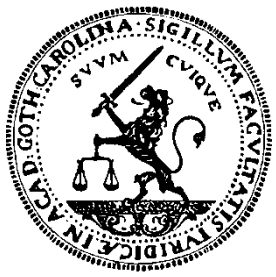

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The Substance of the Rights of the Union Citizen – Freedom of Movement on the Internal Market But Nothing More?

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Contents

Summary

When the legal concept of Union citizenship was first introduced in the Treaty of the European Union in 1992, few thought that the provisions would gain any notable significance beyond the symbolical. But through its case law, the European Court of Justice (ECJ) has gradually developed a body of rights connected to the status of Union citizenship, with the rights of residence and free movement, and with "cross-border movement" acting as a trigger.

In the *Rottmann* and *Ruiz Zambrano* cases, the Court challenged its earlier doctrine of "wholly internal situation" and introduced a new EU law trigger test. If the expulsion of or the refusal to grant residence rights to a third-country national (TCN) family member of a Union citizen deprives the latter of the "genuine enjoyment of the substance of the rights connected to Union citizenship", the measure is precluded. The meaning and implications of this line of case law have and continue to be debated intensively by scholars. With the consequent cases, *McCarthy*, *Dereci* and *Iida*, it became increasingly clear that the scope of the "genuine enjoyment" test is limited to when the Union citizen is de facto forced to leave not only the territory of the home Member State, but the entire Union territory, if the TCN family member is not granted a right of residence. The inherent logic is that by forcing the Union citizen to leave the Union, such a measure also deprives the Union citizen of the right to exercise free movement within the Union.

Departing from the premise that the use of rights language functions as a tool for legitimizing a political project, in this case the European Union, this thesis investigates the relationship between Union citizenship and fundamental rights especially in the context of the 'substance of the rights' doctrine.

It is observed that conflicting discourses on the meaning and contents of Union citizenship affect the role of fundamental rights in the case law. The universalist narrative envisions Union citizenship as an all-encompassing status, guaranteeing rights to all Union citizens regardless of them being free movers or sedentary. The alternative narrative is one of traditional market citizenship, which sees the Union as predominantly an internal market, while the assessment of fundamental rights for those not participating on the internal market belongs to the competence of the Member States.

Through an analysis of the most recent case law, it is found that the return to a more restrictive approach concerning the rights connected to Union citizenship, prevalent in *Dereci*, continues to dominate.

Sammanfattning

När bestämmelserna om unionsmedborgarskap introducerades i Fördraget om Europeiska Unionen 1992 var det få som trodde att de skulle få någon betydelse bortom det symboliska. Genom en omfattande serie rättsfall har EU-domstolen dock utvecklat rättigheter kopplade till unionsmedborgarskap, där uppehållsrätten och rätten att fritt vistas inom Unionen är de centrala. Dessa rättigheter aktiveras vid ett gränsöverskridande.

I rättsfallen *Rottmann* och *Ruiz Zambrano* utmanade EU-domstolen sin tidigare praxis rörande interna situationer. Om en tredjelandsmedborgare som är familjemedlem till en unionsmedborgare nekas uppehållsrätt och detta medför att unionsmedborgaren "berövas möjligheten att faktiskt åtnjuta kärnan i de rättigheter som tillkommer dem i kraft av unionsmedborgarskapet" är den åtgärden oförenlig med unionsrätten. Innebörden och räckvidden av dessa avgöranden har debatterats livligt. Av de efterföljande avgöranden *McCarthy*, *Dereci* och *Iida* framgick det att omfattningen av denna doktrin är begränsad till situationer där en unionsmedborgare tvingas att lämna inte bara sin hemstat utan hela unionen till följd av att familjemedlemmen nekats härledd uppehållsrätt. Den inneboende logiken är att följden av en sådan åtgärd blir att unionsmedborgaren då berövas även sin rätt till fri rörlighet inom unionen.

Med utgångspunkt i idén att en rättighetsdiskurs fungerar som ett verktyg för att legitimisera ett politiskt projekt, i detta fall den Europeiska unionen, undersöks förhållandet mellan unionsmedborgarskap och grundläggande rättigheter i den särskilda kontexten av *Ruiz Zambrano*-undantaget.

Motstridiga diskurser om unionsmedborgarskapsbegreppets innebörd påverkar sättet hur grundläggande rättigheter behandlas i EU-domstolens rättspraxis. Inom den universalistiska diskursen ses unionsmedborgarskapet som en allomfattande status och visionen är att därigenom tillförsäkras rättigheter till alla unionsmedborgare oavsett om de nyttjat rätten till fri rörlighet eller inte. Den alternativa diskursen beskriver unionsmedborgarskapet som "marknadsmedborgarskap". I denna diskurs är EU främst en inre marknad, medan medlemsstaternas kompetens omfattar uppgiften att betrygga de grundläggande rättigheterna för de medborgare som inte är aktiva på den inre marknaden.

Analysen av de senast tillkomna avgöranden från EU-domstolen tyder på att det mer restriktiva förhållningssättet till rättighetsdiskursen som framgått av *Dereci* fortsätter att dominera.

Abbreviations

AG	Advocate General
Charter	Charter of Fundamental Rights of the European Union
EC	European Community
EEC	European Economic Community
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ, Court	European Court of Justice
ECtHR	European Court of Human Rights
FRA	European Union Agency for Fundamental Rights
SEA	Single European Act
TCN	third-country national
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Introducing Union Citizenship

When the legal concept of Union citizenship was first introduced in the Treaty of the European Union in 1992, few thought that the provisions would gain any notable significance beyond the symbolical. But through its case law, the European Court of Justice (ECJ) has gradually developed a body of rights connected to the status of Union citizenship, with 'cross-border movement' acting as a trigger.

Notably, in a fascinating line of case law[1] from 2011 onwards, the Court challenged its doctrine of 'wholly internal situation' and introduced a new EU law trigger test – that of 'genuine appreciation of the substance of rights'. The meaning and implications of this line of case law have and continue to be debated intensively by scholars. Though interpretations vary, the critique is consistent in that it finds the Court's reasoning ambiguous and that it therefore could pose a threat to the coherence of EU law and thus on fairness and legal certainty. In the meantime, national courts are continuing to refer cases to the Court. A number of new cases[2] have in fact been decided by the ECJ. In this paper, Against the background of the general debate on Union citizenship, I want to investigate whether these newest cases provide any further clarity to what is included in that "substance" of rights. What exactly are the rights connected to European citizenship, as outlined by the Court?

One of the recurrent themes in the critique of the case line is the lack of assessment of fundamental rights. When dealing with cases that are essentially about the right to family reunification or keeping a family together in the first place, it would seem intuitive to refer to the fundamental

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1 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] ECR I-01177
Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375
Case C-256/11 *Murat Dereci and others v Bundesministerium für Inneres* [2012] ECR I-11315

2 Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] judgment of 8 november 2012; Joined cases C-356/11 and C-357/*11 O and S v Maahanmuuttovirasto; Maahanmuuttovirasto v L*, judgment of 6 December 2012
Case C-87/12 *Kreshnik Ymeraga and others v Ministre du Travail, de l'Emploi et de l'Immigration,* judgment of 8 May 2013
Case C-86/12 *Alokpa and Moudoulou v Ministre du Travail, de l'Emploi et de l'Immigration,* judgment of 10 October 2013
Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.,* judgment of 12 March 2014

right of the right to family life as a point of departure. However, though this assessment has been made by Advocate Generals in their Opinions[3], the Court has been evasive. This is especially interesting considering the recent decades' debate on the need for fundamental rights to be reasserted in the Union, which ultimately resulted in the Charter of Fundamental Rights that entered into force with the Treaty of Lisbon in 2009. So the theme of fundamental rights is the special focus of this thesis.

The aim of this thesis is to investigate the Court of Justice's newest case law in the field of Union citizenship against the background of Union citizenship at large, and with special focus on the question of fundamental rights. First I start with a short recap of the role of human rights in the history and today of European project. What are some of the problem points that are revealed in academic debate? Though huge steps have been taken in the last twenty years or so, there is also a counter-movement critiquing what is perceived as federalisation, from the part of the Member States and the general public. This has caused the Union to become weary of further steps toward integration, as was seen in the failed adaption of a European Constitution during the '00s. The delicate situation also translates into complications on the human rights front – what competence does the Court have in this area? As will be discussed in Chapter 2, the critique can be divided in roughly two camps: those who believe in a Union that should assert itself as a human rights regime, and those who prefer to see that the Union focuses on its core activity, which is perfecting the internal market. I argue in this thesis that this division line also exists in the academic debate regarding the case law on Union citizenship, and is an explanatory factor for the Court's ambivalent decisions in this field.

1.2 Methodological Premises

This study has traditional legal method as its methodological starting point. This term indicates the study and resolution of a legal problem through the study of sources of law in accordance with the hierarchy of norms[4]. The object of study is the normative system of laws, not the societal reality that it leads to when authorities and lower level courts apply it. In accordance with this, my material is limited to primarily ECJ case law and Opinions of Advocate Generals and secondly legal doctrine. The role of legal doctrine is to provide a wider view of the field of law, and thus point out ambiguities in the Court's legal reasoning and also criticize case law[5]. But in order to reach a deeper understanding of the question on hand, one must have knowledge of the wider socio-political context. This wider context can for example provide explanation to the inconsistencies in the sources of law on hand[6].

[3] See for example Advocate General Sharpston's Opinion in *Ruiz Zambrano* paras 151-177.
[4] Kleineman in Zamboni & Korling p. 37.
[5] ibid p. 34.
[6] ibid p. 23.

But the choice of traditional legal method does not mean that one cannot have a critical perspective on the law, quite the contrary.

That said, more than what is the case in traditional legal method, the conviction in this thesis is that law (and the study of law) is political in the sense that it is a system that legitimises and reinforces a political regime. This legitimisation takes place in subtle ways, through cognitive constructions known as discourses. Discourses are socially produced forms of knowledge that set limits upon what it is possible to think, write or speak about a given social object or practice. It is typical that one form of speaking of a phenomenon becomes dominating, which makes it difficult to establish an alternative set of references in thought. They are powerful fictions dressed as truths. Calling something a discourse means putting its truth into question[7].

The background to these paradigms is to be found in power and dependency relations. Instead of seeking the answer to ”what is law” and from there on try to derive more or less sure solutions, here the focus is on ”how” the law is constructed, and how solutions to legal problems are legitimized.

Therefore, the contribution of a discursive approach is that it reveals that traditional legal analysis possibly hides multifaceted, even conflicted, discourses, instead promoting a solution that the author either personally believes in ”or is bought to support[8]. As the presentation of the legal literature discussing the *Ruiz Zambrano* case line will indicate, there is not one coherent, grand narrative of the EU polity, but several contradictory ones. A postmodern approach to legal study can be helpful in revealing this, where traditional doctrinal legal research struggles in finding coherence where it might not exist at all.

Specifically, in this thesis, the position is that a main question that affects my material (the judgments) is conflicting notions of what the European Union is as a polity. Or to use the words of postmodern legal study[9], there is not one “Grand Narrative” of Europe but several conflicting narratives.

The point of departure here is that the notion of ”Union citizenship” can carry different meanings, depending on the frame of context that it is placed in. In the reading of the academic discussion concerning union citizenship and the *Ruiz Zambrano* case line two conflicting framings, or discourses, of citizenship are identified - one of a market actor (market citizen), and one which embodies that which we traditionally associate with citizenship- such as identity and political rights.

There is, of course, no citizenship without a polity, and the argument here is that inconsistency in the ECJ's rulings on ‘the genuine enjoyment of the substance of the rights’ doctrine is due to there being two competing

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7 Bacchi, p. 35.

8 Andersson in Zamboni & Korling p. 347.

9 ibid p. 345.

paradigms of what the role of the Union is: to safeguard and advance the internal market, or to become a ”deeper” polity than that. In Nic Shuibhne’s words, there is a built-in ambiguity with the EU as a polity: the Union is founded on the principle of conferred powers[10] but it is also committed through primary law and case law to protecting the rights of its citizens[11].

The prevailing market rationality has been characterized as a form of neoliberal governmentality, which has dominated the EU project since its start[12]. In the specific case of citizenship, this concept, which is traditionally associated with identity and politics more than economy has been vested to the interests of the internal market. Brännström also points out that though the neoliberal notion of government as primarily serving a market was entrenched in the Community from its start, it was a weak notion which left room for alternative notions of governance, like a social one. But these alternative notions have gradually been put under extensive pressure, notably through the ECJ's case law.

1.3 A Word on ”Rights”

The approach to rights discourses in this thesis is one of “Foucaultian scepticism”[13]: claims of rights always exist in a landscape of power relations. Rights are a social construction. This is in contrast to a ”natural rights” discourse, where the premise is that rights are freestanding, installed upon every individual independently of the prevailing political regime.

Rights are, to use a phrase of Gayatri Spivak, something ”that we cannot not want”[14]. The ”righteousness” of rights is incontestable. Thus, framing political goals in a rights discourse is a way of making those goals incontestable. At the same time, rights are a driver of segregation, as the degree of empowerment that rights bring to different social groups depends on the social resources available to them plus their degree of social vulnerability when exercising those rights[15].

Following this line of thought in the context of the European project, the concrete use of rights in EU law and ECJ jurisprudence is discussed in the following section. This discussion exemplifies the argument of a rights language used as a strengthening agent in an essentially political discourse, ie the language of rights functioning as a tool for legitimisation of the political project that the Union essentially is.

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10 See section 1.5.
11 Nic Shuibhne 2013 p. 131.
12 See for example Leila Brännströms analysis, Brännström 2014.
13 Patton in Golder & Fitzpatrick, pp. 460-476.
14 cited in Brown 2000 p. 130.
15 Brown 2000 pp. 130-131.

1.4 The Language of Rights in EU Law

The language of rights used in the context of EU law has been deemed ambiguous. The following is an attempt to illustrate the use of the various terms.

The term *human rights* appears quite rarely in the EU law, usually when referring to international human rights conventions, specifically the European Convention of Human Rights[16]. According to Art 6(1) TEU,

> ”The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

Instead, the term *fundamental rights* appears more frequently. Art 6(2) TEU states:

> ”The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. ”

It is apparent from the wording of Art 6(2) TEU that *fundamental rights* is to be understood as a broader notion than human rights, including not only rights recognized in international human rights documents (above all ECHR), but also in constitutions of the Member States of the EU. It has been claimed that *fundamental rights* are more commonly used in constitutional law than human rights[17]. This could possibly be explained by the idea of human rights as universal to all of humanity, whereas fundamental rights exist within the realm of the constitution, and thus are linked to the notion of citizenship, which, as will be discussed later on, on its part carries a dichotomy of inclusion/exclusion instead of universality.

According to the European Union Agency for Fundamental Rights (FRA), the term *fundamental rights* is used in European Union to express the concept of *human rights* within a specific EU internal context. Traditionally, the term *fundamental rights* is used in a constitutional setting whereas the term *human rights* is used in international law. The two terms refer to similar substance as can be seen when comparing the content in the Charter

16 De Witte in Alston et al. p. 860.
17 ibid p. 860.

of Fundamental Rights of the European Union with that of the European Convention on Human Rights and the European Social Charter.[18]

Fundamental rights in the EU law context are a sub-category of *general principles of EU Law* guiding the interpretation of EU law[19]. The common denominator is that they either are described by the language of rights and freedoms, or otherwise traditionally form a part of human rights documents and constitutional rights catalogues. Examples of the latter are the principles of equality and non-discrimination[20].

Finally, *fundamental freedoms* is a specifically in EU law existing notion for the common market freedoms (free movement of goods, persons, services and capital), which have a quasi-rights character. These freedoms, particularly free movement of persons, have been important carriers of individual rights, oftentimes challenging national legal and constitutional provisions[21]. The exercise of fundamental freedoms is not unlimited – the main limitation to their scope is the ”purely internal situation”, which means that a cross-border link has to be established.

Trstenjak has identified a gradual expansion of the respective scope of application is a common trait in both the ECJ case law on fundamental freedoms and rights, and at the same time the rights and the freedoms are increasingly overlapping[22]. This blurring has been criticized for conflating fundamental freedoms and fundamental rights, which arguably diminishes the gravitas of fundamental rights[23]. The question has been raised if in fact a conflict between fundamental rights and fundamental freedoms can be seen as a conflict between two equally fundamental ”constitutional” principles[24]? The argument, which is based on a natural rights discourse, is that fundamental rights are understood to exist and be available to every person, regardless of codification. They are not granted but rather recognized in legal documents[25]. Free movement rights on the other hand are economic in nature, derived from the Treaty, and would thus not exist outside the realm of the Treaty[26]. They are thus instruments for the political project of European integration. But when the Court performs a balancing act between fundamental rights and fundamental freedoms, it follows that fundamental rights must be justified in the context of economic freedoms, thus potentially deflating the status of the fundamental rights while promoting fundamental freedoms[27]. By promoting Treaty-based fundamental freedoms

18 http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights
19 de Vries p. 169.
20 de Witte p. 861.
21 de Witte p. 863, see also de Vries p. 176.
22 Trstenjak 2013 pp. 293-315.
23 de Witte p. 861.
24 de Vries p. 175.
25 Spaventa p. 355.
26 De Vries p. 177.
27 De Vries s. 187, see also Spaventa

to the status of fundamental rights, arguably the Court is promoting itself for monopoly at resolving these conflicts[28]. As Spaventa points out, a court which fails to articulate its own discourse, risks delegitimising itself and moving into the domain of pure politics[29]. This increasing blurring the distinctions between fundamental rights and fundamental freedoms is especially pronounced in the context of Union Citizenship[30].

1.5 On the Study of EU Law

A main specificity of the EU legal order follows from the the *principle of conferral*[31], which denotes that the EU is a union of Member States, and all its competences are voluntarily conferred on it by its Member States. Thus any areas of policy not explicitly agreed in treaties remain the domain of the Member States. The central, and challenging activity of the Court of Justice is defining the scope of EU law, and thus its own jurisdiction. The introduction of the Charter of Fundamental Rights, with Article 51 in particular, has caused tension and placed a demand for the Court to give guidance on the interpretation of the provision. As we will see onward, the definition of the scope in the form of wholly internal situation is decisive for the case law regarding Union citizenship. While the raison-d'etre of this purely internal rule has been questioned, not least because of the situation of reverse-discrimination which it creates for citizens who have not exercised their free movement rights, it does serve a purpose in the context of the principle of conferral. The rationale for the purely internal rule in early free movement case law was to include within the scope of EU law on the fundamental freedoms only those situations that were sufficiently connected with the intrinsic aims underpinning those freedoms. Now that the aims of the Union have evolved from purely economic ones, the identification of aims to which the Court must refer in order to delimit the scope of Union law is under challenge[32].

Any student of EU law will be aware of the ECJ's alleged role as a ”maker” of EU law, and also of the debate of the activist court. After all, the ECJ has a constitutional responsibility – that is a responsibility to protect and further the objectives and values enshrined in the Treaties. In Nic Shuibhnes words, the ECJ seeks to *make* law by shaping the scope of EU law through a series of principles, concepts and tests developed and applied by the Court when it interprets and applies the Treaty provisions, a competence which it derives from art 19 TEU[33]. This activity has sometimes been frowned upon. In the

28 Spaventa p. 363.
29 Spaventa p. 363.
30 Besson & Utzinger pp. 577-578.
31 Art 5 TEU.
32 See O'Leary in Dougan & Nic Shuibhne p. 39.
33 Nic Shuibhne 2013 pp. 8-21.

specific context of Union citizenship, it has been argued that the Court uses the symbolically powerful concept of citizenship, sometimes in conjunction to human rights arguments, in order to justify some of its more daring judgments on free movement and the single market[34].

A challenge that the student of EU law faces is the specific nature of the preliminary ruling procedure – which is also the setting for the cases on hand in this thesis. The Court needs to separate the facts and the law, and articulate its resolution on the level of workable principle, however letting the national court do the resolution on hand whilst they have the question of EU law cleared out. This is sometimes easier said than done, as is illustrated in the academic review of the *Ruiz Zambrano* case line.

1.6 Delimitations

As mentioned before, the broad theme of this thesis is the "problem" of fundamental rights in the European project, especially after the changes that came into force with the Charter. This is obviously too large of an ambition for a master's thesis. Instead, my aim is to bring a new perspective on this theme through an analysis of union citizenship case law.

The main subject in this thesis is, as noted earlier, the specific exception to the prevailing cross-border requirement that is the "substance of rights connected to Union citizenship", which flows from primary law. Thus, though secondary law in the form of Directive 2004/38[35] is assessed in all of the cases under analysis, this falls outside the core subject matter and will be dealt with more summarily.

Regarding the choice of case law for analysis in Chapter 5, while the ambition is to cover all the newest judgments, the *Ymeraga* case is omitted, as it does not provide any novel formulations in respect to the other cases cited. This is in order to avoid monotonous repetitiveness, as the case mostly repeats formulations from previous cases.

Finally, there are some methodological limitations that follow from the choice of focusing on case law. Firstly, case law is to its nature an uneven method of law-making, as courts are forced to resolve the disputes or answer the questions that are placed in front of them, even if these are not necessarily the questions that further the coherence of case law in the best way[36]. The attempt in legal doctrine is to try to find coherence where there really not might be any. To make the claim to uncover the intent of a court

34 Shaw in Craigh and de Burca p. 582.

35 Directive 2004/38/EC of the European Parliament and 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.

36 Nic Schuibhne 2013 p. 10.

through only a few judgments is also risky. It is doubtful if a court like the ECJ, which constitutes of several chambers, can even be claimed to have one distinguished stance[37].

1.7 Thesis Questions

What narratives of the European Union as a polity can be detected in the Union citizenship and fundamental rights debates of the recent years?

How (if in any way) are fundamental rights assessed in the new judgments – as in which language of rights is used? How is the "problem" of fundamental rights represented in this newest case law- as a question of proper delimitation of competences or as a question of all-encompassing, universal human rights?

What representations of citizenship are conveyed in the newest judgments and the Advocate Generals' Opinions?

1.8 Outline

In Chapter 2, a short recap of the history of fundamental rights in the context of the European integration project will be presented. This is obviously only superficial, the aim being to identify key debates, and conflicting discourses that are reflected in academic literature. This background serves to understand the debates concerning Union citizenship. In Chapter 3, an introduction to the legal landscape of Union citizenship is presented, along with an assessment of some of the critical voices on the concept. Chapter 4 introduces the true subject of this thesis, the 'substance of rights' doctrine, as it is revealed in the ECJ's case law. This is, as we will see, an exception to the Court's requirement for a cross-border connection.
In Chapter 5, the newest cases will be presented and analysed. Chapter 6 pulls the strings together – where do we stand now? Which notion of the citizen is prevailing, and which rights are deemed worthy of protection?

[37] Nic Schuibhne 2013 p. 6

2 Fundamental Rights and the European Union

2.1 Historical Background

The traditional narrative of the evolution of human rights protection in the European Union describes a one-sided emphasis on economic cooperation and the creation of a common market, whereas the importance of fundamental rights for the EEC Treaty and for the EU as a polity came about only later. However, there are signs already in the preliminary works leading to the EEC Treaty that reveal the significance that was given to human rights protection in the European Economic Cooperation[38], though it was agreed that the European Convention on the Protection of Human Rights (ECHR) would be the authoritative source of the European Political Community's human rights system[39]. The human rights provisions had however been removed in the final draft of the EEC Treaty. This was due to some Member States wanting a less ”supranational” approach[40], instead preferring the national courts to act as the protectors of fundamental rights even against possible unlawful intrusion from the Community[41].

But with the ECJ developing the supremacy doctrine in the 1960s[42], this division of competences became increasingly problematic. From the 1970s onward, the Community's regulatory powers were challenged by German litigants who invoked domestically granted constitutional rights in national courts, forcing the ECJ to subsequently recognize the role of fundamental rights in the EU legal order[43]. The Court thus ”discovered” fundamental rights, as they manifested themselves in the common constitutional traditions of the Member States and the conventions on which they collaborated, as part of the general principles in EU law[44]. It has been claimed that the driving force for this ”discovery” of fundamental rights in the EU legal order was to protect the supremacy of Community law from rejection in national courts[45]. Subsequently, the case law of the ECJ addressing human rights issues expanded, and various legal and political

38 de Búrca in Craigh & de Búrca pp. 465-497.
39 ibid p. 486.
40 ibid p. 474.
41 de Witte in Alston p. 863
42 Case 6/64 *Flamino Costa v. E.N.E.L.* [1964] ECR 585
43 Case 29/69 *Erich Stauder v. Stadt Ulm-Sozialamt* [1969] ECR 419
Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case 4/73 *J. Nold, Kohlen- und Baustoffgrosshandlung v Commission of the European Communities* [1974] ECR 491
44 *Internationale Handelsgesellschaft* para 4, now codified in art 6(3) TEU.
45 de Witte in Alston p. 866.

initiatives were taken to develop a more active role for human rights within EU law and policy[46].

With regards to sources of law, human rights found their way into treaty texts only in the Maastricht Treaty, though the preamble of the Single European Act (SEA) in 1987 had made a mention of human rights. In the Maastricht Treaty in 1992, formal recognition was finally given to human rights as part of EU law. These amendments gave official affirmation to the case law of the ECJ, and thus marked a ”constitutional coming-of-age of human rights within the EU legal framework[47].

According to Spaventa, this process can be seen as one of the most tangible effects of the constitutional development of the European integration project. Fundamental rights rhetoric has served to legitimize the expansion of Union competences. The idea of drafting a Charter of Fundamental Rights is to be seen against this background, as a legitimization of the Union's evolvement from merely a common market to a more mature polity with its own foreign policy, cooperation in criminal matters and so forth[48].

Whereas the ambition to consolidate the EU Constitution was a main point on the agenda for much of the 00's, the Charter only gained binding status in the Lisbon Treaty in 2009. The delay was due to an increasingly negative opinion amongst the general European public against what was perceived to be an elite project, a turbulence that culminated in the negative referendum results in France and Netherlands for the treaty establishing the European Constitution.

2.2 Fundamental Rights in the Current Sources of EU Law

Currently the main formal sources for EU human rights are listed in Article 6 TEU: these are the Charter of Fundamental Rights, which has the same legal value as the Treaties, and ‘general principles of EU law’ which include fundamental rights as guaranteed by ECHR and flowing from the constitutional traditions common to the Member States.

The Charter is to be interpreted in accordance with the general provisions in Articles 51 to 54 of the Charter. Thus, according to Article 52(1) of the Charter, the exercise of rights and freedoms provided by the said document may be subject to limitations on the conditions that they are provided by the law and that the limitations are necessary and proportionate.

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46 de Búrca in Craigh & de Búrca pp. 479-480.

47 ibid p. 481.

48 Spaventa pp. 346-347.

2.3 The EU and ECHR

The Lisbon Treaty also introduced an obligation for the EU to accede to the ECHR[49]. Until this happens, the Convention is not formally binding on the EU, though the contrary has also been argued[50]. The ECJ treats the ECHR as a source of inspiration rather than a formally binding bill of rights[51], which also has meant that the Court has seen it fitting to go beyond the protection granted by the ECHR see, for example, below for discussion regarding Metock case, where a violation to fundamental right was seen as a breach to free movement right. A human rights conflict with a cross-border link is therefore in some cases more likely to have a favourable outcome for the individual than a purely internal situation[52]. The idea of the Convention as a floor instead of a ceiling is now codified in Article 52(3) of the Charter, which states that ”this provision shall not prevent the Union law providing more extensive protection”.

2.4 Limiting the Scope of the Charter

Article 6(1)2 TEU states that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

According to Article 51(1) of the Charter, it only applies to acts of Member States when they *implement* EU law. Also, according to Article 51(2), no new task or power has been created by its adaption. Regarding the first point, it has been unclear whether the provision should be interpreted literally, which would mean that the scope of the application of the Charter is less than the scope of the application of the general principles of EU law, which bind the Member States when they are acting *within the scope* of EU law[53]. Somewhat confusingly, the Explanations to the Charter state that it binds “Member States when they act within the scope of Union law”[54]. However, with the *Åkerberg Fransson* ruling[55] it was clarified that the Charter does not restrict the scope of EU fundamental rights. But it is still unclear what connection to EU law is actually required in order to trigger the application of Charter rights[56].

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49 Art 6(2) TEU

50 see Craigh and de Burca 2011 p. 381 footnote 117 for a references to a contrary argument.

51 ibid pp. 366-367.

52 Iliopoulou p. 29.

53 according to Case C-260/89 *ERT* [1993] ECR I-2925.

54 Explanations relating to the Charter of Fundamental Rights, O.J. 2007, C 303/17.

55 Case C-617/10. Åklagaren v. Hans Åkerberg Fransson, judgment of the Court (Grand Chamber) of 26 February 2013, nyr

56 Hancox p. 1430

These provisions are to be seen as an insistent ambition from the part of Member States to restrict the extent to which the EU can monitor and affect their policies[57]. The Member States' approach to advancing the EU as a human rights regime seems equivocal – whenever a potential expansion in this field is agreed upon, there seems to be a counteraction from the part of the member state governments. The question how the provision in Article 51 of the Charter will play out in practice is by no means resolved.

2.5 The Right to Respect for Family Life

Due to the delimitation of this thesis, a short presentation of the fundamental right that is actualized in the cases that are under analysis, namely the right to respect for family life, will follow. The right to respect for family life is codified in art 7 of the Charter:

> ”Everyone has the right to respect for his or her private and family life, home and communications.”

The right to respect for family life was first recognized as a general principle of EU law in *Carpenter*[58], which concerned the application of Directive 2004/38. The Court held that the deportation from the home state of the third-country national spouse of a service provider would be detrimental to their family life and therefore to the conditions under which the service provider exercised a fundamental freedom. While Member States might invoke reasons of public interest to justify such a deportation decision, this decision had to be compatible with the fundamental rights, including the service provider's right to respect for his family life[59]. In the *Metock* case, the Court found that the refusal of a Member State to grant a right to entry and residence to a TCN family member of an EU national discourages EU nationals from using their free movement rights, even if marriage took place after the Union citizen exercised his right of free movement[60]. In other words, a violation of human rights is framed as an obstacle to free movement[61], which is not entirely uncontroversial – recalling discussion on the conflation fundamental rights vs. fundamental freedoms in section 1.4.

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57 de Búrca in Craigh & de Búrca p. 485, see also Craigh & de Búrca 2011 p. 393.

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

59 *Carpenter* paras 39-45.

60 Case C-127/08 *Metock v. Minister for Justice* [2008] ECR I-6241 paras 87-93.

61 Iliopoulou in Dougan and Nic Schuibhne p. 29; O'Leary in Craigh and de Búrca p. 541.

O'Leary suggests that these cases are examples of the transformation of the EEC's and EC's objectives in the field of free movement from purely or principally economic objectives to ones influenced by social and humanitarian concerns. Earlier case law had been decided with reference to the dynamics of internal market and free movement, whereas these cases showcased the increased importance accorded to the protection of the right to respect for family life as an independent right of EU nationals and as itself and objective of the free movement rules[62].

2.6 EU and Fundamental Rights – Problem Points

The Court has so far not clearly stated which human rights violations are to be considered as obstacles to free movement. This forms part of the more general uncertainty surrounding the exact scope of ECJ's competence regarding fundamental rights protection[63]. In the name of coherence, it could be argued[64] that all violations of fundamental rights should be defined as breaches of free movement. The opposing voices argue that the ECJ should exercise restraint in this area, and that ”only serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and integrity of the EU legal order[65].

Nic Shuibhne identifies the realisation of fundamental rights as one of central drivers in the fragmentation of the ECJ’s free movement case law. The balancing between the ambition to protect vulnerable individuals, and the binding constitutional constrictions codified in the Charter and the TEU demonstates how the protection of fundamental rights can be source of fragmentation[66].

Without a doubt, it is obvious that the relationship between EU law and fundamental rights is one of the most challenging questions to be settled in the light of the growing expansion of EU competences, the now legally binding Charter and the EU's scheduled accession to the ECHR, and the fact that the convention rights constitute general principles of EU law[67].

62 O'Leary in Craigh and de Búrca pp. 542-543
63 Iliopoulou in Dougan and Nic Shuibhne p. 31.
64 As Iliopoulou does p. 31 onwards.
65 AG Maduro in *Centro Europa* 7 Srl para 22
66 Nic Schuibhne 2013 p. 51.
67 Wiesbrock p. 869.

As a conclusion, there seems to be a paradox beset in the assessment of fundamental rights within the European Union[68]. It is not a question of which rights deserve to be protected, but where this protection, and the balancing of conflicting rights, most aptly should take place – at a domestic or a supranational level[69]. A concrete example of this is the ambivalence surrounding Article 51 of the Charter.

In the long run, this ambivalence is really about the ethos of the Union itself – while there is no doubt that the original aim was to create a union of economic cooperation in order to promote peace and affluence within Europe, there are differing opinions, or competing discourses of where the focus in the cooperation should be placed: on perfecting the internal market, which is relatively uncontroversial today, or if the Union should aim to be ”a mature and comprehensive constitutional system[70]” and a true international human rights regime. This controversy is especially true in an age of growing anti-EU sentiment: not being overtly ambitious seems like a safer bet. These competing discourses translate into discrepancies in the ECJ case law regarding fundamental rights, including those that are connected to Union citizenship. After all, a fundamental rights discourse serves a legitimizing function, at whichever level it is placed.

[68] See also Alston and Weiler, p. 6-7.
[69] Spaventa p. 343.
[70] Spaventa p. 344.

3 Union Citizenship

3.1 The Legal Landscape of Union Citizenship

The current Treaty provisions on Union citizenship are to be found in Articles 20-25 TFEU. Article 20 TFEU contains an inexhaustive list of the rights and duties conferred to Union citizens by the Treaties, including the right of residence and movement. These rights are subjected to limitations and restrictions provided by the Treaties. Article 20(2) a-d guarantees the right to move and reside freely within the territory of the Member States, and political rights and a right to diplomatic and consular protection. The provisions of Articles 21-25 TFEU elaborate the rights summarized in Article 20(2)a-d. Article 21 elaborates the right to move and reside freely, subjecting it to limitations and conditions provided by the Treaties and by secondary law.

Case law[71] has confirmed that the rights of movement and residence provided by Art 20 & 21 TFEU are directly effective, and independent of other legal status categories under Union law. Limitations on these rights imposed by Member States must be proportionate so that their exercise is not limited in a disproportionate manner.

3.1.1 The Hierarchy of European Citizenship

EU citizenship is contingent to the possession of a national citizenship of a Member State. The EU has no competence to decide who is a citizen. That competence belies with the individual Member States. Citizenship is ”additional” to Member State nationality[72]. “Additional” replaced the previously used “complementary” in the Lisbon Treaty, possibly suggesting that Union citizenship can provide rights that are more than just complementary to those connected to national citizenship[73].

A number of cases seem to suggest that the status of citizenship remains residual to other existing legal status categories such as worker, service provider/recipient and the like, based on economic activity, and that the citizenship concept functions as an extra enhancer for pre-existing rights under Union law[74].

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71 Referred to in the section 3.2.

72 Art 20.1 TFEU.

73 Currie in Dougan & Currie p. 388.

74 See Craigh & de Burca pp. 846-847 for case references.

3.2 The Evolution of EU Citizenship

Although Union citizenship was only officially introduced in the Maastricht Treaty in 1992, the concept of European citizenship itself dates back to the 1970's, when first references in policy texts were made to ”a Europe for citizens”, with suggestions for enhancing the integration of Community nationals living in other Member States than their own. During that era the Court started supporting its judgments on free movement provisions by referring to individual free movement rights of European citizens[75]. The thinner notion of market citizenship was present from the start of the EEC, in the traditional ”economic” free movement provisions, and enforced by classic rulings such as *Van Gend and Loos*[76].

Citizenship of the Union is perceived to have two main objectives, of which the first is to protect the individual and strengthen his or her rights. Secondly, it aims at giving the Union a more state-like appearance, by creating a polity in which the citizens can participate[77]. Thus, ”a direct political link is created between the citizens and the Union, with the aim of fostering a sense of identity with the Union”[78]. As such, the development of the concept of citizenship is also connected to the more general aim of increasing the democratic legitimacy of the Union. One suggestion is that Union citizenship is about encouraging ”multiple membership”, that is individuals' rights to not only belong to their home state, based on nationality, but also the host state, based on residence[79]. Union citizenship as conveyed in the ECJ case law is transnational in character, not post-national[80].

For a long time it seemed that not much of practical significance would come out of provisions on Union citizenship[81]. This was the understanding even though the ECJ early on made the claim that Union citizenship is ”destined to become the fundamental status of the citizens of the European Union[82]. What weight is to be put into this claim is unclear. Some have described this statement as ”aspirational”[83], suggesting the possibility of EU citizenship entirely independent of the cross-border connection that has traditionally been required in order for the ECJ to have jurisdiction[84]. During the years, the legal concept of Union citizenship has appeared in a

75 See Currie in Dougan & Currie p. 367 for references.

76 In *Van Gend and Loos* para 12 , the Court stated that ”the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights... and the subjects of which comprise not only Member States but also their nationals”.

77 Bernitz & Lokrantz Bernitz in Alston p. 512.

78 The Commission's Report on Citizenship of the Union (COM(93)702.

79 Iliopoloulou in Dougan & Nic Shuibhne.

80 Shaw in Craigh & de Burca p. 586.

81 See for example Bernitz & Lokrantz Bernitz in Alston pp. 524-525.

82 First stated in the *Grzelczyk* case, (para 31) and repeated thereafter.

83 Currie in Dougan & Currie p. 365, Shaw in Craigh & de Búrca p. 576.

84 See for example Kochenov 2013 p. 508.

number of judgments, expanding and enhancing the rights of movement, residence and other social rights to non-economically active citizens and other categories of citizens who are not protected by pre-existing Union rights, as long as they do not constitute an unreasonable burden to the host state. It can without a doubt be said the first and foremost right connected to EU citizenship is the right to move and reside freely. Through its case law regarding Directive 2004/38 and its predecessors the ECJ has confirmed that Article 20(1) TFEU confers a directly effective right of residence on EU citizens independently of any other existing EU status category, as long as a cross-border dimension can be established[85]. Limitations that a Member State may impose on these rights must not constitute ”a disproportionate interference with the exercise of the fundamental right of freedom of movement and residence upheld by the article in question.[86]”. Interestingly, when it comes to the right to family life, the Court ruled that a refusal to grant a right of residence to the parent, whether an EU or a third country national, and enjoying sufficient resources and health insurance, ”would deprive the child's right of residence to any useful effect”[87].

On the other hand, the Court has also repeatedly insisted that EU citizenship was not intended to enlarge the material scope of EU law[88]. This statement has raised eyebrows among scholars. Kochenov sees it as symptomatic of the Court's uncertainty about the meaning and contents of Union citizenship[89].

As a summary, the development during the last two decades in the legal status of Union citizenship have fundamentally altered the position of economically inactive migrants, and has shaped the interpretation of free movement provisions, a development which has been driven by the ECJ. But in the same time, it is far from constituting a fundamental status for all nationals of Member States, having relevance only for the minority of Union citizens that have exercised their free movement rights.

3.3 EU Citizenship and the ”Wholly Internal Situation”

The ECJ has repeatedly ruled that ”wholly internal situations” fall beyond the scope of EU law and EU law thus cannot be invoked on restrictions to free movement within a Member State. But the ECJ has also identified an increasing amount of situations with a cross-border element, where true

85 *Baumbast*, confirmed in *Zhu and Chen.*
86 *Zhu and Chen* para 33.
87 *Zhu and Chen* para 45.
88 *Uecker and Jaquet, Garcia Avello.*
89 Kochenov 2013 p. 508.

movement is ”either barely discernable or frankly non-existent...”[90], in rulings which sometimes have been criticized for being non-intuitive and quite contrived[91]. There has also been pressure on the ECJ to rethink its stance on the ”wholly internal situation”, not least because of the situation of reverse discrimination which it gives rise to, and which according to critics[92] sits uneasily with ”citizenship” – a notion which is commonly understood to be a rights-bearer, providing equal rights for all citizens. Instead the current situation is that a human rights conflict with a transnational dimension will be likely to have a more favourable outcome for the individual than if he or she were in purely internal situation[93].

3.4 A Thin Notion of Citizenship

There is no shortage of critique toward the notion of Union citizenship. The focus here will be on the concept lacking the depth that is traditionally associated with citizenship. In the words of Nic Shuibhne, “the legal, political and social threads of EU citizenship are not sufficiently joined up”[94]. Political citizenship in the Union is still very weak, though attempts have been made to strengthen it. While political rights have been lacking, The ECJ has gradually taken the Union from market citizenship toward a form of social citizenship. But traditionally, to qualify within the personal scope of Union law, the main rule is that one has to in show a sufficient connection to the internal market, in the form of a cross-border connection[95]. The cross-border requirement embedded in the market citizenship notion still makes Union citizenship irrelevant for most Union citizens, who are static[96].

The question is what the proper locus for developing the contents of Union citizenship is to be placed. The prohibition of restrictions to fundamental freedoms has already curtailed the autonomy of Member States[97]. The political and social deficits affecting the Union broadly should be a sign for

90 Opinion of AG Sharpston in *Ruiz Zambrano* para 77
91 See for example Nic Schuibhne 2013.
92 See for example AG Sharpston in Ruiz Zambrano, referred in 4.1.2.
93 Iliopoulou in Dougan & Nic Schuibhne p. 29.
94 Nic Shuibhne: ”Editorial: three paradoxes of EU citizenship” 2010 35 EL rev 1 p. 130.
95 Besson & Utzinger p. 586. Wollenschläger points at a gradual loosening of the nexus between free movement and market integration due to the inclusion of economically inactive persons in the free movement regime in ECJ case law, pp. 10-14.
96 For example Shaw in Craigh & de Búrca p. 597.
97 Wollenschläger p. 15.

the Court to back off[98]. Others argue the opposite, that progressive case law is needed in order to take Union citizenship to a new level[99].

As citizenship is additional to national citizenship, and does not replace it, it has been questioned what aim it really serves. Instead of creating a new fundamental entity of supra-national character, Union citizenship only enforces national citizenship. A preferable condition of inclusion could be legal residence in the Union[100].

The notion of Union citizenship is built on the idea of enabling the common market by guaranteeing mobility rights for workers. This is a thin notion of citizenship compared to the depth and breath usually associated with national citizenship[101]. Citizenship is a tool aimed at enhancing the legitimacy of the Union and as such an elite project[102].

Others have a more pragmatic approach, arguing that citizenship requires a polity, and the common market is the by now uncontested essence of the European project[103]. Iliopoulou offers a pragmatic motivation for the focus on the internal market: After Union citizenship was introduced in the Treaties, the Court took inspiration from its own case law on economic movement on the internal market, which was more robust. Thus, concepts designed specifically in relation to the economic freedoms were transposed to the field of Union citizenship law[104]. The drawback of this approach is that the Union citizen is a subsidiary character compared to economic agents, an idea which fits uneasily with the declared ambition of becoming the fundamental status.

The tendency toward market citizenship has been the object of a feminist critique. It focuses on securing rights to economically active individuals who use free movement rights to enter Member States and access economic benefits while there. Women are generally in disadvantage in such an equation, because they, more often than men, participate in non-economic activities such as caring. While the EU citizen only exists in the public sphere, the unequal division of labour in the private sphere also produces unequal opportunities in the public sphere[105].

The EU idea of solidarity within society is more individualistic than the traditional welfare state system that is prevalent in many Member States, a system which is based on the logic of collective redistribution. The ECJ case law regarding free movement increases the emphasis of economical

98 Nic Shuibhne: ”The Resilience of Market Citizenship”, CML 47: 1597-1628, 2010.
99 The main proponent for this approach is Kochenov.
100 See for example Kochenov 2013 for this argument.
101 Askola p. 344.
102 Currie in Dougan & Currie p. 367.
103 Nic Schuibhne 2010.
104 Iliopoulou in Dougan & Nic Shuibhne p. 15-16.
105 Askola p. 344.

contribution as a condition of citizenship[106]. Though as we saw earlier, rights have been extended to non-economically active citizens, it can be argued that these are the exceptions that confirm the general rule. The non-economic citizen still comes second.

Everson suggests in her critical review of the Court's citizenship case law that the Court's view of the citizen is so individualistic/ focused on the individual that it becomes atomistic, thus breaking down the social cohesion of Member States. The ECJ's vision of the Union citizen is one of a consumer, acting on the internal market. Thus, ”law has descended into economic technology, has subjectified the European as homo economicus...” [107].

In the discourse of rights connected to citizenship, rights for the citizen mean inevitably no rights for the non-citizen. Citizenship is “a valuable status precisely because it is a closed status” – one that creates a collective solidarity, and whilst showing empathy to the individual the Court fails “to show empathy to the collective[108]”. This is intrinsic to the concept of citizenship itself – one's inclusion means the other's exclusion. As such it fits uneasily with the notion of universal human rights.

106 See Askola p. 350 onward for a discussion and further references.
107 Everson in Dougan & Nic Schuibhne p. 167.
108 ibid p. 153.

4 An Exception to the Wholly Internal Rule: "The Genuine Appreciation of the Substance of Rights"

4.1 Case law

4.1.1 The prelude: *Rottmann*

The *Rottmann* case concerned the planned withdrawal of naturalisation as German citizen of an ex-Austrian citizen due to fraudulence – a measure which would have rendered him stateless. The Court held that that the deprivation of Union Citizenship falls within the scope of Union law and Art 20 TFEU "by reason to its nature and its consequences[109]. Although a cross-border connection clearly did exist, the Court did not take any use of this in its argumentation.

4.1.2 Ruiz Zambrano

The case concerned two EU national children who were born to third-country national parents who resided illegally in Belgium. The children gained Belgian nationality at birth and had never relied on their free movement rights, so no cross-border link was established. The national court requested the ECJ to clarify whether Union law prohibited the authorities from expelling the parents to their home state Colombia. The Court ruled that EU law was applicable because Art 20 TFEU prevents Member States, also in situations with no cross-border element, from taking measures that have the effect of "depriving EU citizens of the genuine enjoyment of the substance of rights conferred on them by the Citizenship of the Union"[110]. Refusing a TCN parent's residence and work permit is such a prohibited measure.

The Advocate General had argued at length against the continued upholding of the cross-border requirement, claiming that "lottery rather than logic would seem to be governing the exercise of EU citizenship rights"[111]. What she suggests is essentially a new stance for fundamental rights protection in the Union as a whole[112]. This reassessment is necessary in order to tackle

109 *Rottmann* para 42.
110 Ruiz Zambrano para 42.
111 Opinion of AG Sharpston in *Ruiz Zambrano* para 83-88
112 ibid para 163 and 173.

the reverse discrimination problem as well[113]. Regarding the case itself, she argued that it follows from previous case law (*Zhu and Chen, Baumbast, Rottmann*) that the rights of residence and free movement stemming from art 20 and 21 TFEU are autonomous sources of residence rights, independently of previous exercise of free movement rights[114]. The ECJ, however, did not discuss any of this, and made no elaboration of which rights actually fall within the scope of Union citizenship.

4.1.3 McCarthy

The *McCarthy* case concerned the derived residence right of the TCN husband of woman with dual British and Irish nationality, who resided in the United Kingdom, never having relied on her free-movement rights. The questions referred by the national court concerned exclusively the application of Directive 2004/38 in this particular case. In her Opinion, AG Kokott reassessed the requirement of cross-border movement – either past, present, or prospective – in order to invoke a right of family reunification in the home state, according to existing case law regarding Directive 2004/38[115]. She then went on to consider whether the fact that Mrs McCarthy has dual nationality could be sufficient for triggering a cross-border link. Stating that the right of residence for Union citizens, for themselves and their family members, serves to facilitate free movement of Union citizens within the Union territory, she did not find sufficient reason for Mrs McCarthy to be treated differently from other British nationals seeking to invoke family reunification rights, but who do not possess nationality of another Member State. Regarding the reverse discrimination problem that thus arises, she reminded that EU law at present provides no means of dealing with this problem, as the treatment of EU nationals who have not exercised their free movement rights does not fall within the scope of EU law[116].

In its judgment, the Court did not confine itself to assess the applicability of Directive 2004/38, but went on assess whether a derived right of residence could flow from primary law. The Court ruled that Mrs McCarthy could not rely on her dual nationality in order to be granted a right of residency under EU law, which would have given her husband a derived right of residency. The Court pointed out that Mrs McCarthy could not rely on the ”substance of rights doctrine” since the measures suggested by the UK did not have the effect of forcing her to leave Union territory[117]. Neither was she impeded from exercising her movement rights, in accordance with art 21 TFEU

113 Which she discusses in para 123-150.
114 ibid para 89-122.
115 Opinion of AG Kokott in *McCarthy* para 20-31.
116 ibid para 40.
117 *McCarthy* para 50.

within Union territory. As in *Ruiz Zambrano*, there is no discussion of fundamental rights or right to family life more specifically.

4.1.4 Dereci

The *Dereci* cases concerned the derived right of residence for a number of TCN family members of Austrian nationals who once again had never exercised their movement rights. The Court explained that the denial of genuine enjoyment of the substance of the rights refers to situations in which the Union citizen not only has to leave the territory of the Member State but Union territory as a whole[118]. Also, the mere fact that it might appear desirable for an EU national to have his TCN family members be able to reside with him in the territory of the Union for economic reasons or to keep his family together is not sufficient to successfully argue that he is forced to leave the territory of the Union if such a right is not granted[119].

Unlike in *Ruiz Zambrano* and *McCarthy*, the Court does address the fundamental right of respect for private and family life, as stipulated in Article 7 of the Charter. But it refers to Article 51 of the Charter, which limits the scope of the Charter to situations where Member States implement Union Law. Ultimately the Court does not take a stance in the interpretation of this provision but leaves it to the national court to decide whether or not the situation on hand is under the scope of union law, and therefore if the Charter should be implemented[120].

In his Opinion, Advocate General Mengozzi stated that his conclusion that the dependency criterion was not fulfilled is based on the premise that the substance of the rights attaching to the status of Union citizen does not include the right to respect for family life enshrined in Art 7 of the Charter and Article 8 of the ECHR[121]. On the other hand, his interpretation of ”dependency” embraces economic, legal, administrative or emotional dependence, which could all expose a citizen to the risk of having to leave the territory of the Union[122] – an understanding which appears to be wider than the Court’s understanding of dependency.

118 *Dereci* para 66.
119 Ibid para 67.
120 Ibid para 70-73.
121 Opinion of AG Mengozzi in *Dereci* para 37-38.
122 ibid para 48.

4.1.5 Summarizing the Contents

Whoever holds citizenship is guaranteed an unconditional right to reside within the territory of the polity- state or EU. Thus, it follows of *Ruiz Zambrano* that national measures that de facto force the citizen to leave the territory of the Union as a whole deprive the citizen of the enjoyment of the substance of rights, and are thus contrary to Article 20 TFEU. Similarly it follows from Article 20 TFEU and *Rottmann* that the right not to be deprived of Union citizenship is protected.

The implication of *McCarthy* is that Article 21 TFEU protects the right of free movement, but it cannot be relied upon by sedentary Union citizens, not even by those possessing several Member State nationalities.

4.2 Analyzing the Academic Review

4.2.1 Lack of Clarity in Reasoning

One aspect of which the scholars agree upon, regardless of if they lauded or criticized this new take on Union citizenship, is that the ECJ is to be criticized for its *lack of clarity.* As such the cases pose a *threat to legal certainty*[123]. Similar facts produce contrary rulings, like in *Ruiz Zambrano*, which involved static minor EU citizens and their non-EU national parents, and on the other hand *McCarthy*, which also involves static minor EU citizens, who were risking the loss of one non-EU citizen parent – though the Court was silent about them, judging instead exclusively from the point of view of their mother, the EU national spouse. It is not intuitively logical why the two TCN parents of EU citizen children can derive residency rights, whereas when one parent is an EU citizen, it would be plausible to split the family up? Is it truly a realistic alternative that the family with one EU citizen and one TCN parent splits across borders, alternatively moves to another EU state in order to establish a cross-border connection in accordance with Directive 2004/38[124]?

The cases illustrate the problem of facts versus the law distinction that is inherent to the preliminary ruling procedure: In *Ruiz Zambrano*, the Court assumed that if Mr Ruiz Zambrano would not be granted a residence and work permit, he and the children would be forced to leave the territory of the Union – but no assessment of their de facto possibility to make use of their free movement rights in order to come within the scope of Dir 2004/38 is made. In *McCarthy,* the Court didn't consider the minor children of the

123 See for example Kochenov 2013, Nic Schuibhne 2013, Richards p. 280, Wiesbrock p. 873 amongst many others.

124 The inconsistency was also pointed out by AG Mengozzi in his Opinion in *Dereci*, paras 43-50.

McCarthy's which apparently had special needs, which left Mrs McCarthy probably more dependent of her husband than otherwise, also economically, as she was caring for the children and thus unable to join the work force, or use her right to free movement and qualify under 2004/38 for that matter. These facts have bearings to the feminist critique of market citizenship, discussed in section 3.4. Instead, the actual likelihood of forced departure from the Union should have been established *by the national courts*, instead of presumed by the ECJ[125].

In *Dereci*, the Court left the evaluation of facts to the national court[126], but it did not consider possible limitations to the applicants' movement rights either. Nic Schuibhne calls this tendency to make hasty assumptions of the applicants' situations from a limited reading of the facts the ”problem of conflation”[127].

The limited exploration of potential impediments to movement in the cases does not fit coherently with the generous approach toward movement shown in the Court's citizenship case law. The Court has already extended the material scope of EU law to ”potential impediments” to free movement, to not consider it here is problematic[128]. Nowak[129] has pointed at a number of inconsistencies with the Court’s future versus hypothetical movement case law arguing that free movement could not be the explanatory factor x of the substance of rights test. However, it seems the Court was so anxious to establish limits to its competence (as not to open the flood gates) that it chose to overlook these inconsistencies. The *Ruiz Zambrano* and *Rottmann* notions of free movement are abstract at best.

Cases like *Rottmann* and *Ruiz Zambrano* are useful and sympathetic to the individual applicants, but have not brought clarity as to where the material scope of EU law is to be drawn[130]. In fact, Nic Schuibhne argues that it simply is not the Court's role to act as sympathetic saviours of individuals in particularly disheartening circumstances, as the flipside to this is arbitrary decisions.

Weak argumentation

In *Ruiz Zambrano*, The Court first presents the argumentation of the eight intervening Member States, but then goes on to follow a different interpretation, based on different premises, without motivating why the first interpretation was dismissed. There is instead a lack of reasoning in what was a rather unexpected ruling. The outcome is presented as inevitable, and the reasoning is built to convey this inevitability.

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125 Nic Shuibhne 2012 p. 379.

126 *Dereci*, para 77

127 Nic Schuibhne 2012 p. 371.

128 Nic Shuibhne 2013 p. 142, Nic Shuibhne 2012 pp. 372-378

129 Nowak pp. 692-695.

130 Kochenov 2013 p. 506, see also Iliopoulou p. 33 and Everson, previously cited in section 3.4.

The problem of weak argumentation extends to the justification of the rights included as well, as no references to the sources of law from which these rights are taken from are provided. The only right that has so far been confirmed a part of the ”substance” is ”not being forced to leave the territory of the European union” - and the source is not defined. But semantically speaking, there has to be more to the substance than that. A substance of rights comprises by definition more than just one right[131]. On the other hand, the right not to be forced to leave Union territory is arguably a base, or a lowest common denominator of rights, to which all other rights are secondary , a core right[132], making it the nuclear legal content of Union citizenship[133].

The wording

Nic Shuibhne is critical of the wording chosen by the Court, ie '*genuine enjoyment* of the substance of rights', which she thinks doesn't well describe the contents vested in the phrase so far. This exception takes action at the literal loss of citizenship, as in *Rottmann,* or in a comparably extreme way as in *Ruiz Zambrano*[134]. Confining the scope to forced departure from the Union brings in to the mind a situation of crisis, of last resort situations.

Article 20 TFEU confers a very open right to reside within the territory of the Member States- there is no ”except in your own state” proviso in the Treaty itself[135]. However, based on these judgments, citizenship is not about positive rights but the negative right of not being forced to leave, a very restrictive approach if the aim is to construe citizenship as a rights-enhancing status. That this is the case is especially apparent when compared to the depth of legal protection that opens up when any connection to movement can be established. But on the other hand, a very high threshold is perhaps necessary, not least for this new EU jurisdiction to gain sufficient legitimacy[136].

The ECJ's choice to apply Article 20 TFEU in *Ruiz Zambrano* and Article 21 TFEU in *McCarthy* has caused confusion. Wiesbrock points to equivocalities regarding the Court's choice to refer to two different Treaty provisions. Article 20 has a broader scope than Article 21, since Article 20 includes the right to reside and move freely. It is not clear if the right to reside flows freely from the nature of Union citizenship or from the provisions, but according to Wiesbrock, the Court's reasoning in Ruiz Zambrano seems to suggest this. Therefore the use of Article 21 in *McCarthy* is peculiar. Maybe the Court was just eager to distinguish

131 Kochenov 2013 p. 513.

132 Opinion of AG Sharpston in *Ruiz Zambrano* para 80. The right to move and reside freely within Union territory are also emphasized in the preamble to Directive 2004/38; see recital 1.

133 Nic Schuibhne 2013 p. 145

134 ibid p. 142

135 Nic Shuibhne 2012 p. 365

136 ibid p. 365-366

McCarthy from *Ruiz Zambrano*, but for the sake of clarity, it would have been preferable to also refer to Article 20[137].

According to Schulyok, this discrepancy is not merely a coincidence or a result of the cases being dealt by different chambers of the Court. Instead, whereas the Ruiz Zambrano children could rely on Article 20 TFEU because the national measure of deporting their parents would have resulted in them, as minors, having to leave the territory of the European Union, Mrs McCarthy was not in a comparable position of dependency towards her husband; it is not a factual impossibility for her to remain in the territory of the Union. Thus, Article 20 TFEU is not applicable in her case[138]. What remained for the Court was to examine if the national measures could limit her prospective right to free movement, thus rendering Article 21 TFEU applicable, which it did not. So she could not rely on Union citizenship in order to derive a residency under Union law. In *Dereci,* the Court did not even test the applicability of Article 21, after having found Article 20 inapplicable. This suggests that the consistency in the argument is not as thorough as suggested by Schulyok.

Of particular concern is the statement made by the court in *Dereci*, according to which it is a task for the national courts to define what the essence of the EU citizenship rights are[139]. Kochenov claims that this means that the ECJ delegates the definition of the material scope of EU law in this field (however marginal it may be) to the national courts! This is according to him a threat to the uniform application of EU law, and also very unlikely, since that would mean that the Court lets national courts define its jurisdiction. Or is it just trying to avoid the question, instead inviting the national courts to refer further questions? Kochenov comes to the conclusion that the statement must in fact be a mistake[140]. An alternative explanation, offered by Schulyok, is that since the case concerned five different applicants, the Court was in fact suggesting that EU law (and thus EU fundamental rights) were applicable to some of the applicants but not all, and that the national court should decide whether this is the case on the basis of case law concerning the scope of application of EU law[141]. In fact, there is great variety amongst the different applicants: ranging from adult non-EU national children who had resided outside the Union, who wish to be unified with a now EU national parent who has resided in Austria for decades. On the other hand, a non-EU national chid who had legally resided in Austria since two years of age with his now EU national parents, and whose residence permit had expired, with the Austrian authorities planning to deport him to the country where he came from two decades ago[142].

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137 Wiesbrock p. 867

138 Schulyok p. 452-454; note however the previous critique towards the ECJ's selective assessment of facts.

139 *Dereci* para 74.

140 Kochenov 2013 p. 514.

141 Schulyok p. 457.

142 See Richards p. 282.

Kochenov[143] sees the emergence of the *Rottmann* and *Ruiz Zambrano* line of case law with great optimist, as a ”commence of a new era for EU law”, in which Union citizenship emerged as a source of rights in its own right, independent of other statuses. The subsequent rulings, which largely proved otherwise, have been met with frustration.

Kochenov and Plender argue that the wording of the Treaty provisions on Union citizenship is such that a simple internal market reading fails to capture the contents of the provisions. Thus, *the Rottmann –Ruiz Zambrano* case line is a step to the right direction, which is to bridge the gap between the internal market ideology and the citizenship logic enshrined in the Treaties. Court should be on the side of the citizens, acting as a moral safeguard against nationalist and populist Member States. “Europe does not need nomadic rituals to discover the dignity and rights of its citizens.”[144].

It could certainly be said that the Court in *McCarthy* reassesses the centrality of free movement. As O’Leary points out, the Court refers in para 27 to the free movement of persons as being one of the fundamental freedoms of the internal market[145]. Then, the Court combines the genuine enjoyment rule established in *Ruiz Zambrano*, with a requirement that their free movement rights, which are identified as central to that status, must be threatened in some way[146]. This again suggests the renewed relevance of the market citizen discourse.

McCarthy clearly limits the possible implications of *Ruiz Zambrano*, but does not overall change the new approach to invoking citizenship rights – which are no longer necessarily linked to movement, either past, present or future.. In earlier case law, there was a ”factual geographic connection” of a specific case to cross-border movement, either in the past, present or potentially in the future, whereas now citizenship has been decoupled from such a requirement of factual geographic movement, (and replaced with a more theoretical idea/assumption to movement[147].

Wiesbrock notes that this is remarkable considering the initial internal market rationale behind movement and residence rights. ”By perceiving movement and residence as more than purely economic rights, the Court has successfully turned nationals of MS from ”economic factors” of the internal market to holders of the ”fundamental status” of Union citizenship.[148]” She thus sees evidence of the increasing degree of harmonisation within and the growing maturity of the concept of Union citizenship.

143 Kochenov 2013 p. 507.
144 Kochenov & Plender pp. 393-395.
145 *McCarthy* para 27.
146 McCarthy para 49; O’Leary in Dougan and Nic Shuibhne p. 65.
147 Wiesbrock pp. 865-866
148 ibid p. 867

The implication of the case law line for Union citizenship, according to Iliopoulou[149], is that the concept still provides added value mainly for the legal migrant with dual memberships in both a home and host Member State, but only exceptionally for the sedentary citizen. Thus, European citizenship is still not about supporting an autonomous set of rights based on membership in the European community. Such an order is not sufficient for the creation of a true transnational citizenship with an acclaimed fundamental status. The Court is urging citizens to take instrumental use of their free movement rights. But why would it be better to urge citizens to act like this, why pretending that a staged cross-border movement is more worthy than never having moved[150]?

4.2.2 Fundamental Rights and the 'Substance of Rights'

A recurrent critique on the case line is that there is no mention of fundamental rights in *Ruiz Zambrano* or *McCarthy*[151]. Even though Advocate General Sharpston discussed the fundamental rights aspect extensively in her Opinion, argueing that individuals should be able to invoke EU fundamental rights in any situation covering a field of law where the European Union has shared or exclusive competence[152], the Court decided the cases purely on the basis of Union citizenship. It was thus unclear if fundamental rights were a part of the substance of Citizenship rights, as protected by Article 20 TFEU.

In *McCarthy*, Advocate General Kokott took the stance that a Member State might be obliged to grant a right of residence to the spouse of a union citizen, but that is not a question of EU law. Otherwise, no mentions of fundamental rights were made[153].

Dereci however showed that a possible breach of the fundamental right of the right to family life was not enough in order to bring the case within the scope of EU law, with reliance on the Union citizenship provisions. This is underlined in the Court's statement that the fact that it might appear desirable for an EU citizen in order to keep his family together, to have TCN members of the family to be able to reside with him in the territory of the Union, is not in itself sufficient to support the view that the Union citizen would be forced to leave Union territory if such a right is not granted[154]. Schulyok's conclusion is that EU fundamental rights cannot in

149 Iliopoulou in Dougan and Nic Shuibhne p. 34.
150 Nic Shuibhne 2012 p. 372.
151 See for example, Wiesbrock p. 869 regarding Ruiz Zambrano and McCarthy, Kochenov, Schulyok, Nic Schuibhne.
152 AG Sharpston's Opinion in *Ruiz Zambrano* para 163.
153 Opinion of AG Kokott in *McCarthy* para 60.
154 *Dereci*, para 68.

themselves lead to application of EU law, in situations where no cross-border element can be established. While *Rottmann* and *Ruiz Zambrano* showed that EU citizenship in itself is worthy under protection of EU law, thus moving EU citizenship further away from a merely market citizenship, *Dereci* showed that the same is not true for EU fundamental rights[155]. Charter rights are not free-standing rights in the absence of a connection to other EU law provisions[156].

In *Dereci,* The Court pointed out that its conclusion that Article 20 TFEU is not applicable does not mean that a right of residence could not be granted based on other sources of law, but these have to be assessed independently from the issue of genuine enjoyment of Citizenship[157]. The Court based this distinction on Article 51(1) and 51(2) of the Charter, which stipulate that the Charter does not establish any new power or task for the Union, or modify tasks as defined in the Treaties"[158]. Advocate General Mengozzi argued that the Union should not encroach on the powers of the Member States in matters concerning immigration and on those of the ECtHR in matters concerning family life[159]. Effectively, this argument is about establishing and maintaining sharp dividing lines between the national, ECHR and EU law competences. But is this division plausible? Generally speaking, If there is a clear breach of a human right, is it reasonable for a court (any court) to ignore this, claiming that it is not within their jurisdiction?

Similarly, Wiesbrock questions whether a clear separation between EU law and human rights, as suggested by Advocate General Kokott, is still possible, and whether it can be argued that a perceived or possible human rights violation is not a question of EU law[160].

Earlier cases have shown that the ECJ's case law on family reunification is stronger and more far-reaching than ECtHR case law[161]. The question remains: Why would fundamental rights not be a part of the genuine enjoyment of the rights connected to Union citizenship, even if the protection under Article 8 ECHR is not as far-reaching?

On the other hand, the extension of EU competence to family reunification is problematic – a hot potato – as the entry and residence of third-country nationals who are not family members to EU movers is by and large the competence of Member States[162]. Omitting any references to fundamental rights might have been a strategic omission in the light of Art 51(2) in order to avoid charges of competence creating. Possibly, the Court simply did not want to establish a direct link between Union citizenship and fundamental rights protection, creating the impression that Union citizenship alone would

155 Schulyok p. 459.
156 Richards p. 284.
157 *Dereci* para 69.
158 ibid para 71.
159 Opinion of AG Mengozzi in *Dereci* paras 39-42.
160 Wiesbrock p. 869.
161 *Carpenter, Metock.*
162 Wiesbrock p. 870.

be a sufficient trigger for invoking the protection of fundamental rights[163] - Or as Stanislaw Adam argues, a compromise between diverging standpoints within the Grand Chamber on the sensitive issue of the scope of *Ruiz Zambrano*[164].

Considering the Court's earlier fundamental rights case law, it would not have been legally impermissible to consider the right to respect for family life within the genuine enjoyment doctrine. According to Nic Shuibhne, the Court is struggling at sustaining its established approach to the protection of fundamental rights while also managing the limitations set out in the final provisions of the Charter[165]. The choices made in *McCarthy* and *Dereci* suggest that case law has entered into a more restrictive phase. In *Dereci*, the judgments appear to follow Article 51 of the Charter literally. But this also means that the Court has lowered its own established standards for fundamental rights protection, as established already in Carpenter. The decisions in *Carpenter, Baumbast* and *Metock* among others form a coherent line of case lawabout the high level at which respect for family life is protected within the EU legal order, that is, protecting residence in the citizen's home state as a matter of choice. The decisions in *McCarthy* and *Dereci* also have their own coherence when it comes to the interpretation of Article 51 of the Charter. But the problem is that these two lines of case law do not fit well together[166].

When it comes to *Ruiz Zambrano*, Nic Shuibhne argues that it would have been legally permissible for the Court to consider fundamental rights - when the Court found the children's situation to fall within Article 20 TFEU, an assessment of fundamental rights would have been the ”usual secondary obligation related to a situation that was already grounded in the Treaty and thus within the scope of EU law[167].

It is problematic to address fundamental rights in this haphazard way. They need to be addressed consistently, or else their impact as an appropriate motivation will be weakened, risking a loss of legitimacy[168]. On the other hand, an assertive approach to fundamental rights protection can undermine the shared competence between EU and Member States, potentially placing every Member state action under scrutiny from the ECJ. This also sits uneasily with the Treaty wording of EU citizenship as additional.

As Wiesbrock put it, “The judgments touch upon the essence of the two core questions underlying the whole body of citizenship case law: the proper division of competences between the Union and the Member States on the one hand, and the division of tasks between the judiciary and the legislator.” The evolution of citizenship rights during the last twenty years was arguably

163 Nowak p. 689.
164 Adam p. 184.
165 Nic Shuibhne 2013 p. 136.
166 Nic Shuibhne p. 139
167 Nic Shuibhne p. 140.
168 Nic Shuibhne p. 138.

not the intention of the Maastricht Treaty drafters. Thus, it is often argued[169] that the extension of citizenship rights to non-movers should be decided by the legislator rather than in courts. But Wiesbrock also reminds that the Member States have been complicit in this development as well, for example by codifying ECJ case law in Directive 2004/38[170].

When a field of law is developed through a case law approach, with the legislator following the decisions of the Court, the development is inevitably not straight-forward, but rather crooked, with its developments following the Court's understanding of how far it can go under the prevailing political climate. But this kind of a casuistic approach sits badly with the Court's role as an instance of preliminary rulings, where its aim is to provide general guidance on the application of EU law[171].

In Kochenov's words, shaping clarity will be of utmost importance in the future case law in the field, if the concept of union citizenship is to have any significance at all/ avoiding it to be marginalized into oblivion[172].

4.3 Identifying the Discourses

The reading of the academic review over the *Ruiz Zambrano-Dereci* line of case law in the previous section has revealed that two conflicting narratives are discernable. To some extent this is guiding the reactions to the case law.

The first narrative is one in which Union citizenship is seen as a source of positive rights. Here, the focus is on universal all-encompassing rights which relate to third-country nationals and sedentary Union citizens as much as Union citizens who have exercised free movement rights. In the Court, this approach is especially visible in Advocate General Sharpston's Opinion in *Ruiz Zambrano*. Among scholars, notably Kochenov, there is a keenness to maintain the revolutionary meaning of *Ruiz Zambrano* while downplaying the limiting effect of *McCarthy*, and *Dereci* and as new cases are decided, a growing exasperation.

The other narrative reveals an interest in establishing and de-limiting the scope of Union citizenship vis-á-vis Member State competences. This approach dominates Advocate General Mengozzi's Opinion in *Dereci*. The focus is on defining the negative scope of citizenship, its ulterior limits is the main concern here. This narrative is essentially content with the market citizen notion of Union citizenship for the time being, asserting that the

169 As AG Sharpston did in her Opinion on *Ruiz Zambrano*
170 Wiesbrock p. 873.
171 Wiesbrock p. 873.
172 Kochenov 2013 p. 504.

trigger of cross-border movement is necessary to maintain the divisions of competences that follows from the principle of conferral.

The ambivalent reasoning of the ECJ, while possibly a mishap, suggests that the Court is indeed conflicted. In a misguided attempt to not step on any toes it chooses to first conceal and obscure the reasoning behind a radical judgment, then trying to correct the mistakes afterwards by reinterpreting and constructing boundaries.

5 New Cases

5.1 Iida

5.1.1 Facts

The case concerned the derived right of residence of a Japanese national, who resided (and worked) in Germany and shared custody of her daughter, now residing with her mother in Austria after having moved there from Germany. Thus, contrary to the *Ruiz Zambrano*, *McCarthy* and *Dereci* rulings, a cross-border situation undoubtedly exists here. Mr Iida maintained his relationship with his daughter with monthly visits to Vienna, and she spent her vacations with him in Germany. He originally had a national residence permit as the foreign spouse of a German national, but the validity of this permit was not extended after the spouses' moving apart. Instead, Mr Iida held a national residence permit linked to his employment, but he chose not to reapply, instead applying for a residence permit based on EU law by virtue of the right of custody to his daughter.

The national court referred a number of questions regarding the application of Directive 2004/38, Treaty provisions and the Charter and general principles of EU law in this case, through which it essentially conveyed a number of alternatives on how a right of residence could be motivated in Mr. Iida's case. As a summary, the national court wanted to know if under European law a third-country national parent who has custody of a Union citizen child has a right to remain in the Member State of origin of the child, if the child moves from there to another Member State[173].

5.1.2 The Opinion of Advocate General Trstenjak

The Advocate General concludes firstly that no right of residence could be derived from Directive 2004/38, as the Directive does not accommodate the granting of a residence permit for a parent who wishes to remain in the Member State of origin while the beneficiary, the child, moves to another Member State[174]. She then moves on to the question if a residence permit could be granted on the basis of primary law, in the light of fundamental rights guaranteed under 6(1) and 3 TEU and pursuant to Articles 20 TFEU and 21 TFEU. According to her summary of previous cases *Ruiz Zambrano* and *Zhu and Chen*, such a right could be derived if the ”effective exercise of the Union citizen's legal position would … be harmed substantially” if the

[173] *Iida* para 26.

[174] Opinion of AG Trstenjak in *Iida*, para 31-58.

third-country national parent were denied a right of residence[175]. This is not the case for the daughter of Mr Iida, as she had already exercised her freedom of movement, and thus, ”the essence of the practical effect of her legal position” as a Union citizen is not under threat[176].

The Advocate General's assessment of fundamental rights as a source for residence is based on the *Dereci* judgment and especially on the categorization of competences presented there[177]. Regarding the controversy on interpretation of Article 51(1) of the Charter, referred above in section 2.4, she argues that based on the case law referenced in the explanations of the Charter, the Charter should apply in such a situation[178].

The assessment of the facts when it comes to a possible restriction of free movement is the domain of the national court. But the Advocate General points out that the undermined residence of the father could present a potential impediment to the daughter's future exercise of free movement. Based on the facts that have been presented so far, this cannot be answered. The national court should also take into account the possibility of the applicant's entitlement to a national residence permit[179].

If a connection to Article 21 TFEU is established and the Charter thus applicable, it remains to be evaluated if the current situation is a breach against the right of respect for family life, Charter Article 7 and to the rights of the child, Charter Article 24. If the denial of residence were to undermine the father's ability to maintain a regular contact with his child, this could constitute an interference with a fundamental right, and this would have to be assessed from the standpoint of proportionality[180].

She finally reminds the national court that under Article 52(3) the rights of the Charter correspond to rights guaranteed by the ECHR but that there is no restriction for the EU law to provide a more extensive protection. Article 8 ECHR is applicable to parent-child relations also when the two do not live together permanently[181].

5.1.3 The Judgment

The Court first sets out to ascertain whether the applicant could rely on secondary law in order to gain a right of residence under Union law. Though it was not compatible with Mr Iida's application nor requested by the national court, the Court starts with an assessment of Directive 2003/109,

175 ibid para 62.
176 ibid para 65.
177 Presented in *Dereci* para 72.
178 Opinion of AG Trstenjak in *Iida* para 74.
179 ibid para 78.
180 ibid paras 82-86.
181 ibid para 87.

which obliges Member States to grant long-term residency for third-country nationals who have resided in the Member State for a longer period of time. The Court finds that there was no apparent hinder for Mr Iida to be granted long-term residence on this basis, but that he voluntarily withdrew his application, which means he cannot be granted long-term residency under the prevailing conditions.

Like the Advocate General, the Court finds Directive 2004/38 inapplicable, as the applicant neither accompanied nor joined his union citizen family members in the host Member State[182].

Moving on to an assessment based on primary law, the Court recalls previous case law, like the cases *Zhu and Chen* and *Dereci*, claiming that the common denominator for those cases is that the situations that they concerned were such that although they a priori fall in the competence of the Member States as opposed to Union law, they ”nonetheless have an *intrinsic connection with the freedom of movement of a Union citizen* which prevents the right of entry and residence from being refused... in order not to interfere with that freedom.[183]” Considering the facts, the Court notes firstly that Mr Iida is not applying for residence in the host Member State, and secondly, that the risk of his absence of residence has not hindered his family members from moving. Thirdly, the Court points to its earlier assessment of the applicant's right of long term residency based on Directive 2003/109, and concludes that the suggested measure of not granting the applicant residence based on primary law is not liable to deny his spouse or daughter the genuine enjoyment of the rights associated with their status as Union citizens, nor impede the exercise of their right to move and reside freely within the territory of the Member States[184]. In contrast to the Advocate General’s considerations of the potential impediments to the daughter’s future exercise of free movement, the Court states that purely hypothetical prospects of obstruction to freedom of movement could not be considered[185].

Finally, just as in *Dereci*, there is a reminder that in accordance with Article 51(1) of the Charter, the provisions are addressed to the Member States only when implementing Union law, and that the Charter does not extend or modify the powers of the Union. It is for the national court to interpret whether the national measure falls within the implementation of Union law[186].

182 *Iida* para 65.
183 ibid paras 69-72.
184 ibid paras 73-77.
185 ibid para 77.
186 ibid para 78.

5.2 O, S and L v Maahanmuuttovirasto

5.2.1 Facts

The joint cases contain yet another variation of the minor Union Citizen situation, this time in the context of a reconstituted family, where the right to residence of a minor Union citizen's mother's new spouse is under scrutiny. Specifically, the Union citizen was born into the marriage of a third country national mother and a Finnish national father. After the parents' separation, the child had continued to live with her mother, which gained a permanent residence right in Finland. The mother then remarried to a third-country national without right of residence, and a child –the Union citizen's half-sibling –was born. The half-sibling is not a Union citizen, but has instead obtained the mother's non-EU citizenship. In one of the cases, the TCN father continued to reside with the family in Finland, in the other case, he had been returned to his country of origin.

The national court essentially requested guidance on the interpretation of Union citizenship rights in the light of the Ruiz Zambrano ruling in the specific context of a reconstituted family where the applicant does not have parental responsibility over the Union citizen child[187].

5.2.2 The Opinion of Advocate General Bot

The Advocate General distinguishes the situations on hand from the situation in the *Ruiz Zambrano* ruling. Firstly, the applicants are not the parents of the Union citizen children, whose care is the exclusive responsibility of their mothers. Thus a decision to not grant the applicants residence permits would not derive the children of their subsistence. And if the mother would choose to leave Union territory in order to preserve family life, thus inciting the minor union citizen to follow along, this would not be an effect of the national measure as such, but *a manifestation of the mother's free choice*[188]. The interpretation of the Ruiz Zambrano ruling that was set out in *Dereci* was particularly restrictive – a possible scenario might concern an adult child of whom a parent is dependent because of illness or disability, but surely not the situation on hand. Extending the residence right of third country nationals based on Article 20 TFEU would play against secondary law, namely Directive 2003/86, which determines the conditions for the exercise of the right to family reunification for third-country nationals residing lawfully in the territory of the Member States. The

187 Opinion of AG Bot in *O, S & L* para 5.

188 Or, as the AG puts it, depending "on the whims and vagaries of his mother's married life"; ibid para 52.

purpose of this directive is to promote family reunification[189]. Advocate General Bot finds this Directive applicable in both of the situations on hand. Consequently, he also finds that the national court is obliged to interpret the relevant provisions in the Directive in light of the Charter and the ECHR. The national court is reminded of the necessity to interpret Article 7 of the Charter in accordance with the case law of the ECtHR[190].

5.2.3 The Judgment

The Court elaborates on the confines of the *Ruiz Zambrano* judgment by way of *Dereci*: It is not decisive for the assessment whether the applicant lives together with the other family members or not, neither is its applicability confined to blood relationships between the applicant and the Union citizen. What is relevant is that the mothers of the minor Union citizens have a permanent right of residence, and whether the Union citizens are legally, financially or emotionally dependent of the applicants. Furthermore, the relevant relationship of dependency is between the Union citizen and the applicant himself[191], i e, it is a question of *direct dependency*. The Court states that such a dependency is not present in the cases on hand, but that is for the national court to ultimately decide.

Having clarified that, the Court goes on to point out that this does not rule out the possibility that the applicants could not be refused residence permits based on other criteria, such as the right to the protection of family life[192]. Without the national court having requested clarification, the Court goes on to give guidelines on the applicability of Directive 2003/86. The Directive must be interpreted in the light of the Charter provisions, which require the Member States to take into account the interests of the children concerned and also with the promotion of family life, and avoiding any undermining of the objective and the effectiveness of the Directive[193].

5.3 Alokpa & Moudoulou

5.3.1 The Facts

This case concerns yet another variation of the *Ruiz Zambrano* minor Union citizen scenario, this time with Union citizen children residing with their TCN mother in a Member State other than that of their nationality, never having exercised free movement rights. The mother of the twins, who were born prematurely, did not have a regularised residence permit in

189 Opinion of AG Bot in *O, S & L* para 63, citing *Chakroun* para 43.
190 ibid para 77
191 *O,S, & L* paras 54-56.
192 ibid para 59.
193 ibid paras 61-82.

Luxembourg. After their birth, the father, a French national, acknowledged paternity and the children thus became Union citizens. The children had no further contact with their father. They continued to reside in Belgium with their mother, who thus applied for a derived right of residence as the carer of union citizen minors. The national court requested clarification as to whether Article 20 TFEU, read in the light of *Ruiz Zambrano*, posed a hinder to dismissing her application[194].

5.3.2 The Opinion of Advocate General Mengozzi

Firstly, the Advocate General distinguishes the case from *Ruiz Zambrano.* Article 20 TFEU is to be taken into account when no cross-border connection can be established, which is not the case here, because the children are citizens of one Member State, residing in another. In this sense the Advocate General likened the situation to the one in *Zhu and Chen*, where the Court found the situation to fall within the scope of what is now Directive 2004/38[195].

Even though Article 20 TFEU is not applicable, it is still necessary to consider whether the planned national measure of expulsion potentially risks forcing the Union citizens to leave the territory of the Union, thus depriving them of the effective enjoyment of the substance of rights conferred by virtue of their status as Union citizens[196].

As French nationals, the Alokpa children have the unconditional right to enter and remain in France. Under such circumstances, it is not possible for French authorities to refuse Ms Alokpa, the sole carer of the children, a derived right of residence. Thus the children would not be forced to leave the territory of the Union. With regard to the job offer that she has received in Luxembourg, she could carry out her employment as a frontier worker, ”like thousands of other French residents”[197].

5.3.3 The Judgment

First, the Court refers to its earlier case law regarding Union citizenship. The rights of a third-country national based on Treaty provisions on Union citizenship are not autonomous rights of the TCN, but rights derived from “the exercise of freedom of movement by a Union citizen”. The purpose of those derived rights is based on the fact that not granting them would interfere with freedom of movement by ”discouraging the [Union] citizen

194 *Alokpa & Moudoulou* para 19.
195 Opinion of AG Mengozzi in *Alokpa & Moudoulou* para 11-15.
196 ibid para 51.
197 ibid para 54-57.

from exercising his rights of entry and residence in the host Member State"[198].

It is for the national court to assess whether the provisions of Directive 2004/38 and 21 TFEU are applicable. In accordance with *Iida*, a third-country national who is not dependent of the holder of the residence right, but of whom the holder is dependent of cannot be regarded as a dependant family member within the meaning of the Directive. But, as the Court found in *Zhu and Chen*, a refusal to allow a right of residence to a parent, whether a third-country national or a Union citizen, who is the carer of a Union citizen who resides in a host member state, would deprive the child's right of residence of any useful effect.[199].

The Court goes on to assess the "very specific" situations in which, though secondary law does not apply, right of residence cannot be refused because it would force the Union citizen to leave the territory of the Union, thus depriving him of the genuine enjoyment of the substance of rights connected to his status as a Union citizen. Here the Court agrees with Advocate General Mengozzi's opinion that even if the Luxembourg authorities would not grant residence to the applicant, she would still have the right to derived residence in France and thus the children would not be forced to leave Union territory altogether[200].

5.4 O & S

5.4.1 The Facts

The cases concerned the right of residence of third-country national family members of Union citizens who have exercised their right of movement to a varying degree - either working, residing or consuming services in another state than the Member State of origin, where the derived residence permit is now requested. As such, the judgment is not within the scope of this thesis. However, in her ambitiously written opinion, Advocate General Sharpston sought to bring clarity and coherence to the current status of Union citizenship case law. Thus she discussed the recent rulings on Union citizenship, and her conclusions have relevance also regarding the "substance of rights" doctrine.

198 *Alokpa & Moudoulou* para 22.
199 ibid paras 24-31.
200 ibid para 32.

5.4.2 The Opinion of Advocate General Sharpston

Firstly, a genealogy of the derived rights of residence is presented: The notion was developed in the context of the economic freedoms of movement, in particular those of migrant workers. ”Workers are human beings, not automata”, she points out, and forcing them to leave behind their family members, who are possibly dependent of them, could lead to them being discouraged from exercising their right to free movement[201]. Through the introduction of Union citizenship in the Maastricht Treaty, the right to move and reside freely within the territory of Member States was decoupled from the demand for a pursuit of economic activity, a notion which was confirmed in *Baumbast*[202].

Assumably based on the *Dereci* and *Iida* rulings, the Advocate General states that in the current state of EU law, derived rights of residence in principle only exist where these are necessary to ensure that EU citizens can exercise their free movement and residence rights effectively. Rules governing freedom of movement can only exceptionally be applied to cases that show no actual connection with situations governed by EU law. Thus, if a national measure would oblige EU citizens to leave the territory of the EU as a whole, then that would fall within the exception. In *Iida*, the Court clarified that this test was not limited to situations that otherwise would be classified as purely internal[203].

Sharpston is critical of the ‘division of competences’ regarding fundamental rights and citizenship provisions that was established in *Dereci*, where the Court proclaimed that even if residence could not be granted based on Art icles 20 and 21 TFEU, the national court may still require residence to be granted based on either Article 7 of the Charter or Article 8(1) of the ECHR (for other situations). According to Sharpston, it seems that the Court establishes at least three separate grounds for a right of residence under EU law: the right to family life (Article 7 Charter), the right to free movement and residence (Article 21 TFEU) and the deprivation of genuine enjoyment of the substance of Union citizenship rights (Article 20 TFEU). Should the same test be applied in order to determine both whether EU law applies and whether denying residence is contrary to Article 20 or 21 TFEU[204]? Granted that the Charter currently does not provide free-standing rights, could a situation really fall within the scope of EU law if Articles 20 or 21 TFEU are not applicable: is it not then a wholly internal situation?

Instead, Sharpston argues that no such division is necessary: if the Treaty provisions apply, then the Charter applies, meaning essentially that a

201 Opinion of AG Sharpston in *O & S* para 46.
202 ibid para 47.
203 See Iida, para 76.
204 Opinion of AG Sharpston in *O & S*, para 56-58.

provision such as Article 20 or 21 TFEU is not simply a basis for residence status separate from Article 7 of the Charter. Treaty provisions such as the afore-mentioned must always be implemented in a Charter-compliant manner[205].

Taking a nod toward critics who have been anxious at keeping Union competence at bay, she argues that such an approach does not extend the scope of EU law; it is a *fundamental principle in a Union based on the rule of law* that all relevant provisions, also those of constitutional provenience are to be taken into account when interpreting a legal provision. As such, taking into account the Charter is no more intrusive to the Member States' competence than by now well-established interpretations on free movement of goods[206].

On the other hand, situations that fall outside the scope of EU law are, as discussed earlier, to be interpreted in accordance with the ECtHR case law. Following Article 52(3) of the Charter, the fundamental rights standard to be applied is the same[207].

She also compellingly addresses the problem of reverse discrimination, which is a logical effect of the free movement requirement as it is applied today. When a situation is labelled a purely internal situation, Member States are enabled to treat their own nationals worse than other EU nationals, which is ill-at ease with ”the solidarity that is presumed to underlie the relationship between a Member State and its own nationals. Also, the effect which the free movement provision Article 21 has is counterproductive to its aim: the provision is about guaranteeing the right to move and reside freely, that is the free choice to move or not. A measure that places the citizen in a situation *where he is compelled to move in order to keep his family together does not promote this aim*[208]. These arguments have resonance not least when it comes to the Court's reasoning in McCarthy.

5.4.3 The Judgment

While generally uninteresting for this thesis, as it focuses on the technicalities of Directive 2004/38, taking no ambition to react to Advocate General Sharpston’s assertive Opinion, the following statement is noteworthy. ”Any rights conferred on third-country nationals by provisions of EU law on Union citizenship are rights derived *from the exercise of*

205 ibid para 62.
206 Opinion of AG Sharpston in *O & S* para 63.
207 ibid paras 64-65.
208 ibid para 86-89.

freedom of movement by a Union citizen"[209].. Free movement is once again placed center-stage!

5.5 Analysis

How (if in any way) are fundamental rights then assessed in the new judgments – as in which language of rights is used? Starting from Advocate General Trstenjak's Opinion in *Iida*, it is notable that the language of rights is clearly toned down. Compared to "the genuine enjoyment of the substance of rights", the "essence of the practical effect of [the Union citizen's] legal position" sounds positively bland.

In his Opinion for *O, S & L*, AG Bot ruled out TCN family members' manifestations of free choice from constituting a deprivation of the substance of rights for the Union citizen. But what is the worth of free choice in a situation where one is forced to choose between living with one biological child or the parent of another biological child? In her Opinion for *O & S*, AG Sharpston reassesses free choice in contrast to AG Bot's statement. Her declaration of workers as "human beings not automata" is in stark contrast to AG Mengozzi who deems it natural for a single mother of twins to relocate herself to a new state.

The "problem" of fundamental rights is represented as a question of proper delimitation of competences, and the compartmentalization technique that we saw in *Dereci* is repeated in every judgment and Opinion except in Sharpston's Opinion.

In *Iida*, the Court's choice to assess residence rights based the long-term residency without it being requested shows the Court's urgency to mark that citizenship rights based on account of primary law are only to be applied in situations where no other remedies are available to the applicant. Instead, it is not for Mr Iida to choose on which grounds he is granted a right of residence. Because he had withdrawn his application for long-term residence based on Directive 2003/109, one can only assume that he would have preferred to be granted the derived right of residence based on his paternal position to his Union citizen daughter. As a conclusion, the Court is very much focused on the boundaries of rights as opposed to the positive contents of the rights.

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[209] Case -456/*12 O. & B* para 36, referring to *Iida* para 67, *Ymeraga* para 35, *Alokpa* para 22 .

Amongst the rights addressed in these judgments, the right to free movement is prevailing, as is shown by the Court's re-reading of previous judgments as having "an intrinsic connection with the freedom of movement of a Union citizen", a statement that is later repeated. For practically every case, the Court seems to be reassessing its relevance, even though it had all but forgotten it in the *Rottmann* and Ruiz *Zambrano* rulings. To compare, in *Rottmann*, a cross-border connection did exist, but the Court chose to take no note of it.

Similarly to Wiesbrock's understanding (section 4.2.1) that the free movement notion had evolved into something more abstract than the geographical connection of earlier case law, AG Trstenjak opened for the possibility that potential impediments to future free movement could fall within the scope of Union law. But as we saw in the judgment, the Court rejected this thought, confining the limits on this front as well.

As has been pointed out extensively in the literature commenting the *Ruiz Zambrano* case line, a high threshold is perhaps necessary in the light of the division of competences between Member States and the Union respectively. But this is also a quite nihilistic notion, and reminiscent of Giorgio Agamden's notion of "bare life"[210], the status which remains when all rights are expelled.

[210] Agamden.

6 Conclusion – and A Look Ahead

Between Union citizenship as a fundamental status and the instrumental form of citizenship embedded in the notion of market citizenship, what is the true meaning of the 'substance of rights' doctrine in the light of the latest judgments? The conclusion reached in this thesis is that the universalist notion of Union citizenship has taken a step back and has been put in the box again. Meanwhile, the saga continues. New cases concerning the derived right of residence of TCN family members to Union citizens are pending: a request for a preliminary ruling from Spanish Supreme court concerns the derived residence right of a third-country national parent of a dependent union citizen minor in the situation where the parent has a criminal record in the country of desired residence[211].

Also, though slightly outside the core of the case law that has been analyzed in this thesis, but still very much concerning the question of rights of free movement and residence of Union citizens, is the pending case of McCarthy and others[212], in which Advocate General argues for a wider interpretation of Directive 2004/38 to be applicable even in situations where Union citizens with multiple nationalities when they move to a Member State that strictly observed is their Member State of origin either because the citizen holds nationality in this state or otherwise, but where the move in fact resembles the exercise of free movement. The arguments used by the Advocate General against nitpicking on the technicalities of the Directive and in favour of a greater inclusiveness fall very much into the universalist discourse of citizenship as a fundamental status.

The struggle continues.

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211 Case C-165/14 Request for a preliminary ruling from the Tribunal Supremo (Spain) lodged on 7 April 2014 — *Alfredo Rendón Marín v Administración del Estado.*

212 Opinion of Advocate General Szpunar in case C-202/13 *Sean Ambrose McCarthy and others v Secretary of State for the Home Department*, delivered on 20 May 2014

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