Tryfonidou, A. ‘Family reunification rights of (migrant) Union Citizens: Towards a liberal approach’ (2009) 15 European Law Journal 634

Wollenschläger, F. ‘A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 European Law Journal 1

Wiesbrock, A. ‘Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?’ (2012) 14 European Journal of Migration and Law 63

Table of Cases

Judgments of the Court of Justice of the European Union

Case 26/62 v*an Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 13

Case 6/64 *Costa v ENEL* [1964] ECR 585

Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837

Case 175/78 *The Queen v Vera Ann Saunders* [1979] ECR 1129

Joined Cases 35/82 and 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 3723

Joined cases 314/81, 315/81, 316/81 and 83/82 *Procureur de la République and Comité national de défense contre l'alcoolisme v Alex Waterkeyn and others ; Procureur de la République v Jean Cayard and others* [1982] ECR 4347

Case 238/83 *Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade* [1984] ECR 02631

Case C-112/91 *Hans Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-00429

Joined Cases C-64/96 and C-65/*96 Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] I-3171

Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691

Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459

Case C-448/98 *Criminal proceedings against Jean-Pierre Guimont* [2000] ECR I-10663

Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139

Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193

Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279

Case C-413/99 *Baumbast and R v The Home Secretary* [2002] ECR I-7091

Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-16191

Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-13187

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

Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573

Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6421

Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119

Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government (Flemish Welfare Aid)* [2008] ECR I-1683

Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-01449

Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] O.J. C 130/02

Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] O.J. C 186/05

Case C-256/11 *Murat Dereci and Others v Bundesministerium fûr Inneres* [2012] O.J. C 25/20

Pending cases

Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, O.J. C 145/4

Joined cases C-356/11 and C-357/11 *O, S, L*, O.J. C 269/36

Opinions of Advocates Generals

Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi [2011] O.J. C 130/02, Opinion of AG Sharpston

Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] O.J. C 186/05, Opinion of AG Kokott

Case C-256/11 *Murat Dereci and Others v Bundesministerium fûr Inneres* [2011] O.J. C 25/20, Opinion of AG Mengozzi

Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, O.J. C 145/4, Opinion of AG Trstenjak