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EUROPEAN UNION CITIZENSHIP. PROBLEMATIC ASPECTS

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INTRODUCTION

2013 year is the Year of European Citizens. The European Union citizenship, which was first introduced in the Maastricht Treaty in 1992 (entered into force in 1993), this year celebrates 20th anniversary of the movement from a market citizenship to a political citizenship. Although this represented the first formal “constitutionalization” of European Union citizenship, the idea of Community citizenship and the rhetoric of the People’s Europe had been in circulation for a long time.¹ Article 20 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) establishes the core statement of the Union citizenship: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.²

While the Court of Justice of the European Union (hereinafter – CJEU or Court) continues to repeat the underlying phrase that „Union citizenship is destined to be the fundamental status of nationals of the Member States“³, this does not answer many questions arising while studying EU citizenship.

The main idea and objective of this research work is to analyze and to understand what is the meaning of the status of European citizenship under Article 20 of TFEU, how it evolved through the years according to case by case development, and how it came to be the result of the Court’s competence broadening in the recent ground-breaking cases where the risk of the deprivation of citizen’s rights genuine enjoyment conferred under Article 20 TFEU was highly possible. These ground-breaking cases are not by accident, as we will see, containing the element of a very sensitive area of European Union policy nowadays. This element is the fundamental right of every Union citizen to have a normal family life. In these controversial family

¹ Craig P., de Burca G. EU law. Texts, Cases and materials. – Oxford: Oxford University Press, 5th edition, 2011. P. 820

² Treaty on the Functioning of the European Union//OJC326, 26.10.2012 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF> accession 2013-09-05

³ Case C-184/99 Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve [2001] ECR I- 06193 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=46599&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=145251> accession 2013-09-20;

Case C-224/98 D’Hoop v Office national de l’emploi [2002] ECR I-6191 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47092&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=145404> accession 2013-09-20;

Case C-413/99 Baumbast and R v Secretary of State for the Home Department [2002] ECR I-07091 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=145776> accession 2013-09-20;

Case C-148/02 Carlos Garcia Avello v Belgian State [2003] ECR I-11613 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=48670&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=147269> accession 2013-09-20;

Case C-200/02 Zhu and Chen v Secretary of State for the Home Department [2004] ECR I-9925 <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-200/02&td=ALL> accession 2013-09-20

reunification cases the element of third country national family member of the European Union citizen is included, as the Court is going decisively towards the intention of high protection of the fundamental rights of EU citizens. The attempt of the Court to be the protector of these rights and to secure the legal certainty in European Union creates many ambiguities in the application of Article 20 TFEU – the guardian provision of EU citizenship status. The problems caused by these ambiguities are the core objects of this research.

In the first part of this work the introduction of the origin and the evolution of the status of European Union citizenship will be introduced. The interaction between the citizenship of a Member State and the citizenship of European Union will be analyzed and the few cases of the CJEU, where the status of European Union citizenship was firstly recognized, will be presented as to introduce the cross-border and inter-state movement approach of the Court for the application of Article 20 TFEU in these cases. Then the Court's movement towards the broadening its competence and refusal of the actual cross-border and inter-state movement approach in the application of Article 20 TFEU will be shown. Few relevant cases where the Court found the Article 20 TFEU applicable, where the EU citizens have not moved from the Member States of their nationality, but somehow were linked to EU as a whole, will be presented and analyzed in the context of national and EU law applicability interaction in the circumstances given of these cases.

In the second part of this work, the significant EU citizenship case law in cases of family reunification will be analyzed as the further CJEU's competence into purely internal situations broadening when applying Article 20 TFEU. The Court's interpretation of the enjoyment of the substance of the rights conferred to every EU citizen under Article 20 TFEU in these cases will be analyzed and the problems that this interpretation in family reunification cases has brought will be revealed.

In the third part, the Court's protection of fundamental rights in the context of the citizenship case law in family reunification cases where the application of Article 20 TFEU was found will be analyzed. The consequences of the Court's protection of family rights in family reunification cases, when the EU law was applied in considerably purely internal situations, will be revealed and the problems that the Court's intention to be both the fundamental rights protector and the safeguard of EU legal certainty in the context of Article 20 TFEU application will be explored.

Problem. Recent CJEU case law in European Union citizenship revealed many problematic and controversial questions about the scope of citizens' rights in European Union, especially in cases of family reunification where third country national family members are involved. The Court in its rulings tried consequently to interpret the meaning of the substance of

the rights conferred to Union citizens and the scope of these rights under Article 20 TFEU. The problem is that generally for the European Union law to be applied (citizenship cases are no exception) the border of the Member State must be crossed and the field of national law dominion must be left, but it seems that the Court in its recent EU citizenship case law of family reunification didn't require a cross-border element and inter-state movement for the European Union law to apply – Article 20 of TFEU – and found the deprivation of the genuine enjoyment of the substance of the rights conferred by the EU on its citizens in situations where the citizen of EU have not moved nowhere from his native Member State. In this research we will analyze this problem and will confirm that the Court, avoiding the reverse discrimination or merely protecting the fundamental rights of EU citizens, have refused its initial cross-border approach of EU law application and extended its competence into situations which have always been within the competence of national institutions of Member States and been dealt undoubtedly at the national level. By doing so, the Court raised many discussions where is now the boundaries of EU competence in applying Article 20 TFEU and the scope of citizens' rights protection at EU level.

Relevance of research. This research is relevant first of all because 20 years has passed after the citizenship of European Union was introduced and it is important to see how effective and necessary this introduction was. As those years passed by, the activism of the CJEU helped us to get what we have now, not theoretically but practically adjusted Article 20 TFEU – the vivid notion of the fundamental rights given to all of us – European citizens. The results of this research is even more important as the fundamental rights protected by European Union legislation, no matter primary or secondary law, remains the most politically sensitive field for all – Member States and European Union as such. This research will help to identify, by invoking most famous cases of family reunification, how the Court gradually broadened the application of Article 20 TFEU starting by the early citizenship cases analysis of the dating of the Maastricht Treaty and reaching the analysis of very recent Court rulings in family reunification cases. The results of this research are novel as these recent rulings brought a brand new Court's approach in interpreting citizenship rights covered by Article 20 TFEU applying the content of this article in family reunification cases which by some were considered to be purely internal. As we will see, all these cases involve such a sensitive issue as family life, and the fact that the family members of EU citizens in these cases happen to be third country nationals, the balance between legitimate immigration policy and the protection of family rights in the whole European Union intends to become a quite big challenge.

Hypothesis. The introduction of EU citizenship in the Maastricht Treaty caused the Court of Justice of the European Union competence broadening into purely internal cases for the

Article 20 TFEU to be applied and this extension, seen particularly in EU citizenship cases of family reunification, thereby caused the ambiguity in defining the boundaries of Article 20 TFEU application and the possible threat of family rights protection.

The object of research. The meaning of the substance of the rights conferred to the EU citizens under Article 20 TFEU and the development of the scope of these rights will be examined by the analysis and critical insight of the most significant citizenship cases starting from the EU citizenship introduction in the Maastricht Treaty and leading up to the most important recent cases of the CJEU referring to the situations of family reunification in European Union.

The subject matter of research. The meaning of the substance of the rights conferred to European Union citizens; the scope of Article 20 TFEU; reverse discrimination; the situation of third country national family members in EU; the competences of EU and Member States in family reunification situations; residence permit to third country national in Member States; case law in family reunification under Article 20 TFEU; cross-border and inter-state movement requirements under Article 20 TFEU; protection of fundamental right to have a family in EU.

Purpose of research. Using the comparison of Article 20 TFEU application in early citizenship cases and recent ground-breaking family reunification cases to analyze what are the exact boundaries of the scope of Article 20 TFEU, in this way CJEU's competence of this article application, and the problems this application brought at EU level in the context of family rights protection.

The Goals of research.

1. To analyze what is the exact CJEU case by case development in application of Article 20 TFEU which determined the extension of European Union competence and the Court's dispense with a requirement for a cross-border and inter-State movement element before Article 20 TFEU can apply.

2. To explore what leads to the deprivation of EU citizenship rights and the genuine enjoyment of the substance of these rights under Article 20 TFEU.

3. To explore what kind of problems did the broadening of Court's competence in Article 20 TFEU application cause by analyzing particularly recent EU citizenship cases of family reunification.

4. To analyze how the application of Article 20 TFEU in the Court's judgments in recent EU citizenship cases of family reunification influenced the balance between protection of family rights and legal certainty of European Union.

The method of research.

Theoretical analytical: using this method the theoretical literature sources and the legal documents of European Union and Member States will be analyzed, critical view of the main dominant ideas will be explored and the various interpretation of the most famous CJEU rulings in citizenship cases of will be given.

Comparative: different views and opinions, insights and arguments of most famous scholars, as well as different CJEU approaches in application of EU legislation will be compared during the whole research work.

Historical: using this method the historical review and year by year development of the case law of European Union citizenship and its interpretation will be expounded.

Documental: using this method the legal acts – EU treaties, regulations, directives, national legislation and international legislation – will be analyzed during this research.

Sources of research. Academic researches, works of famous scholars (J. Shaw, D. Kochenov, P. Craig, G. de Burca, D. Kostakopoulou, G. Davies, A. Tryfonidou and others), academic literature for European Union law students, European Union Treaties and secondary legislation, speeches of the representatives of EU institutions, case law of the Court of Justice of European Union, opinions of Advocates General in CJEU cases, The Internet.

1. European Union citizenship – relevant elements of cross-border approach

This chapter reveals the origin of European Union citizenship, explains its evolution and explores the consolidation of the status of the European Union citizen in the case law of CJEU .

As Shuibhne explains, basically, the citizenship is comprised of rights, which usually evolve through a process of contestation among individuals, groups, and institutions, shaped by and in turn transforming the political culture. According to him, there is no universal definition and citizenship is inevitably contextualised – in other words, there can be versions of citizenship, within which different elements are highlighted, configured or emphasized in different ways, to explain different social and historical contexts, or to fit different ideological or philosophical perspectives.⁴

O. Dan distinguishes three ways of citizenship explanation – as utilized in the lexicon of citizenship studies, “citizenship” might have the following dimensions: 1. membership in a state, which entails specific rights and duties. 2. legal and egalitarian participation in processes of popular governance and 3. membership in a group with certain standards of proper conduct.⁵

Willem Maas concludes that in theory, citizenship denotes intrinsic status, signifying both full membership in the political community and a set of rights that adhere inherently and equally to all citizens. In practice, however, the rights of citizenship are variable and differentiated, and governments often approach citizenship not as a fundamental birthright or basic legal status but rather as a policy tool that is subject to constant adaptation, alteration, and modification. The question of which individuals are citizens is as important as the issue of what the status of citizenship entails.⁶

European citizenship emerged because of a continuing series of political junctures that span the entire history of European integration, coupled with an ongoing institutional and political commitment to safeguarding and promoting the development of European rights. The freer trade of the 1950s and 1960s created demands for freer movement of labor. Political commitment transformed this demand for mobile labor into individual mobility rights for workers. This altered the political environment and produced pressures to extend the scope and expand the content of those rights. Because of continued political commitment, this process of

⁴ Shuibhne N. N. The Resilience of EU Market Citizenship//Common Market Law Review. 2010, Vol. 47, Issue 6. P.4 http://www.research.ed.ac.uk/portal/files/8657263/the_resilience_of_eu.pdf accession 2013-09-22

⁵ Dan O. United in Diversity: the determinants of European Union citizenship//Unpublished manuscript, Harvard University, 2008, p. 6, http://www.wjh.harvard.edu/~hos/papers/Oana_Dan.pdf accession 2013-09-25

⁶ Maas W. Unrespected, unequal, hollow? Contingent citizenship and reversible rights in the European Union//The Columbia Journal of European Law, 2009, Vol. 15. P. 265-280, <http://www.yorku.ca/maas/Maas2009a.pdf> accession 2013-10-01

extension and expansion of rights resulted in a common European citizenship.⁷ From the day the citizenship was introduced at EU level, the concept's perception has varied from a mere declaratory status to a more substantial, fundamental status attached to Europeans. Regardless of whether one views citizenship as the latter or the former of the above construes, this concept is undoubtedly intriguing and is still the subject of discussions and studies.⁸

The increasing amount of recent scholarly work that not only continues the tradition of interlinking EU citizenship with the theoretical foundation of the EU, but also investigates special issues of citizenship as such and the similarly increasing number of the Court's decisions on European citizenship pay witness to the fact that questions regarding EU citizenship remain highly important.⁹

1.1. The movement to People's Europe

There was no mention and no discussion of the term of the citizenship in the initial EC Treaty.¹⁰ Looking at the rights initially conferred to citizens of European Union member states, the original EC Treaty granted a right to reside in other Member States, together with a right to equal treatment with host-State nationals, only to those nationals of the Member States who migrated in order to pursue an economic activity. Economic rights that are now associated with citizenship were at that time attached to workers only and it took the European Union many decades to realise that a political union was also needed to complement its already existing economic counterpart.¹¹ Therefore by that time non-economically active migrants were not in any way protected by Community law. Over the time that changed. With the progress of the Union and the efforts of the Court of Justice of the EU, the free movement provisions became more substantive and these efforts were merged in the introduction of a more inclusive, but, as Stasinopoulos proposes, far from perfect, Union citizenship.¹²

The initial use of the term was made in the Tindemans Report in 1975, which contained a chapter entitled „Towards a Europe for Citizens“, which examined the idea of a passport union and the conditions under which member states could grant the right to vote and eligibility for

⁷ Maas W. The evolution of EU citizenship//Memo for Princeton workshop on The State of the European Union, 2005, Vol. 8. P. 1, <http://www.princeton.edu/~smeunier/Maas%20Memo.pdf> accession 2013-10-05

⁸ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Autumn/Winter, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

⁹ Mann D. J., Purnhagen K. P. The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship. A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?// Working Paper Series, Amsterdam Centre for European Law and Governance, 2011. P. 4 <http://cadmus.eui.eu/bitstream/handle/1814/19400/ace1g-wp-2011-09.pdf> accession 2013-10-07

¹⁰ Maas W. The evolution of EU citizenship//Memo for Princeton workshop on The State of the European Union, 2005, Vol. 8. P. 5, <http://www.princeton.edu/~smeunier/Maas%20Memo.pdf> accession 2013-10-05

¹¹ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Autumn/Winter, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

¹² Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Autumn/Winter, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

public office to citizens of other member states.¹³ Firstly, three residence directives¹⁴ were adopted which granted a conditional right of residence to those who had sufficient means to support themselves, including pensioners and students.¹⁵ But the breakthrough moment was the Intergovernmental Conference on Political Union that preceded the adoption of the Treaty on European Union at Maastricht.¹⁶

The Union citizenship was then finally introduced in 1992 in the Treaty of Maastricht and was defined as the fundamental status of Union citizens:¹⁷ „Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.“¹⁸ Amending the Treaty of Rome, the Maastricht Treaty further granted all EU citizens a series of rights and privileges: the freedom to live and work anywhere in the European Union, the right to non-discrimination on the basis of nationality, the right to vote and stand in municipal and European Parliament elections, the right to be protected by European diplomatic services, and the right to petition the European Parliament and contact the European Ombudsman in any of the 23 (at that time) official EU languages.¹⁹ As a result of these legislative changes, Union citizens, previously excluded from the scope of Community law have gained directly enforceable rights.²⁰ Later, the Amsterdam Treaty, adopted in 1997, implicitly suggesting that citizenship of the Union might be misunderstood, added at the end of the first paragraph: ‘Citizenship of the Union shall complement and not replace national citizenship’.²¹ This clause went well beyond the declaration attached to the Maastricht Treaty, which simply stated that the question whether an individual possesses the nationality of a member state would be settled solely by reference to the national law.²² After the adoption of the Treaty of Lisbon, the Article 20 of the Treaty on the Functioning of the European Union,

¹³ Maas W. The evolution of EU citizenship//Memo for Princeton workshop on The State of the European Union, 2005, Vol. 8. P. 5, <http://www.princeton.edu/~smeunier/Maas%20Memo.pdf> accession 2013-10-05

¹⁴ Directive 90/365/EEC of the Council of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity//OJ L180/28 [1990]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0365:en:NOT> accession 2013-10-07;

Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students//OJ L317/59[1993]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0096:EN:HTML> accession 2013-10-07;

Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence //OJ L180/26[1990]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0364:EN:HTML> accession 2013-10-07

¹⁵ Arnall A., Dashwood A., Dougan M., Ross M., Spaventa E., Wyatt D. European Union law. 5th edition. – London: Sweet and Maxwell, 2006. P. 663

¹⁶ Chalmers D., Davies G., Monti G. European Union law. 2nd edition. - Cambridge: Cambridge University Press, 2010. P.444

¹⁷ Arnall A., Dashwood A., Dougan M., Ross M., Spaventa E., Wyatt D. European Union law. 5th edition. - London: Sweet and Maxwell, 2006. P. 663

¹⁸ Art. 8 Treaty on European Union (Treaty on Maastricht)//OJ C 191 of 29.7.1992

<http://eur-lex.europa.eu/lt/treaties/dat/11992M/htm/11992M.html> accession 2013-10-08

¹⁹ Dan O. United in Diversity: the determinants of European Union citizenship//Unpublished manuscript, Harvard University. 2008 http://www.wjh.harvard.edu/~hos/papers/Oana_Dan.pdf accession 2013-09-25

²⁰ Arnall A., Dashwood A., Dougan M., Ross M., Spaventa E., Wyatt D. European Union law. 5th edition. – London: Sweet and Maxwell, 2006. P. 663

²¹ Jacobs F. G. Citizenship of the European Union-A Legal Analysis//European Law Journal, 2007, Vol. 13, No. 5. P. 592

²² Maas W. The evolution of EU citizenship//Memo for Princeton workshop on The State of the European Union, 2005, Vol. 8. P. 12, <http://www.princeton.edu/~smeunier/Maas%20Memo.pdf> accession 2013-10-05

establishing European Union citizenship provides that Union citizenship is *additional* to national citizenship and replaces the earlier expression that it is *complementary*:²³ „Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.“²⁴ Article 20 TFEU now creates a derivative or dependent citizenship. A person is a citizen of the Union if and only if she or he is a citizen of a Member State. The idea of replacing national citizenship is explicitly rejected.²⁵ In its present shape, the citizenship of European Union is thus a complementary set of rights which confirms the existence of the cultural and political identities corresponding to the Member States.²⁶ As a consequence, and according to the different conceptions of nationality such as *ius soli* and *ius sanguinis* in Europe, the conditions for acquiring and losing European citizenship depend on the conditions for acquiring and losing the nationality of the respective Member State.²⁷

A concrete manifestation of the rights-based and EU citizen-oriented approach that began to take root in the new millennium is the 2004 Directive on the Right of Citizens and their Family Members to move and reside freely within the territory of the Member States.²⁸ The Directive remedied the piecemeal approach to free movement rights which existed before the Maastricht Treaty by incorporating and revising the existing Directives²⁹ and amending Council Regulation 1612/68.³⁰ It also gave concrete meaning to the principle that the European Union citizens' residence in other Member States gives rise to legitimate expectations and to entitlements.³¹ It built on, and further extended, the rights-based approach characterising the rights of free movement since the 1960s and made Union citizenship a genuine mode of

²³ Craig P., de Burca G. The evolution of EU Law. 2nd edition. - Oxford: Oxford University Press, 2011, p. 599

²⁴ Article 20 of the Treaty on the Functioning of the European Union (consolidated version 2012)// OJC326, 26.10.2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0047:0200:EN:PDF> accession 2013-09-05

²⁵ Chalmers D., Davies G., Monti G. European Union law. 2nd edition. – Cambridge: Cambridge University Press, 2010. P.445

²⁶ Martiniello M. The development of European Union Citizenship in Roche M. and van Berkel R. European Citizenship and Social Exclusion. - Ashgate: Aldershot, 1998. P. 35

²⁷ Mann D. J., Purnhagen Kai P. The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship. A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?//Working Paper Series, Amsterdam Centre for European Law and Governance, 2011. P. 7, <http://cadmus.eui.eu/bitstream/handle/1814/19400/accelg-wp-2011-09.pdf> accession 2013-10-07

²⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States//OJ L 158, 30.4.2004

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF> accession 2013-10-07

²⁹ Directive 90/365/EEC of the Council of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity//OJ L180/28 [1990]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0365:en:NOT> accession 2013-10-07;

Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students//OJ L317/59[1993]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0096:EN:HTML> accession 2013-10-07;

Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence //OJ L180/26[1990]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0364:EN:HTML> accession 2013-10-07

³⁰ The Council Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community//OJ L 257, 19.10.1968

http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31968R1612&model=g uichett accession 2013-10-12

³¹ European Commission Directorate-General for research & innovation Policy review „Co-creating European Union citizenship“, written by prof. Dora Kostakopoulou, 2013,

http://ec.europa.eu/research/social-sciences/pdf/co-creating_eu_citizenship.pdf accession 2013-10-12

associated living by establishing an unconditional right of permanent residence for Union citizens and their families who have resided in the host Member State for a continuous period of five years. Permanent residence brought along a formal expectation for the elimination of the barrier of nationality, Union citizens are entitled to full equal treatment in the areas covered by the Treaty in the Member State of their residence.³² Periods of residence exceeding three months, on the other hand, entail a right of residence for Union citizens and their family members provided that they are active contributors to the commonwealth or self-sufficient: they are workers or self-employed persons in the host Member State; or have sufficient resources and comprehensive sickness insurance cover, if they are non-active economic actors; or they are students enrolled at a private or public establishment, have comprehensive sickness insurance cover and are self-sufficient in order to avoid becoming a burden on the social assistance system of the host Member State.³³

After all these significant changes have been introduced, we can clearly see, that Union citizenship reflects the interaction between the notions of both citizenship and nationality. The institution of Union citizenship was a further step in the process of ensuring European integration.³⁴ As Advocate General Maduro has stated in his opinion in the *Huber*³⁵ case, „when the Court describes Union citizenship as „the fundamental status“ of nationals it is not making a political statement; it refers to Union citizenship as a legal concept that goes hand in hand with specific rights for Union citizens“³⁶ Also, „Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of people of the Union“.³⁷ To conclude, at present, European citizenship grants individuals in possession of this status a constantly growing number of rights which were previously associated with the state

³² Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms// EUSA 12th Biennial International Conference, Boston, 03 – 05 March, 2011. P.3, http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

³³ Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms// EUSA 12th Biennial International Conference, Boston, 03 – 05 March, 2011. P. 3, http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

³⁴ La Torre M. European Citizenship. An institutional challenge. - Hague: Kluwer Law International, 1998. P. 255

³⁵ Case C-524/06 H. Huber v Bundesrepublik Deutschland [2008] ECR I-9705, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=76077&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=150304> accession 2013-10-07

³⁶ Opinion of Advocate General Maduro, 3 April 2008 delivered in Case C-524/06 H. Huber v Bundesrepublik Deutschland, <http://curia.europa.eu/juris/document/document.jsf?docid=71021&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&cid=2085634> accession 2013-10-10

³⁷ Opinion of Advocate General Maduro delivered on 28 February 2008 in Case C-499/06 Nerkowska [2008] ECR I-399 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CC0499:EN:HTML> accession 2013-10-10; Opinion of Advocate General Trstenjak delivered on 28 June 2007 in joined cases C-396/05, C-419/05 and C-450/05 Habelt, Möser and Wachter [2007] ECR I-11895 http://curia.europa.eu/juris/document/document_print.jsf?jsessionid=9ea7d2dc30db005c1d1fa0ce4dd6bb5bf80bee0deb1d.e34KaxiLc3qMb40Rch0SaxuLbx10?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=61856&occ=first&dir=&cid=153048 accession 2013-10-10

nationalities alone. The so called „market Europe“ was transformed into a peoples‘ Europe or a European society.³⁸

Due to increasing importance of European Union citizenship and the rights attached to it, the mere declaratory status became a vital institution of the Member States citizens‘ and along brought the problems related to the implementation of mission of this status.

1.2. Early case law of European Union citizenship: following a cross-border approach

A survey of the case law shows that the CJEU has used the concept of citizenship of the EU in various ways. In early years after the EU citizenship was officially introduced, it has applied the concept of citizenship in order to broaden the scope of application of the non-discrimination principle both under Article 18 TFEU and in relation to the market freedoms. The later CJEU rulings has also used the concept of citizenship as an ‘independent source of rights‘ in the context of non-financial benefits, where a right to residence was in question.³⁹ In general, the CJEU developed from the outset a policy of effective protection of individual rights, as we will see. According to F. G. Jacobs, even in its original form, the Treaty was perceived by some as creating ‘an incipient form of European citizenship‘ and that perception was progressively strengthened by the case-law of the CJEU.⁴⁰

In this chapter the introduction and the initial recognition of European Union citizenship in the case law of CJEU will be presented. It will be seen that the Court developed case by case the scope of the rights which the status of being an European Union citizen covers.

In the CJEU’s case law of the Union citizenship, the substantive rights of European citizens have been linked to equality and the exercise of free movement rights through Europe. It means that, by the principle of non-discrimination, whenever a Union citizen exercises his or her right to move and reside freely within the territory of the EU, these citizens should, in principle, be treated on an equal footing with the host Member State’s own nationals.⁴¹ So in this way the status of European Union citizenship was usually interpreted by CJEU considering the Article 18 TFEU in the light of principle of non-discrimination, Article 20 TFEU which established the notion of European Union citizenship with all the rights linked to it and Article 21 TFEU with the most substantial rights to move and reside freely. With the creation of EU citizenship (Art. 20 TFEU), free movement (Art. 21 TFEU) became "a primary and individual right" within the

³⁸ Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms//EUSA 12th Biennial International Conference, Boston, 03 - 05 March, 2011. P. 5 , http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

³⁹ Jacobs F. G. Citizenship of the European Union – A Legal Analysis//European Law Journal, 2007, Vol. 13, No. 5. P. 598-599

⁴⁰ Jacobs F. G. Citizenship of the European Union – A Legal Analysis//European Law Journal, 2007, Vol. 13, No. 5. P. 593

⁴¹ Eijken H. van European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals//Merkourios, Vol. 27, Issue 72, 2010. P. 66

territory of the Member States only subject to the possession of such statute and without any connection with an economic target, as we shall see.⁴²

The earliest recognition of the rights conferred to European Union citizens can be found in the Court's ruling in *Micheletti* case⁴³, and that was even before the introduction of Union citizenship. The Court confirmed that while Member States remain competent alone to define the scope of their citizenship laws in order to determine who are their citizens, when the host state is faced with a person who has the nationality of a Member State and also the nationality of a third state, it is obliged to recognise that part of a person's dual (or multiple) nationality which gives them access to free movement and non-discrimination rights.⁴⁴ The CJEU concluded that 'under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.⁴⁵ This case was a pre-Union citizenship case that concerned the freedom of establishment. Since then, European citizenship has been introduced, thereby extending the right of free movement of persons beyond the economic dimension.⁴⁶ This passage of the judgment has been interpreted as a general duty of the Member States to also acknowledge the effects on European law when establishing the conditions for acquiring or losing Member State nationality⁴⁷

After the *Micheletti* judgment, the Court had many occasions to shape the content of European citizenship.⁴⁸ The next time it did so, was after the Treaty of Maastricht was adopted and the European Union citizenship was introduced in this Treaty.

In 1992 the Treaty of Maastricht was adopted and the the establishment of citizenship was laid down in the Treaty.⁴⁹ The explicit creation of the status of citizenship by the

⁴² Rebaque A. P. EU citizenship against the country of nationality, 2011. P. 16, <http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2011/01/TOPIC-EU-citizenship-against-the-country-of-nationality.pdf> accession 2013-10-12

⁴³ Case C-369/90 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria [1992] ECR I- 04239 <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97581&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=153418> accession 2013-10-07

⁴⁴ Shaw J. Citizenship: Contrasting dynamics at the interface of intergration and constitutionalism//Working Paper, University of Edinburgh School of Law, 2010, Vol. 2010/14. P. 16, http://cadmus.eui.eu/bitstream/handle/1814/14396/RSCAS_2010_60.corr.pdf?sequence=3 accession 2013-10-12

⁴⁵ Case C-369/90, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, [1992] ECR I- 04239, para 10, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97581&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=153418> accession 2013-10-07

⁴⁶ Eijken H. van European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals//Merkourios, Vol. 27, Issue 72, 2010. P. 66

⁴⁷ Mann D. J., Purnhagen K. P. The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship. A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?// Working Paper Series, Amsterdam Centre for European Law and Governance, 2011. P. 10, <http://cadmus.eui.eu/bitstream/handle/1814/19400/aceig-wp-2011-09.pdf> accession 2013-10-07

⁴⁸ Mann D. J., Purnhagen K. P. The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship. A Comparative Analysis of the *Rottmann* Ruling, or: How to Avoid a European *Dred Scott* Decision?//Working Paper Series, Amsterdam Centre for European Law and Governance, 2011. P. 11, <http://cadmus.eui.eu/bitstream/handle/1814/19400/aceig-wp-2011-09.pdf> accession 2013-10-07

Maastricht Treaty fuelled expectations that, despite its limited innovation and contents, it could provide solid grounds for the CJEU to strengthen its not so impressive foundation. It took five years from 1993 to 1998 for the Court to deliver its first judgment referring to the interpretation of EU citizenship introduced by Maastricht, and this was *Martínez Sala*.⁵⁰ This case was the first to begin to explore the extent to which a non-economically active person can claim social advantages in a host member state and claim equal treatment in respect of social advantages under Art. 21(1) TFEU (ex Art. 18 TEC). The Court considered the case with regards to non-discrimination and citizenship.⁵¹ Having effectively admitted conjugation of Article 21(1) of TFEU with other Union's legal bases governing the exercise of the right of residence, the most striking feature of the precedent set was the granting the Union Citizen a general right of non-discrimination in areas which until then had been the sole preserve of economically active.⁵² It is widely recognized that this case significantly extended the scope of EU law and enhanced the rights of non-economic migrants. It brought all EU nationals – whether economically active or not – under the same banner of EU citizen and thus abandoned the perception that EU law concerned only ‘workers’. This was a fundamental change in the EU's outlook, moving it away from a purely economic body to a more political being. It also represented a further limitation on Member State power in an important area of sovereignty – the relationship between a state and its residents.⁵³

Martínez Sala rule was confirmed and further clarified in the Court's ruling in *Grzelczyk*.⁵⁴ In *Grzelczyk* the Court analyzed, whether Articles 20 TFEU and 18 TFEU precluded national legislation which made the entitlement to a minimum subsistence allowance (a non-contributory benefit referred to as “minimex”), in the case of nationals of Member States other than the host state, conditional on their falling within the scope of Regulation 1612/68 (now amended by Directive 2004/38), when no such condition applied to nationals of the host Member State. Apart from restating the reasoning laid out *Martínez Sala* based on the reading of Articles 18 and 21 TFEU in conjunction, the Court also proclaimed one of its famous phrases,

⁴⁹ Art. 8 of the Treaty on the European Union//OJC19, 1992 <http://eur-lex.europa.eu/lt/treaties/dat/11992M/htm/11992M.html> accession 2013-10-12

⁵⁰ Case C-148/02 Carlos Garcia Avello v Belgian State [2003] ECR I-11613 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=48670&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=153764> accession 2013-09-20

⁵¹ Waite A. M. European Union citizenship: more than merely financial integration//Student Pulse, 2012, Vol. 4, No. 05 <http://www.studentpulse.com/articles/647/european-union-citizenship-more-than-merely-financial-integration> accession 2013-10-12

⁵² P. On EU Citizenship in the Light of Objective Justification of National Rules in the ECJ case-law//no published date of issue. P. 2 <http://www.enelsyn.gr/papers/w4/Paper%20by%20Pavel%20Hamernik.pdf> accession 2013-10-14

⁵³ Spalding A. The Year of the Citizen: Moving Beyond Lip Service, 2013, <http://kslr.org.uk/blogs/europeanlaw/2013/06/19/the-year-of-the-citizen-moving-beyond-lip-service/> accession 2013-10-19

⁵⁴ Case C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, [2001] ECR I-06193

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=46599&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=153923> accession 2013-09-20

later repeated as a mantra in the subsequent cases concerning citizenship rights. It stated: “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for”.⁵⁵ According to the findings of the Court of Justice, a citizen coming from another Member State and applying for a social allowance must have an established link with the host country. This link can be based either on belonging to the labour market, as the Court ruled later also in the cases *D’Hoop*⁵⁶ or *Collins*⁵⁷ or on the period of residence and integration into the host society as can be found in the judgments of *Martinez Sala*, *Grzelczyk* and *Bidar*⁵⁸ cases. This argumentation was reinforced by the judgements, where the Court accepted the right to residence of Union citizens and their family members unless if they consider that the presence of a citizen would be unreasonable burden for the social system of the Member State. Without these factors the host Member State can refuse the right of residence from Union citizen.⁵⁹

Another significant judgment of European citizenship made by the Court was *Baumbast*,⁶⁰ which can, in Montero opinion, be considered the first decisive, authoritative CJEU judgment on provisions on EU citizenship regarding free movement and residence.⁶¹ In this case the Court ruled that: „The citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as the citizen of the Union enjoy there a right of residence by direct application of 18(1) TEC (now Art. 20(1) TFEU).“⁶² The Court here explicitly recognised that Article 21(1) TFEU, right to free movement, is directly effective, that is, it confers individuals rights which are enforceable before national courts.⁶³ It was *Baumbast*, where the Court made an express link between residence, integration and solidarity:

⁵⁵ Case C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-06193, para.

31 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=46599&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=153923> accession 2013-09-20

⁵⁶ Case C-224/98 D’Hoop v Office national de l’emploi [2002] ECR I-6191

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=47092&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154015> accession 2013-09-20

⁵⁷ C-138/02 Collins v Secretary of State for Work and Pensions [2004] ECR I-2703

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49010&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154092> accession 2013-10-01

⁵⁸ Case C-209/03 Bidar v London Borough of Ealing and Secretary of State for Education [2005] ECR I-2119

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-209/03&td=ALL> accession 2013-10-01

⁵⁹ Asztalos Z. Scenes of Future of Union Citizenship//Le Courant Juridique, 2009, Vol. 36. P.21-22

http://www.revcurentjur.ro/arhiva/attachments_200901/recjurid091_1F.pdf accession 2013-10-07

⁶⁰ Case C-413/99, Baumbast and R v Secretary of State for the Home Department, [2002] ECR I-07091

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=47668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154241> accession 2013-09-20

⁶¹ Montero C. C. The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty. Martinez Sala and Baumbast: an institutionalist analysis. - Oxford: Hart Publishing, 2009. P. 394

⁶² Case C-413/99, Baumbast and R v Secretary of State for the Home Department, [2002] ECR I-07091, para. 94

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=47668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154241> accession 2013-09-20

⁶³ European Commission Directorate-General for research & innovation Policy review „Co-creating European Union citizenship“, written by prof. Dora Kostakopoulou, 2013 http://ec.europa.eu/research/social-sciences/pdf/co-creating_eu_citizenship.pdf accession 2013-10-12

the longer migrants are resident, the more integrated they are in the society of the host state and thus, the more support they can expect from the host state in terms of benefits. The same philosophy underpins the Citizens' Rights Directive 2004/38.⁶⁴ As long as social benefits as the expression of social rights do not constitute an unreasonable burden for national social budgets, the CJEU forbids discrimination in matters of social welfare, family benefits, or on issues unrelated to social economic conditions.⁶⁵ *Martínez Sala* and *Baumbast* have become the leading cases on free movement of persons in Community law. The market citizen has not been overcome, but has only been dressed in political clothes, as Menendez declares.⁶⁶ On such a basis, it is only fair to say that *Martínez Sala* and *Baumbast* have actually radicalized a trend that was already at work, and in doing so have exacerbated the processes of Europeanization of what used to be exclusive national competences, and the judicialisation of decision-making processes where representative institutions used to have the exclusive word.⁶⁷

With the cases of *Michelletti*, *Martínez Sala*, *Grzelczyk*, *Baumbast* and other first EU citizenship cases, where EU citizenship status was firstly recognized, the Court began his journey towards the substantial establishment of the EU citizenship status in the CJEU case law. We see that this introduction began with the Court's approach containing the inter-state and cross-border elements, as for the application of Article 20 TFEU, followed by Articles 18 TFEU (non-discrimination provision) and Article 21 (the right of movement within EU), to be concluded under particular circumstances, those two elements must have been provided against the Court. The Article 20 TFEU was found to be the reliable source of rights for the Member States' citizens, in this way – European Union citizens, to enjoy.

1.3. Later case law of European Union citizenship: a cross-border approach without actual inter-state movement

In the years that followed, the Court proceeded to weaken the link between economic self-sufficiency and the exercise of free movement rights. The right to move and reside freely within the territory of the Member States thus became a fundamental right that all Union citizens should enjoy irrespective of their economic status.⁶⁸ It is clear that European Union citizenship is

⁶⁴ Montero C. C. The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty. *Martínez Sala and Baumbast: an institutionalist analysis*. - Oxford: Hart Publishing, 2009. P. 394

⁶⁵ Fehrenkamp N. European citizenship – a new bond between the EU and the citizens of the Member States?//Bachelor thesis, 2013. P. 3 [http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_\(s1112929\).pdf](http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_(s1112929).pdf) accession 2013-10-14

⁶⁶ Menéndez A. J. European Citizenship after *Martínez Sala* and *Baumbast*. Has European law become more human but less social?//Working Paper, 2009, No. 11 http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2009/WP11_09_Online.pdf accession 2013-10-14

⁶⁷ Menéndez A. J. European Citizenship after *Martínez Sala* and *Baumbast*. Has European law become more human but less social?//Working Paper, 2009, No. 11 http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2009/WP11_09_Online.pdf accession 2013-10-14

⁶⁸ Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms//EUSA 12th Biennial International Conference, Boston, 03 - 05 March, 2011. P. 8, http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

no longer a weak institution in the European Union edifice. It has assumed constitutional importance, has become a fundamental status of EU nationals, matured over time and has apparently been embraced by many European citizens.⁶⁹

One of the most important rights enjoyed by EU citizens is the right to move and reside freely in the territory of the Member States as Article 21 TFEU provides. In the exercise of this right, the EU citizen may be joined or accompanied by his close family members such as his spouse, partner, children or parents, as Article 2(2) of Directive 2004/38⁷⁰ sets. But the exercise of this right is subject to a number of important conditions. First of all, it cannot be invoked by an EU citizen in his home Member State unless his situation has a sufficient link with EU law. This link is most commonly provided by the fact that an EU citizen has in the past resided in another Member State. Second, the EU citizen must be either economically active or self-sufficient, that means he have sufficient resources for himself and his family members and have comprehensive sickness insurance cover, as Article 7(1) of Directive 2004/38 provides. A specific condition applies in the case of parents (or ascendants in a further degree) who accompany an EU citizen: it is required that they are financially dependent on the EU citizen says Article 2(2) of Directive 2004/38.⁷¹ However, in the below analyzed cases of European Union citizenship we will see that by the development of the case by case the CJEU suddenly began to recognize and protect the rights of European Union citizens even in the situations where the physical inter-state movement and cross-border element was clearly missing and the situations might have then been understood as the wholly internal cases. The Court ruled that for the application of the Treaties and European Union secondary law there is no need for the Union citizen to really move within the European Union, the risk of infringement of the rights of European Union citizens is possible when just the potential inter-state movement of the citizen is considerable in particular situation, and this is enough for this situation to be caught under European Union law.

One of the most famous cases, where the Court found that the risk of the Union's citizenship rights impediment are highly conceivable, even when the citizens have never left the state they were born at, is *Garcia Avello*⁷² case. The issue which arose in *Garcia Avello* concerned whether there was an EU law issue in a dispute between the Garcia Avello family and

⁶⁹ European Commission Directorate-General for research & innovation Policy review: Co-creating European Union citizenship//written by prof. Dora Kostakopoulou, 2013, http://ec.europa.eu/research/social-sciences/pdf/co-creating_eu_citizenship.pdf accession 2013-10-12

⁷⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States//OJ L 158, 30.4.2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> accession 2013-10-07

⁷¹ Dr. Cambien N. EU citizenship and the ECJ: why care about primary carers?//EUSA Conference 2013 – Baltimore, 2013. P. 1, http://euce.org/eusa/2013/papers/4j_cambien.pdf accession 2013-09-25

⁷² Case C-148/02 Carlos Garcia Avello v Belgian State [2003] ECR I-11613 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=48670&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=147269>, accession 2013-09-20

the Belgian state about the surnames of the children. Mr Garcia Avello married a Belgian woman in 1986 and had two children subsequently, who were born in Belgium and had dual Belgian-Spanish nationality, pursuant to national law. They were registered in Belgium with the surname of their father – Garcia Avello – whereas the family wanted the children to be registered according to the Spanish style, with the first part of the surname of the father – Garcia – plus the surname of the mother – Weber. Hence, according to Spanish norms they would be Garcia Weber. This was the name they were registered with in the consular section of the Spanish embassy. The children were thus faced with a scenario of having their surname registered differently by the two states to which they “belonged” as citizens. This could give rise to confusion. The Court concluded that in principle this was not a wholly internal issue. It invoked *Micheletti* to point out that a Member State cannot place an additional condition in relation to the recognition of the nationality of another Member State, if a person resident in that state also has the nationality of another Member State. It pointed to the difficulties that a person can encounter in both the public and the private spheres as a result of having different versions of their surname extant, in areas as diverse as the recognition of diplomas not to mention issues relating to passports and identity cards. This gave, in the Court’s view, a connection to EU law because of the potential impact on free movement in the future. Hence, the Court concluded that EU law was applicable, despite the absence of a competence as such for the EU to regulate matters of surnames. Furthermore, for the Garcia Avello children to be treated in the same way as persons who have only Belgian citizenship amounts to discrimination on grounds of nationality.⁷³ In this way, the CJEU stated in *Avello* case that „although as Community law stands at present, the rules governing a person’s surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law, in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States“.⁷⁴

Another one interesting and contentious case was that of *Zhu and Chen*⁷⁵. It provided a further pertinent example of how Union citizenship can have profound effects on the status of individuals. The facts of the case are as follows: Catherine was a baby born to Chinese parents in Northern Ireland. Belfast had deliberately been chosen as the place of birth due to the Republic of Ireland’s nationality rules which extended citizenship to all persons born within the island of Ireland. Had Catherine been born in China, her parents would have been in contravention of the

⁷³ Shaw J. Concluding thoughts: *Rottmann* in context <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=7> accession 2013-09-27

⁷⁴ . On EU Citizenship in the Light of Objective Justification of National Rules in the ECJ case-law//no published date of issue. P. 2, <http://www.enelsyn.gr/papers/w4/Paper%20by%20Pavel%20Hamernik.pdf> accession 2013-10-14

⁷⁵ Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154730> accession 2013-09-20

one-child policy. Mrs Chen later moved with Catherine to Wales and sought to rely on Article 18 TEC (now Art. 20 TFEU) to establish a right of residence in the UK.⁷⁶

Despite the situation being suggestive of an abuse of rights, the CJEU accepted the argument that Catherine, a minor, could exercise a right to reside under Article 18 TEC (now Article 20 TFEU). Crucial to this was the finding that, by virtue of the financial status of the family, Catherine would satisfy the sufficient resources condition in the applicable secondary legislation. Additionally, as Catherine's right to reside would be worthless without the corollary right being extended to her primary carer, Mrs Chen could also continue to reside in the UK. Again, in spite of the lack of impact this outcome had for the social assistance system of the UK (the non-discrimination principle was not relevant to this case), it is easy to surmise that this case may well have had negative implications for the perception of Union citizenship. The potential connotations of this judgment not only include the suggestion that Member States lose the ability to control their own borders, but also that the citizenship provisions are open to 'abuse'.⁷⁷

Accordingly, nationals of a Member state should be able to exercise their rights to free movement without impediments imposed by additional regulations adopted by other Member States. In *Chen*, the European Court of Justice criticised the restrictive impact of such additional conditions for the recognition of nationality of a Member State. It ruled that the United Kingdom had an obligation to recognise a minor's (Catherine Zhu) Union citizenship status even though her Member State nationality had been acquired in order to secure a right of residence for her mother (Chen), a third country national, in the United Kingdom.⁷⁸

Later, in 2010, the very famous and significant ruling in *Rottmann*⁷⁹ case also concerned a fundamental question of European citizenship. In the *Rottmann* case, the complainant was threatened with the withdrawal of the citizenship of Germany which he gained through naturalisation, on the grounds that he committed a fraud during the application process because he failed to disclose criminal proceedings brought against him in Austria, his state of origin. On naturalisation in Germany, however, Rottmann had, by operation of law, lost his Austrian citizenship, and as things stood he would not automatically regain his Austrian citizenship just because he lost his German citizenship. He risked, therefore, the loss of his EU citizenship,

⁷⁶ Currie S. The transformation of Union citizenship, 2009, p. 377, http://www.wh.agh.edu.pl/other/materialy/41_2009_09_23_23_09_15_Curry%202009%20-%20The%20Transformation%20of%20Union%20Citizenship.pdf accession 2013-10-04

⁷⁷ Currie S. The transformation of Union citizenship, 2009, p. 377, http://www.wh.agh.edu.pl/other/materialy/41_2009_09_23_23_09_15_Curry%202009%20-%20The%20Transformation%20of%20Union%20Citizenship.pdf accession 2013-10-04

⁷⁸ Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms//EUSA 12th Biennial International Conference, Boston, 03 - 05 March, 2011. P. 30, http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

⁷⁹ Case C-135/08, Janko Rottman v Freistaat Bayern, [2010] ECR I-01449 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=75336&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=154875> accession 2013-10-18

because he would no longer hold any citizenship which gave him access to EU citizenship and its associated rights. In its judgment the Court rejected the contention that the case concerned a ‘wholly internal situation’, on the basis that it involved a decision of a German administrative authority about the status under German law of a German citizen. It noted that while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, they must none the less do so ‘having due regard to Community law’ in ‘situations covered by European Union law’.⁸⁰ In *Rottmann* the connection which the Court draws between EU law and national law is the simple fact that by losing national citizenship a person will also lose EU citizenship rights. The Court omitted significantly the equal treatment principle and the transnational element of Union citizenship.⁸¹

The most important point is that for the first time the CJEU ruled very clearly that the exercise of the Member State competence to regulate the conditions of their nationality falls within the scope of Union law, a ruling which also has certain consequences for the application and judicial review of nationality regulations.⁸² The CJEU then becomes the final instance to scrutinise whether national conditions of nationality do comply with Union law. The idea that Member States are the ultimate gatekeepers of Union citizenship status is more nuanced than was thought by (some) Member States.⁸³ According to Golyner, in a narrow sense, the decision on deprivation of nationality in *Rottmann* does not affect the exercise of the right to free movement and residence under Article 21 TFEU as it does not create any impediment retroactively to the exercise of the right to free movement and residence in a specific situation. However, this approach was already rejected by the Court in *Garcia Avello* where specific obstacles to free movement were identified as likely to arise in the future. Yet, in *Rottmann* the Court goes even further raising the argument to a more general level: the loss of the status of Union citizenship and the loss of rights attached to it, as a result of the deprivation of the nationality, are not merely potential, but inevitable, and therefore, a situation of potential loss of the status of Union citizenship and the rights attached to it should fall, by reason of its nature and consequences, within the ambit of EU law.⁸⁴

⁸⁰ Shaw J. Citizenship: Contrasting dynamics at the interface of intergration and constitutionalism// Working Paper, University of Edinburgh School of Law, 2010, No. 2010/14. P. 16,
http://cadmus.eui.eu/bitstream/handle/1814/14396/RSCAS_2010_60.corr.pdf?sequence=3 accession 2013-10-12

⁸¹ Shaw J. Citizenship: Contrasting dynamics at the interface of intergration and constitutionalism// Working Paper, University of Edinburgh School of Law, 2010, No. 2010/14. P. 17,
http://cadmus.eui.eu/bitstream/handle/1814/14396/RSCAS_2010_60.corr.pdf?sequence=3 accession 2013-10-12

⁸² Eijken H. van European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals//Merkourios, 2010, Vol. 27, Issue 72. P. 66

⁸³ Eijken H. van European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals//Merkourios, 2010, Vol. 27, Issue 72. P. 69

⁸⁴ Golyner O. The correlation between the status of Union citizenship, the rights attached to it and nationality in *Rottmann* <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?showall=1&limitstart=> accession 2013-10-21

As Gareth Davies concludes, *Rottmann* is a case which we will probably look back on as an important step in the gradual absorption of national citizenship within Union citizenship. In abovementioned older cases, such as *Micheletti* and *Garcia Avello* the Court has remarked that national laws on citizenship must have ‘due regard to Community law’ and that Union citizenship is destined to be the “fundamental status” of Europeans.⁸⁵ Today we see a scenario where citizenship of the Union is treated as a relatively autonomous legal basis for “solving” certain types of hard cases involving “citizens of the Union”, who are faced with an actual or potential denial of rights under the Treaties where other legal instruments, such as the Citizens’ Rights Directive of 2004 are insufficient.⁸⁶

To conclude, in *Garcia Avello* we see that the link to intra-state movement was the mere element of dual nationality, notwithstanding the fact that the persons in this case have not moved anywhere within European Union territory. And simply the suggesting of potential inconveniences to the future right of movement caused by recognition of surnames was enough for the Court to conclude that it was not a wholly internal situation and the Article 20 TFEU must in this case to be applied thus concluding that such inconveniences could affect EU citizens to enjoy their rights conferred to them under the EU citizenship status in Article 20 TFEU. In *Zhu and Chen* the Court also, notwithstanding the fact that the situation must have been treated as the wholly internal, concluded that the protection of minor’s EU citizenship status must be carried out by the Court of Justice of the European Union, and it was for the Court to decide, whether the refusal of residence permit to third country national parent of minor EU citizen must be interpreted in the context of Article 20 TFEU, not in the context by national law of the referring court. In this way the Court decided that according to Article 20 TFEU such a refusal would lead to the deprivation of minor EU citizen rights attached to the status of EU citizenship. Following the obvious trend, it is no surprise that the next Court’s ruling in *Rottman* was crucial – it was the evidence of the first bigger extension of the European Union competence where the intervention to the wholly internal situation was made, as the Court took the role to solve the citizenship gaining and losing question at the European level.

⁸⁵ Davies G. T. The entirely conventional supremacy of Union citizenship and rights" <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?showall=1&limitstart=> accession 2013-10-21

⁸⁶ Shaw J. Concluding thoughts: *Rottmann* in context <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=7> accession 2013-09-27

2. Recent case law of EU citizenship: the „genuine enjoyment test“ and the application of Article 20 TFEU in family reunification cases

As we can summarise from the explained previously, it seems very clearly that: every Union citizen, which enjoys the status of the citizenship under Article 20 TFEU, is entitled also under Article 21 TFEU to move to another Member State and reside there with his family members if he can prove that he is either economically active or has sufficient financial resources. We already know, for the citizenship rights to be applicable, the action of movement has to be found, if we want the EU law to be applicable in any case.

The free movement of Union citizens is centred on three basic elements, which can be labelled ‘classic’ elements of free movement. Firstly, it is obvious that the right to free movement is only to be enjoyed by Union citizens, it means by persons, who have acquired and retained the nationality of a Member State in accordance with the nationality rules of that Member State. Secondly, it can only be invoked by Union citizens once they leave their Member State and move to another Member State. Static Union citizens, those Union citizens who have never resided in a Member State other than that of their nationality, cannot normally invoke the benefits related to the right to free movement. Thirdly, Union citizens can only reside in another Member State for longer periods of time if they are self-sufficient, merely speaking if they have a job or can fall back on sufficient personal means. These three classic elements are embedded in the Treaties and in secondary Union law, most notably Directive 2004/38, and have been consistently confirmed by the CJEU. Nonetheless, the case law of the CJEU, that was overlooked above, seemed to start shaking the traditional approach of these elements and to considerably reduce their importance as requirements for the application of the free movement rules in citizenship cases, where the Article 20 TFEU is applicable.⁸⁷ Also, the problem with citizenship cases where family issues arise, is that it usually touches upon sensitive questions such as migration and discrimination on the basis of nationality or Member State sovereignty.⁸⁸ That is why the development and the Court’s turning in citizenship cases in recent case law, where the circumstances include family reunification elements, are so important, sometimes unexpected and usually induce a lot of critical discussions. EU citizens rights, particularly the right to move and reside with one’s family members is one of the most fundamental and coveted rights and the deprivation of this right could lead to the huge misunderstanding between the

⁸⁷ Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 10, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

⁸⁸ Fehrenkamp N. European citizenship – a new bond between the EU and the citizens of the Member States?//Bachelor thesis, 2013. P. 6, [http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEARENKAMP_\(s1112929\).pdf](http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEARENKAMP_(s1112929).pdf) accession 2013-10-14

Court and the European Union society. The risk of affecting negatively this most sensitive area of citizen rights, protected by European Union primary law, and the risk of discrimination of statutory citizens, might have influenced the Courts decisions in recent case law of citizenship in family cases as those judgments clearly reflect the Courts intentions to rather intervene into purely internal situations than risk the deprivation of the rights that are ensured by European Union law.

In this chapter we will see that European Union law, granting the most important right to move and reside freely for Union citizens in citizenship cases weren't only applicable in the situations where the cross-border or inter-state movement element was included. And the issues, previously to be recognized and solved at the national level, considering them as purely internal situations, now are seen differently by the CJEU. For instance, the Court in early cases of European citizenship held that: "The provisions of the Treaty on freedom of movement for workers cannot...be applied to situations which are wholly internal to a Member State, in otherwords, where there is no factor connecting them to any of the situations envisaged by Community law."⁸⁹ Well now it is assumed, that this early Court's approach suggested that these kind of rulings might lead also to the reverse-discrimination of European Union citizens, while those who use the rights to move and reside freely within the EU are in better treatment of EU law than those static citizens, who only live in their national country and can not use the rights conferred to moving European citizens. And we will see, that especially in cases important for this reseach, it appears that where European Union citizen never used the right to move within the territory of European Union, expressing his wish to live or reunite with his family member who is third country national, the risk of reverse discrimination is very high, while the EU primary law or Citizenship Directive can not be applied.

The first evidences of those mentioned threats in previously analyzed case law of CJEU must have proven that the Court applied EU law provisions in the cases, where no cross-border or inter-state movement element was involved.⁹⁰ So does that really mean after all, that the Court was being aware of the citizenship right abuse under Article 20 TFEU or reverse-discrimination,

⁸⁹ Case 155/78 Regina v Saunders [1979] ECR 1129

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=89973&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=155351> accession 2013-10-21

⁹⁰ Case C-148/02, Carlos Garcia Avello v Belgian State, [2003] ECR I-11613

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=48670&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=155568> accession 2013-09-20,

Case C-200/02 Zhu and Chen v Secretary of Statefor the Home Department [2004] ECR I-9925

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=154730> accession 2013-09-20,

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

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=75336&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=154875> accession 2013-10-18

and extended its competence to apply EU law in the cases where no inter-state movement, not physically and even not potentially, was included?

This will be analyzed using recent ground-breaking and well known cases of family reunification. The third chapter of this work will examine recent ground-breaking cases such as *Ruiz Zambrano* and *McCarthy*, and also *Dereci*, which seem to be establishing new guidelines on how to address issues of citizenship where the traditional rules of intra-border move may not apply as unambiguously as in the past, owing to potentially complicated lives of Europe's residents.⁹¹

The main question in all three cases was whether EU law could apply to the facts of the case in order to require the State of nationality of the said Union citizens to accept, or permit to continue living, within its territory their third-country national family members.⁹² The EU is currently involved in a fundamental reinterpretation of the border between the scopes of the EU and Member State law.⁹³ We will see also, that the activism of the Court and its case law development in citizenship cases has in recent years become something of a 'leader' or driver of integration processes, in areas where case law has resulted in significant protections against deportation for the third country national family members of EU,⁹⁴ which as was presupposed above, also shows the Court's intention to link its judgments to wide citizens rights protection.

2.1. Zambrano: a wide extension of rights protection under Article 20 TFEU

As already mentioned, one of the most important rights enjoyed by EU citizens and their family members is the right to move and reside freely in the territory of the Member States as Article 21 TFEU provides. In the exercise of this right, the EU citizen may be joined or accompanied by his close family members such as his spouse, partner, children or parents, as Article 2(2) of Directive 2004/381⁹⁵ sets.⁹⁶

⁹¹ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

⁹² Tryfonidou A. Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy//European Public Law, 2012, Vol. 18, No. 3. P. 494, <http://uaces.org/documents/papers/1201/tryfonidou.pdf> accession 2013-10-10

⁹³ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, Vol. 18(1). P. 56-58, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

⁹⁴ Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-0000 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=155897> accession 2013-10-04, Jo Shaw "EU citizenship and the edges of Europe" University of Edinburgh, School of Law, Working paper 2012/19, p. 9, http://www2.law.ed.ac.uk/file_download/series/372_eucitizenshipandtheedgesofeurope.pdf accession 2013-10-06

⁹⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> accession 2013-10-07

⁹⁶ Dr. Cambien N. EU citizenship and the ECJ: why care about primary carers?//EUSA Conference 2013 – Baltimore, 2013, p.1, http://euce.org/eusa/2013/papers/4j_cambien.pdf accession 2013-09-25

In the recent cases of CJEU⁹⁷, surprisingly, the Court has recognised a right of residence for a family member of an EU citizen, despite the fact that one or more of the conditions of the EU primary or secondary law (Directive 2004/38) were not satisfied, as we have already saw in Court judgment in *Zhu and Chen* case,⁹⁸ or the situations were intended to be interpreted as the purely internal ones.⁹⁹ The Court justified this holding, for instance in *Zhu and Chen* case, by pointing out that the person concerned was the “primary carer” of children having a right of residence under EU law.¹⁰⁰ Although the early case-law did offer a qualified right to free movement, the introduction of citizenship and the consequent evolution would now not be compatible with the need to meet both requirements of EU law application in the same way the Court had suggested in the past.¹⁰¹ In the past few years, the Court appears to have obviously accepted Union citizenship in itself as a sufficient link with Union law in the cases of family reunification.¹⁰² We will see that the judgments of *Zambrano* and later judgments of family reunification cases absolutely confirmed this proposition.

The judgment of the Court of Justice of the European Union in the *Zambrano*¹⁰³ case in the year 2011 has inaugurated a new approach or, we can say, a new doctrine regarding EU citizenship rights. Starting the analysis, we must begin with the say, that this judgment brought strong repercussions on the human rights debate within the boundaries of the European Union due to its implications for the rules governing family reunification of EU citizens. Consequently, it was the judgment which blurred the borderline between EU law and purely internal matters in this area.¹⁰⁴

⁹⁷ Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=154730> accession 2013-09-20,

Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-0000

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=155897> accession 2013-10-04, *Joined Cases C-356/11 and C-357/11 O, S v Maahanmuuttovirasto and*

Maahanmuuttovirasto v L

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131491&pageIndex=0&doclang=EN&mode=lst&dir=&occ=fir st&part=1&cid=39572> accession 2013-10-14

⁹⁸ Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=154730> accession 2013-09-20

⁹⁹ Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-0000

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=155897> accession 2013-10-04

¹⁰⁰ Dr. Cambien N. *EU citizenship and the ECJ: why care about primary carers?//EUSA Conference 2013 – Baltimore, 2013. P. 2* http://euca.org/eusa/2013/papers/4j_cambien.pdf accession 2013-09-25

¹⁰¹ Stasinopoulos P. *EU Citizenship as a Battle of the Concepts: Travailleur v Citoyen//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, http://www.ejls.eu/9/112UK.pdf* accession 2013-10-07

¹⁰² Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 18, http://www.ejls.eu/10/124UK.pdf* accession 2013-10-22

¹⁰³ Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-0000

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=155897> accession 2013-10-04

¹⁰⁴ Palumbo P. *European Citizenship and Fundamental rights: The Zambrano Case, 2012,*

<http://www.kslr.org.uk/blogs/humanrights/2012/01/04/the-zambrano-case/> accession 2013-10-15

The circumstances of the case was that Mr. Ruiz Zambrano was a Colombian national who came to Belgium together with his Colombian spouse and their first child. Although his request for asylum was rejected by the Belgian authorities, he nevertheless remained in the country and even managed to become gainfully employed. He did not, however, satisfy the conditions under Belgian law for obtaining a residence permit or a work permit. The question to be answered by the CJEU was whether Mr. Ruiz Zambrano could derive a right of residence in Belgium from Union law and whether Union law would exempt him from the obligation to hold a work permit.¹⁰⁵ The crucial element in this regard was that, during his stay in Belgium, Mr. Ruiz Zambrano's spouse gave birth to a second and third child, who acquired the Belgian nationality on grounds of their birth in Belgium.¹⁰⁶ Eight Member States, also the Commission, intervened and argued that the situation in question should be characterized as „wholly internal“, such that EU law on citizenship was not applicable, but Advocate General Sharpston¹⁰⁷ and CJEU disagreed.¹⁰⁸ The CJEU held that Union law was applicable to the circumstances of the case. The case took the ruling in *Chen* one step further. In *Zhu and Chen* the Court had ruled that a young Union citizen was entitled to be accompanied in the host Member State by the parent who is his or her primary carer. It seemed problematic, however, to apply an analogous reasoning to the facts of the *Ruiz Zambrano* case since, in contrast with baby Chen, the children of Mr. Ruiz Zambrano had never resided in a Member State other than that of their nationality. For that reason, it seemed that the situation of Mr. Ruiz Zambrano was a purely internal one, in which no reliance on Union law was possible. But in a remarkably short judgment, the Court pointed out that the children of Mr. Ruiz Zambrano were undeniably Union citizens and that Union citizenship was, according to settled case law, the fundamental status of nationals of the Member States.¹⁰⁹ Referring to paragraph 42 of the *Rottmann* judgment, the Court stated that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the ‘genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’.¹¹⁰ After the ruling this statement became the *Zambrano principle*. The Court held then that the refusal of a residence permit and of a work permit to a person in a

¹⁰⁵ Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi, [2011] ECR I-0000, para 36, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=155897> accession 2013-10-04

¹⁰⁶ Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 20, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹⁰⁷ Opinion of Advocate-General Sharpston 30 September 2010 delivered in Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi [2011] ECR I-0000 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0034:EN:HTML> accession 2013-10-16

¹⁰⁸ Craig P., de Burca G. EU law. Texts, cases and materials, 5th edition. – Oxford: Oxford University Press, 2011. P. 831

¹⁰⁹ Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi [2011] ECR I-0000, para 40, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=155897> accession 2013-10-04

¹¹⁰ *Ibid*, para 42

situation like Mr. Ruiz Zambrano had precisely this effect.¹¹¹ The reason was that a refusal of a residence permit would require Ruiz Zambrano's children to accompany their parents to a third country. Similarly, the refusal of a work permit would entail the risk that Ruiz Zambrano would not have sufficient resources to provide for himself and his family, which would also result in the children having to leave the territory of the Union. In both circumstances, the children would, as a result, be unable to exercise the 'substance of the rights conferred on them by virtue of their status as Union citizens'.¹¹² This would be, according to the Court in contradiction with Article 20 TFEU.¹¹³

First of all, in *Ruiz Zambrano*, like in *Rottmann* the Court surprisingly applied EU law without any reference to the existence of a cross-border situation, while this element is assumed to be the essential one in citizenship case. Cross-border movement, even if only potential, was not invoked by the Court at all, representing a true departure from the Court's previous jurisprudence.¹¹⁴ This was reflected in Directive 2004/38 which codifies the jurisprudence of the Court and which states, in its preamble, that 'Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free movement'. Following the *Zambrano* judgment, it could be said that part of the EU citizenship regime is now split in two parts. The ordinary enjoyment of EU Citizenship rights (residence and non-discrimination) is established on the basis of Article 21 of the TFEU and Directive 2004/38 and still dependent on mobility. Also, now there is 'extraordinary situation' in which the safeguard of the statute is directly concerned. EU citizenship can then be based on Article 20 of the TFEU and be released from the mobility condition. In the first part of the *Ruiz Zambrano* judgment, the Court sets aside the Directive and decides to ground its decision on the basis of Article 20 TFEU, concealing the fact that this provision explicitly refers to the conditions defined by the EU legislator in the Directive. On this basis, the Court is able to state that the sole presence of a Union citizen in a Member state, even if this Member state is his country of origin, is liable to trigger 'European' protection. The right of residence of the children is sufficient on its own to grant residence to the parents who take care of them. As we can see, in this particular 'extraordinary' situation, there is no need to refer to 'fundamental' rights - EU Citizenship works well on its own.¹¹⁵, as in a previous *Rottmann* case. In *Zambrano* case the status is presented as the real source of the rights

¹¹¹ Ibid, para 43

¹¹² Ibid, para 44

¹¹³ Dr. Cambien N. EU citizenship and the ECJ: why care about primary carers?//EUSA Conference 2013 – Baltimore, 2013. P. 20, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹¹⁴ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, Vol. 18(1). P. 58-59, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

¹¹⁵ Azoulai L. "Euro-Bonds". The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 37, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

and duties conferred on EU citizens and their family members. The consequence is that the status in itself has to be protected in order to protect the rights attached to it.¹¹⁶

As a consequence of all these insights, Fehrenkamp notices that Europeans, irrespective of where they are and what they are doing within the EU, now seem to enjoy a new fundamental status. *Zambrano* therefore contributed to a high extent to the unique nature of EU citizenship and the perspectives of its development.¹¹⁷ It therefore seems probable after the judgment that static EU citizens would, by reference to their fundamental right to a family life, be considered ‘unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union’ were their nuclear family members unable to derive a right of residence under Union law.¹¹⁸ But, as Azoulai straightly observes here, it is not by chance that this case benefits mainly a non-European, Mr. Ruiz Zambrano, a Colombian national. This shows the willingness of the Union to develop its own boundaries between individuals, its own notion of membership. The case challenges the theory of defining the European citizenship by reference to the nationals of member states who circulate within the EU. The theory is required to include all those individuals who are integrated in Europe and are willing to develop ties in this territory, including nationals of non-member states who contest the borders of Europe set up by the member states.¹¹⁹ What the Court is doing here is to recognize a status to specific categories of individuals – European citizens and the persons connected to them as dependents or care-takers. This status is attached to them wherever they happen to be, it does not depend on their physical location. It grants them rights to circulate and to occupy the European space. Also, to reside in Europe means not only to be physically located in its territory but also to be granted a number of rights and ultimately to be under the protection of certain values of personal welfare and moral security.¹²⁰ What is more, Member states are thus prohibited from applying national immigration laws to a significant group of third country nationals, a group comprised at the minimum of parent care-givers of minor nationals and potentially extending by analogy to family members of all nationals.¹²¹

¹¹⁶ Azoulai L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 37, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

¹¹⁷ Fehrenkamp N. European citizenship – a new bond between the EU and the citizens of the Member States?//Bachelor thesis, 2013. P. 3, [http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_\(s1112929\).pdf](http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_(s1112929).pdf) accession 2013-10-14

¹¹⁸ Lansbergen A., Miller N. Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l’emploi//European Constitutional Law Review, 2011, Vol. 7, Issue 02. P. 296

¹¹⁹ Azoulai L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 38, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

¹²⁰ Azoulai L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 34, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

¹²¹ Lansbergen A., Miller N. Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l’emploi//European Constitutional Law Review, 2011, Vol. 7, Issue 02. P. 287

According to Stasinopoulos, the important elements of the *Zambrano* case are threefold: one concerns the right to residence conferred to parents via their children's status of EU citizen; the other is the lack of intra-border movement, which seems not to be needed in order to trigger the application of the Citizenship rights; thirdly, the judgment refers to a new European space and a new European territory, which is more than the sum of the territories of the Member States.¹²² But the uncertainty remains, as Tryfonidou observes, what was the exact definition, according to the Court's ruling, of „genuine enjoyment“ and the „substance“ of the rights and what exactly should be proven, what kind of circumstances in each situation are needed, in order to establish that a Union citizen is deprived of the enjoyment of his citizenship rights. The Court, following its classic approach, has not provided a clear definition for these terms, but appears to have chosen to decide on a case by case basis whether a measure falls within the protective net of Article 20 TFEU.¹²³ This Court's attempt will be found out in the following cases of family reunification – *McCarthy* and *Dereci*.

Here the very important and significant implication of *Lenaerts* has to be given, as he explicitly puts the points in *Zambrano* occasion. First, it follows from *Ruiz Zambrano* that, contrary to the traditional approach, Article 20 TFEU applies to EU citizens who reside in their home Member State but have not exercised their right to move, provided that the national measure at issue deprives that citizen of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. The fact that the deprivation of those rights takes place in a context lacking a cross-border dimension is not decisive. Moreover, in contrast to its previous ruling in *Rottmann* and the Opinion of Advocate General Sharpston, the CJEU held that Article 20 TFEU opposed a national measure such as that at issue in the main proceedings, without first determining whether it complied with the principle of proportionality. It seems very difficult for a national measure, which causes the de facto loss of the status of citizen of the Union, to pass muster under the proportionality principle, given that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'. It is worth also noting that, unlike the Opinion of Advocate General Sharpston, the CJEU did not address the issue of reverse discrimination. Perhaps, once it held that the situation of Mr Ruiz Zambrano was not purely internal, the CJEU reasoned that it was no longer necessary to determine the role played by reverse discrimination in the context of EU citizenship.¹²⁴

¹²² Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

¹²³ Tryfonidou A. Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy//European Public Law, 2012, Vol. 18, No. 3. P. 514, <http://uaces.org/documents/papers/1201/tryfonidou.pdf> accession 2013-10-10

¹²⁴ Lenaerts K. *Civis europaeus sum: from the cross-border link to the status of citizen of the Union*//Online Journal on free movement of workers within the European Union, 2011, No 3. P. 14-15,

Following the ruling of the Court in *Ruiz Zambrano*, this European territory is more than a geographical reference and it denotes an area of rights, a common identity, and European values. The Court is approaching the founding ideals of personal fulfillment and the amelioration of one's wellbeing by referring to rights which are applicable to individuals who are physically in the Union, without the need for an intra-border movement or the exercise of an economic activity (or even the need to be financially independent).¹²⁵

After all, *Zambrano* judgment and its analyses and interpretations of the scholars shows us that the Court clearly expanded its competences to decide issues that have previously been undoubtedly within the competence of Member States, and after *Zambrano* a notable unclarity has appeared, what's left now for the Member States to decide, if situations no matter having intra-state and cross-border element or not might be decided by the European Union if the Court sees even the smallest risk of the deprivation of the citizens rights conferred to them under Article 20 TFEU. This wide application of the EU citizenship rights in *Zambrano* case might lead us to the assumption, that the Court concluding in this way might have wanted to avoid the affect minor EU citizens' rights, of what it might have considered as a very important destination, but did not presume how many controversies by choosing such liberal approach in the judgment it will bring after.

2.2. McCarthy: limiting Zambrano

The liberal approach the Court took in *Chen* and again in *Zambrano* appeared to be a positive sign for third-country nationals who had family member in the Union – as long as those family members are Union citizens themselves. This makes the CJEU's subsequent decisions all the more surprising and, in some cases unwelcome.¹²⁶ The next case to be presented here is the *McCarthy* case in which the circumstances was controversially differently interpreted by the Court.

In *McCarthy*,¹²⁷ the CJEU had for the first time the opportunity to apply its new approach to EU citizenship. In so doing, the CJEU clarified some of the issues that *Ruiz Zambrano* left open, notably the interaction between Articles 20 and 21 TFEU, and the interpretation of the expression 'national measures which have the effect of depriving ...'¹²⁸ The

¹²⁵ ¹²⁵ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

¹²⁶ Bradshaw J. E. *European Union Citizenship: The Long Road to Inclusion*, 2012. P. 200,

<https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170914&datastreamId=FULL-TEXT.PDF> accession 2013-10-13

¹²⁷ Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* [2011] ECR I-0000

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=83573&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=161661> accession 2013-10-13

¹²⁸ Lenaerts K. *Civis europaeus sum: from the cross-border link to the status of citizen of the Union*//Online Journal on free movement of workers within the European Union, 2011, No 3. P. 15

applicant in the *McCarthy* case, Mrs McCarthy, held both the UK and the Irish nationality (following her marriage, Mrs McCarthy applied for an Irish passport for the first time and obtained it¹²⁹), but had lived her whole life in the UK. In 2002, she married a Jamaican national, who was not, however, entitled to reside in the UK in accordance with the British immigration rules.¹³⁰ In order to prevent his deportation, Mrs and Mr McCarthy applied to the Secretary of State for a residence permit and residence document under EU law as, respectively, a Union citizen and the spouse of a Union citizen. However, their application was rejected on the ground that Mrs McCarthy was neither economically active nor self-sufficient, as she was a recipient of State benefits.¹³¹ Relying on her Irish nationality, Mrs McCarthy and her husband argued that they were entitled to residence on the basis of Union law, namely in their capacity of Union citizen and husband of a Union citizen, respectively.¹³² She freely admitted that she had only applied for her Irish passport on the basis that it brought her within the scope of Union law, but as she did not have to travel in order to receive the document, the Secretary of State was able to argue successfully that she was not a ‘qualified person’ to receive the full benefit of Union rights.¹³³ But as Mrs McCarthy had never exercised her right to free movement, her situation seemed to amount to a purely internal situation.¹³⁴

The question arose whether the fact that Mrs McCarthy possessed the nationality of another Member State than the Member State in which she resided could maybe provide a sufficient link with Union law. Some earlier cases, the *Garcia Avello* case in particular, appeared to confirm that the possession of the nationality of two Member States was sufficient in order to enable a Union citizen to invoke Union law. Contrary to what some commentators had expected in view of the recent *Ruiz Zambrano* judgment, the Court ruled that Union law was not applicable in the circumstances of the case.¹³⁵

The CJEU began by recalling that a Union citizen in a situation such as that of Mrs McCarthy is not covered by the concept of ‘beneficiary’ as provided for by Article 3(1) of Directive 2004/38/EC, since Directive 2004/38/EC sets out the conditions governing the exercise

¹²⁹ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [2011] ECR I-0000, para 16, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83573&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=161661> accession 2013-10-13

¹³⁰ Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics?* // *European Journal of Legal Studies*, 2012, Vol. 5, Issue 1. P. 21, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹³¹ Lenaerts K. *Civis europaeus sum: form the cross-border link to the status of citizen of the Union* // *Online Journal on free movement of workers within the European Union*, 2011, No 3. P. 15

¹³² Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics?* // *European Journal of Legal Studies*, 2012, Vol. 5, Issue 1. P. 21, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹³³ Bradshaw J. E. *European Union Citizenship: The Long Road to Inclusion*, 2012. P. 200, <https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170914&datastreamId=FULL-TEXT.PDF> accession 2013-10-13

¹³⁴ Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics?* // *European Journal of Legal Studies*, 2012, Vol. 5, Issue 1. P. 21, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹³⁵ Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics?* // *European Journal of Legal Studies*, 2012, Vol. 5, Issue 1. P. 21, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

of the right to move and reside freely within the territory of the Member,¹³⁶ which Mrs McCarthy haven't done yet. The Court explicitly distinguished the circumstances of the *McCarthy* case from those at stake in *Ruiz Zambrano*. According to the Court, Mrs McCarthy could't also invoke Article 21 TFEU because the contested national measure did not have the effect of depriving her of the genuine enjoyment of the substance of her citizenship rights or of impeding the exercise of her right of free movement and residence. It held that, in contrast to the case of *Ruiz Zambrano*, the contested national measure did not have the effect of obliging Mrs McCarthy to leave the territory of the European Union, if the permit would not be given to her husband.¹³⁷ The Court then went on to distinguish the facts of the case from those in *Garcia Avello* which was another case analyzed before, that involved persons who held the nationality of two Member States and who had never exercised their right to move between Member States.¹³⁸ According to circumstances to *Garcia Avello*, the Court ruled that 'what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that the discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued'.¹³⁹ Therefore the fact that Mrs. McCarthy possessed the nationality of two Member States could not change anything with regard to these findings, as it did not trigger the application of national measures depriving her of the genuine enjoyment of the substance of her citizenship rights or impeding the exercise of her right of free movement and residence.¹⁴⁰ It should be noted that, in addition to not having exercised her right of free movement, Mrs McCarthy had also never been classed as a worker, selfemployed or self-sufficient – the original economic actor test, if applied to Mrs McCarthy, would also have seen her fail.¹⁴¹ Interestingly, however, the Court ruled that the fact Mrs McCarthy had never exercised her right to freedom of movement was insufficient in itself to conclude that was in a wholly internal situation. This was because, according to ruling in *Zambrano*, Article 20 TFEU precludes national measures „which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the

¹³⁶ Lenaerts K. *Civis europaeus sum: form the cross-border link to the status of citizen of the Union*//Online Journal on free movement of workers within the European Union, 2011, No 3. P. 14-15

¹³⁷ Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics*//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 21, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹³⁸ Tryfonidou A. *Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy*//European Public Law, 2012, Vol. 18, No. 3. P. 504, <http://uaces.org/documents/papers/1201/tryfonidou.pdf> accession 2013-10-10

¹³⁹ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, [2011] ECR I-0000, para 50, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83573&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=161661> accession 2013-10-13

¹⁴⁰ Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics*//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 21, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹⁴¹ Bradshaw J. E. *European Union Citizenship: The Long Road to Inclusion*, 2012. P. 200,

<https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170914&datastreamId=FULL-TEXT.PDF> accession 2013-10-13

rights conferred by virtue of that status“, even where they are nationals of the Member State in question and have never exercised rights of free movement.¹⁴²

The interesting thing in this case, as Bradshaw notices, is why should Mrs McCarthy’s right to enjoy her family life matter less as a Union citizen, simply because she had neither been economically active nor exercised her right of free movement, especially if it is true that “Union citizenship is destined to be the fundamental status of nationals of the Member States” and why should Mr McCarthy’s right to enjoy his family life and enjoy residence with her (a concept so reasonably embraced in *Chen* and *Zambrano* alike) be impinged simply because the Union citizen he married had not exercised a right of free movement. The Court differentiated this case from *Zambrano*, although both required a third-country national to receive rights to which they might not have been entitled, by stating that the UK’s decision to eject Mr McCarthy did not deprive Mrs McCarthy of genuine enjoyment of Union rights. In other words, the Union offered her a choice: to stay in the UK without her husband or move to another Member State with him. An interesting sidebar here is that, although Article 21 TFEU provides an independent right of movement between Member States, the requirements concerning possession of sufficient funds for stays longer than three months in Directive 2004/38 might mean successful migration was impossible and, therefore the Court’s decision actually did result in the impingement of genuine enjoyment of her rights.¹⁴³ In other words, we can allege that by refusing to grant a permit to Mrs McCarthy’s husband, this Court’s ruling will lead this woman to leave her country of nationality at least, but it can also be fully foreseen that maybe even the Union as the whole, leaving to the country of the nationality of her husband. And this would not be very explicable from the point of view that it doesn’t deprive Mrs McCarthy’s genuine enjoyment of Union rights, while forcing her to change her home merely because her husband can’t stay with her. In this way it is strange that some Union citizen are more protected by Article 20 than others.

So the fact, that the family member for whom the EU citizen was seeking a derivative residence permit in that case was an adult spouse, as compared with the parent of dependant minor children in *Ruiz Zambrano*, seems to have influenced the Court in reaching a different conclusion in the two cases.¹⁴⁴

The question of reverse discrimination could be also rised in this case, as we could presume that all negative consequences arise from the fact that McCarthy haven’t exercised her freedom of movement and this fact puts her in less favourable situation than those who have moved within the Union. But as Lansbergen and Miller perceives, the decision in *McCarthy*, that

¹⁴² Craig P., de Burca G. EU law. Texts, cases and materials, 5th edition. - Oxford: Oxford University Press, 2011. P. 832

¹⁴³ Bradshaw J. E. European Union Citizenship: The Long Road to Inclusion, 2012. P. 201,

<https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170914&datastreamId=FULL-TEXT.PDF> accession 2013-10-13

¹⁴⁴ Craig P., de Burca G. EU law. Texts, cases and materials, 5th edition. - Oxford: Oxford University Press, 2011. P. 833

Union law does not require the grant of a residency permit to a static European citizen, does not however necessarily limit the scope of *Ruiz Zambrano* as regards the issue of reverse discrimination. They lead us to Advocate-General Kokott opinion in *McCarthy*'s case where she points out: 'The present case nevertheless does not appear to be the right context for detailed examination of the issue of discrimination against one's own nationals.'¹⁴⁵ Mrs McCarthy did not in fact face reverse discrimination because a mobile European citizen who similarly had never been economically active would not have met the criteria for permanent residence. Mrs McCarthy therefore does not suffer a disadvantage by reason of the fact that she has not exercised her right of free movement – had she done so, she still would have been ineligible for permanent residence.¹⁴⁶

So after the judgment in *McCarthy* we can summarise that the Court might have rethought its liberal approach of application of Article 20 TFEU in *Ruiz Zambrano* and decided that the cross-border element is indeed needed for the Union law to apply and that the adult European Union citizen is not capable of invoking his EU citizenship rights under the application of primary and secondary EU legislation in family reunification case if he didn't represent the element of intra-state movement within the Union so that the deprivation of genuine enjoyment of European citizen rights easily reasoned in *Zambrano* case couldn't be so easily fitted in Mrs McCarthy situation, as in the Court's view the refusal to grant a residence permit to her third country national husband doesn't push Mrs McCarthy to compulsorily leave her home Member State by that stating that it doesn't in any way hinders her enjoyment of all the rights conferred to EU citizens including the right to freely move within all European Union territory.

2.3. Dereci: further limitations on Zambrano

The *Dereci and Others*¹⁴⁷ case provided the CJEU with an ideal opportunity to further clarify the scope of its holdings in *Ruiz Zambrano* and *McCarthy*. The reference of the Austrian Verwaltungsgerichtshof in fact concerned five cases in which a third country family member of a static adult Austrian national, who has never exercised his free movement within the Union, were refused a right of residence in Austria.¹⁴⁸

¹⁴⁵ Opinion of Advocate General Kokott delivered on 25 November 2010 in Case C-434/09 *McCarthy* [2011] ECR I-00000 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0434:EN:HTML> accession 2013-10-13

¹⁴⁶ Anja Lansbergen, Nina Miller Court of Justice of the European Union. *European Citizenship Rights in Internal Situations: An Ambiguous Revolution?* Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi*//*European Constitutional Law Review*, 2011, Vol. 7, Issue 02. P. 305

¹⁴⁷ Case C-256/11, *Dereci v Bundesministerium für Inneres* [2011] ECR NYR, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=114222&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=162270> accession 2013-10-15

¹⁴⁸ Dr. Cambien N. *Union Citizenship And Immigration: Rethinking The Classics?*//*European Journal of Legal Studies*, 2012, Vol. 5, Issue 1. P. 23, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

The nature of the familial relationship, the current place of residence and the regularity of initial entry into Austria differed for each applicant. The factual situations of each of the applicants can be summarised as follows: Mr Dereci was a Turkish national who entered Austria illegally and married an Austrian citizen. He and his wife had three children, all of whom are Austrian citizens and minors. Mr Dereci was in time of the case resident with his family in Austria. Mr Maduiké was a Nigerian national who entered Austria illegally and married an Austrian national. He and his wife resided together in Austria. Mrs Heiml was a Sri Lankan national who married an Austrian national. She then entered Austria as a regular migrant, and continued to reside in Austria with her husband, despite her residence permit having since expired. Mr Kokollari entered Austria legally at age of 2 with his parents, who were then Yugoslav nationals. In time of the case he was 29 years old, he resided in Austria and claimed to be maintained by his mother who has assumed Austrian nationality. Mrs Stevic was a Serbian national who resided in Serbia with her husband and three adult children. She sought family reunification with her father, a naturalised Austrian citizen resident in Austria, from whom she received monthly financial support.¹⁴⁹

All five applicants have had their applications for residence permits rejected by the Austrian Bundesministerium für Inneres, which refused to apply provisions under Directive 2004/38/EC for family members of EU citizens on the grounds that the Union citizen concerned has not exercised right of free movement. Mr Dereci, Mr Maduiké, Mrs Heiml and Mr Kokollari have in addition been subject to expulsion orders and individual removal orders.¹⁵⁰

The referring court wanted to know, whether these refusal decisions were precluded under Article 20 TFEU. This required the CJEU to clarify whether such decisions were to be considered as having the effect of depriving the EU citizens concerned of the genuine enjoyment of the substance of their citizenship rights.¹⁵¹

Like in *McCarthy* the Court firstly stated that the situation of a Union citizen who, like each of the citizens who are family members of the applicants in the main proceedings, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation.¹⁵² In this way it was shown that the situations of the applicants fall under the competence of European Union. Further, the Court provided that as nationals of a Member State, family members of the applicants enjoy the status of Union citizens under Article

¹⁴⁹ Lansbergen A. Case Summary and Comment on *Dereci*
<http://eudo-citizenship.eu/docs/Dereci%20Case%20Summary%20and%20Comment.pdf> accession 2013-11-03

¹⁵⁰ Lansbergen A. Case Summary and Comment on *Dereci*
<http://eudo-citizenship.eu/docs/Dereci%20Case%20Summary%20and%20Comment.pdf> accession 2013-11-03

¹⁵¹ Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 23, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹⁵² Case C-256/11, *Dereci v Bundesministerium für Inneres* [2011] ECR NYR, para 61,
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=114222&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=162270> accession 2013-10-15

20 TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin¹⁵³ and then applied the *Zambrano principle* to state that on that basis, Article 20 TFEU is the one that precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.¹⁵⁴

Further in its judgment the Court clarified things up after the controversial rulings in *Ruiz Zambrano* and *McCarthy* when applying „genuine enjoyment“ test, and held that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole¹⁵⁵ and that the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.¹⁵⁶ The Court further indicated that national authorities or courts should assess in every case whether a refusal to grant a residence right would undermine the right to protection of family life in the light of Article 7 of the Charter of Fundamental Rights in situations covered by Union law and of Article 8 of the European Convention on Human Rights where Union law is not applicable.¹⁵⁷

This statement seems to suggest that a European Union citizen who has the option to reside with his family member within a second Member State will not satisfy the condition of deprivation of genuine enjoyment. This would, however, render the *Ruiz Zambrano* test meaningless in its application to non-minor EU citizens that can independently exercise a right of movement within the Union.

Dereci focussed directly on the third-country national's right to remain in Austria with their children. However, owing to the conjoined nature of the case, not all situations were the same. The common theme was that all applicants had ties to citizens/residents in Austria, enjoying Union citizenship, and all were rejected when making applications for residence permits. Mr Dereci had entered Austria illegally, but had married and had children, another applicant's entrance to Austria was perfectly lawful, but an application for a permit had been rejected all the same. Thus, illegality of an original action was not the unifying factor on which

¹⁵³ Ibid, para 63

¹⁵⁴ Ibid, para 64

¹⁵⁵ Ibid, para 66

¹⁵⁶ Ibid, para 68

¹⁵⁷ Ibid, para 70

the Court based its findings.¹⁵⁸ However, the Court in *Dereci* does not appear to distinguish between categories of familial relationship in applying the test of ‘genuine enjoyment’. Whereas the decision in *McCarthy* may have suggested that the spousal relationship by its nature will fail where the dependency relationship of a parent and child (*Ruiz Zambrano*) will succeed, such distinction gains little substantiation in the joint cases of *Dereci* and others.¹⁵⁹ The children in *Dereci* had not exercised a right of free movement – nor had the children in *Zambrano*. Bradshaw here raises the inevitable question as to how this decision could do anything other than deny genuine enjoyment of rights. Even the link to a Union citizen is now insufficient to provide a guaranteed shield against a Member State seeking exclusion or removal. The reality for the children in *Dereci* is that they, like Mrs McCarthy face the stark choice of remaining a cohesive family unit by moving away from friends and family to another Member State, or life without a present father figure. In this case, two factors are worth noting. Firstly, Mr Dereci remains married to his children’s mother and his continual presence in the family household would surely make his later absence all the more distressing for his children. The second factor is that this finding came about in a time of economic distress for the Union, yet the Court has effectively demanded that Mrs Dereci must leave her place of employment in the hopes of finding work abroad at a time when the employment market is feeling incredible strain.¹⁶⁰ One remarkable consequence of the Court’s approach in *Dereci* is the essentially economic content given to the dependence. It could be suggested that financial maintenance can easily be provided from abroad (for instance, Mr Dereci) whereas personal contact, support in the education of children and daily caretaking (for instance, Mrs Dereci) activities cannot.¹⁶¹ By this presumption it can be said that the Court didn’t see the problem that Mr Dereci should have to leave the Union while at the same time the mother of the children, Mrs Dereci could stay and take care of them in the Member State of children nationality. So in the case of the children rights protection under Article 20 it is not enough, according to the Court, that the Union citizen is a minor. If one of the parents is EU citizen or the physical care of minor citizen is not relevant, the Court provides that it is not necessary for the minor to leave the territory of the Union, and the genuine enjoyment of the substance of the rights conferred to him under Article 20 TFEU would not be deprived in this way, as the financial care could be given from the third country national member of that minor

¹⁵⁸ Bradshaw J. E. *European Union Citizenship: The Long Road to Inclusion*, 2012. P. 201-202, <https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170914&datastreamId=FULL-TEXT.PDF> accession 2013-10-13

¹⁵⁹ Lansbergen A. *Case Summary and Comment on Dereci* <http://eudo-citizenship.eu/docs/Dereci%20Case%20Summary%20and%20Comment.pdf> accession 2013-11-03

¹⁶⁰ Bradshaw J. E. *European Union Citizenship: The Long Road to Inclusion*, 2012. P. 201-202, <https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170914&datastreamId=FULL-TEXT.PDF> accession 2013-10-13

¹⁶¹ Adam S., Elsuwege P. *van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci*, 2012. P. 181, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

also from the other place that European Union territory. That seems logic in terms of physical care of the human, but it does not in psychological, as not seeing daily one of the a minor child's family member could cause at least psychological inconveniences for that child and this could be hypothetically understood as the deprivation of fundamental right to have a normal family life. The same approach was met also in *McCarthy* where the Court didn't took into consideration the emotional and phsycological element when concluding the absence of the circumstances that could deprive Mrs McCarthy „genuine enjoyment“ of her citizenship rights.

According to Dr Cambien, the picture resulting from the *Dereci* judgments is rather nuanced. In *Ruiz Zambrano* the Court departed from its traditional Union citizenship case law, which was centred on the presence or absence of an inter-state element. As a consequence, a large number of situations could seem to fall henceforth within the scope of Union law which would previously have fallen outside that scope. That would have drastic consequences for the vertical division of competences between the Union and the Member States. And the Court in *McCarthy* and *Dereci* had nothing to do but to clarify that it is willing to apply Union law only where the 'substance of' citizenship rights' is at stake. Consequently, the Court appears to limit its extensive interpretation of the scope of Union law to children who face the impossibility to be joined by their parent(s).¹⁶²

What is fundamental about *Dereci*, also before in *McCarthy*, however, is that the Court did not depart from the *Ruiz Zambrano* approach, namely investigating whether the essence of rights of EU citizens at issue has been infringed and acknowledging that should this be the case, the construction of a cross-border situation would not be required for moving the factual situation at issue within the material scope of EU law.¹⁶³ The *Dereci* judgment remains silent on the cross-border test, arguably because the preliminary questions all concerned the interpretation of Article 20 TFEU and the implications of the *Ruiz Zambrano* ruling.¹⁶⁴

Another important outcome, of the same *Dereci* and *McCarthy* reveals that Member States still have a relatively broad margin to discriminate against their own static nationals by imposing on them strickter conditions for family reunification purposes.¹⁶⁵ The phenomenon of reverse discrimination is usually regarded as an unavoidable consequence of the division of

¹⁶² Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 23, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

¹⁶³ Fehrenkamp N. European citizenship – a new bond between the EU and the citizens of the Member States?, 2013, p. 27, [http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_\(s1112929\).pdf](http://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_(s1112929).pdf) accession 2013-10-14

¹⁶⁴ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 184, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

¹⁶⁵ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 188, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

competences between the Union and the Member States.¹⁶⁶ *Dereci* judgment clearly illustrates the vacuum left by the legislative framework in the field of family reunification: static Union citizens that do not benefit from the strict *Ruiz Zambrano* exception are possibly subject to more restrictive national measures. However, solving issues of reverse discrimination unavoidably implies further harmonization of national immigration law and that this cannot be done without the involvement of the Member States and the Union legislator.¹⁶⁷

All in all we can see, that after the judgment in *Dereci* the Court, by concluding, that the real deprivation of the genuine enjoyment of the substance of EU citizenship rights conferred to one under Article 20 TFEU is possible only when EU citizen must leave the Union territory as a whole, led us to the perception, that third country national family member of the EU citizen win more than EU national family member of another European citizen when all of their rights derive from Union citizenship status, because these families where both parents are third country nationals do not have to „split“ their family in case the residence permit is not granted to them by one of the Member States. That proves different judgments in *Ruiz Zambrano* and *Dereci*. And respectively third country nationals' children, who gain EU citizenship, win more than children who have one their parents EU citizen and another one – third country national. This example, using minor children rights at stake in family reunification case, shows perfectly that *Ruiz Zambrano* children, having parents without nationality of neither of EU Member States get more protected rights as EU citizens, then the same minor children of *Dereci*, who have one of their parent possessing EU citizenship. Therein lies also the obvious true that the adults – parents – in these two, at first glance similar, situations win also more, if they are third country nationals, not EU citizens, as they get to stay with their children, and a family as a whole, in European Union. This brings us again, to the problem of reverse discrimination. But, notwithstanding this insight, *Dereci* seems to have put everything in the right places, as after *Zambrano* judgment there could have risen many problems with the abuse of EU law and migration, using this very beneficial and favourable Court's justification for the third country nationals residence in European Union territory. Some authors, we will see in the next chapter, argues that, contrary to to this conclusion, the gradual integration of third country nationals must be the aim of the European Union.

¹⁶⁶ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 459, <https://biblio.ugent.be/input/download?func=downloadFile&recordOId=1940490&fileOId=1940491> accession 2013-11-01

¹⁶⁷ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 189, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

2.4. EU citizenship: the answers of the famous case law trilogy

It is arguable that we are moving towards a less geographical notion of Europe and towards a new construe whereby Europe is regarded as a common space of rights and common values, where EU citizens have rights by virtue of their physical presence in the Union rather than their exercise of free movement rights.¹⁶⁸ Now European Union citizenship gives many rights and therefore it is supposed to be an “interesting investment” for some to obtain a citizenship of one of the European Union states.¹⁶⁹

The case law on our survey in this research of cross-border situations makes two fundamental points. First, any economic engagement within the internal market does not necessarily play a role in shaping the material scope of EU law. Second, the precise legal meaning of a cross-border situation became so technical and vague that qualifying as a cross-border situation ceased to be related to State borders or the movement of the person and his or her Member State of residence.¹⁷⁰ Analyzed judgments in *Garcia Avello*, *Rottman*, *Zhu and Chen*, *Zambrano*, *McCarthy* and *Dereci* proved both of these points.

The situation of EU citizens and third country nationals in any Member state is categorically different allowing talk of an unfulfilled promise of European citizenship. Naturalization in the Member State of residence is already less important by far for EU citizens than for the third country nationals. This is true because a number of key rights formerly associated with state nationality are granted to EU citizens directly by legal order. Among these are virtually unconditional rights of entry, residence, taking up employment, and crucially non-discrimination on the basis of nationality. In this context it is evident that little is left of the Member States' nationalities in the EU. Currently it is not Member State nationality, but EU citizenship, which provides Europeans with the most considerable array of rights, so long as, by virtue of this status rights in twenty-eight states instead only one are extended and any discrimination at the basis of nationality is prohibited.¹⁷¹ The fact that an EU citizen has not crossed borders within the EU does not appear to be a prerequisite for his or her enjoyment of

¹⁶⁸ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

¹⁶⁹ Roots L. European Union Citizenship or Status of Long-Term Resident: A Dilemma for Third-Country Nationals in Estonia//Baltic Journal of European Studies, Tallinn University of Technology, 2011, Vol. 2, No. 1. P. 66 http://www.ies.ee/iesp/No11/bjes_no11.pdf accession 2013-11-02

¹⁷⁰ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, 18(1). P. 70-71, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

¹⁷¹ Kochenov D. Rounding up the circle: The mutation of Member States' nationalities under pressure from EU citizenship//EUI Working paper, RSCAS, 2013, No. 2010/13. P. 11 http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS_2010_23.corr.pdf?sequence=3 accession 2013-11-01

rights, as the Court clearly stated in *Zambrano* - a landmark case which disassociated the scope of EU law from the need to show cross-border movement. The evolution of European Union citizenship has thus generated a new ethos of rights protection which showed signs of a generally accepted moral code by all its institutions.¹⁷² One could speak of a new dawn for citizenship, with a more independent character and less reliance upon market values and crossing of borders. Clearly, as *McCarthy* showed, this will not be always the case but, the Court's *modus operandi* relies heavily upon *ad hoc* assessment of facts which means that each case will be judged differently, rather than on a 'one size fits all' basis.¹⁷³

As Peh explains, according to the Advocate General's opinion in *Zambrano* case, before the Court's decision in this case was met, she stressed that there is quite hard to keep the relevant balance between drawing the boundaries of Article 20 TFEU, in this way also Article 21 TFEU application, because if EU law is too restrictive, with the result that mere wholly internal situations are excluded, there will be an increase in cases of reverse discrimination, where EU citizens exercising their rights of free movement enjoy more favourable provisions. A lower level of protection for "static" citizens against "mobile" citizens is, from a broader perspective, undesirable in terms of EU citizenship and potentially undermines what it means to be an EU citizen. However, where the reach of EU law is extended to situations without an evidently cross-border dimension, thus stepping into the purview and jurisdiction of the Member States, that would give rise to unpredictability and inconsistency. The result has left EU citizens in a grey area between purely internal situations and cross-border situations, engendering legal uncertainty as to the jurisdiction of EU and Member State legal orders.¹⁷⁴ But this was so until the judgment in *Zambrano* case was made, because after that judgment there is no need to provide a cross-border element anymore, as Article 20 TFEU is now applicable no matter if the EU citizen has moved from his Member State of nationality as long as the national measure deprives his genuine enjoyment of the rights conferred under Article 20 TFEU.

The Court's option to defend a broad or narrow interpretation of the new jurisdiction test developed in *Ruiz Zambrano*, which is based on the severity of a Member State's interference with EU citizenship rights rather than on pure cross-border logic, has significant repercussions for the vertical division of powers within the Union. A flexible interpretation of the *Ruiz Zambrano* criterion that national measures cannot undermine the genuine enjoyment of EU

¹⁷² Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „On progress towards effective EU Citizenship 2011-2013“//Brussels, 2013, No. 8.5.2013, COM(2013) 270 http://ec.europa.eu/justice/citizen/files/com_2013_270_en.pdf accession 2013-10-25

¹⁷³ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

¹⁷⁴ Peh F. Striking a balance: The ECJ's changing approach towards EU citizenship law//Warwick student law review, 2013, Vol. 3, Issue.1. P. 31, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?_=13_3peh.pdf accession 2013-10-26

citizenship rights could significantly affect the regulatory autonomy of Member States.¹⁷⁵ An act of birth, a potential provision of services somewhere outside of one's Member State of nationality, or a mere possible future desire to use free movement rights can create a cross-border situation.¹⁷⁶ The Court's decision in *Ruiz Zambrano*, although ambiguous in its justification, also seemed to widen greatly the access of third-country national family members to rights under Union law,¹⁷⁷ as simply being the carers of EU citizens who never exercised freedom of movement, they were supposed, according to the Court's provision in *Zambrano* be granted the residence permit in the Member State of their family member nationality.

Things started to fall apart, when the judgment in *McCarthy* was added to the mix. The Court first restated the wholly internal rule, but rather than confirming *Ruiz Zambrano* as an exception, it said instead that deprivation in genuine enjoyment situations cannot be assimilated to a purely internal situation. According to Shuibhne, there is no "assimilation" formula needed here – in *Ruiz Zambrano* it was a purely internal situation but a particularly serious one, according to the Court.¹⁷⁸ The Court's judgment in *Ruiz Zambrano* and *McCarthy* raised many questions about the precise criteria that need to be applied when deciding whether a particular situation is covered by the provisions on EU citizenship or not.¹⁷⁹ *Ruiz-Zambrano* referred especially to a new European space, while *McCarthy* was a more limited application of the principles established in the former case but, nevertheless, established a new trend which may be used in future Citizenship cases.¹⁸⁰ What the Court then emphasized in both *McCarthy* and *Dereci* is that being forced to leave a particular Member State, but not the territory of the Union, does not deprive an EU citizen of the substance of his or her rights. The precedent set by *Ruiz Zambrano* was thus confined as tightly as it could be. But problems emerge when that finding is blended back into EU law more generally, especially with respect to prospective movement

¹⁷⁵ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 177, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

¹⁷⁶ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, 18(1). P. 70, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

¹⁷⁷ Lansbergen A., Miller N. Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi//European Constitutional Law Review, 2011, Vol. 7, Issue 02. P. 303

¹⁷⁸ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*//Common Market Law Review, 2012, Vol. 49.1. P. 366, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

¹⁷⁹ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 180, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

¹⁸⁰ Stasinopoulos P. EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*//European Journal of Legal Studies, 2011, Vol. 4, Issue 2. P. 74-103, <http://www.ejls.eu/9/112UK.pdf> accession 2013-10-07

rights and the right to respect for family life,¹⁸¹ as will be explored in more detail later in the next chapter.

After *McCarthy*, the extent to which the Court had intended to create tiers of families for the purposes of invoking the protection of EU citizenship rights was raised. After *Dereci*, fears that families with children were being privileged over those without were laid to rest: by ensuring fewer rights for everyone. It would seem that the Ruiz Zambrano children were extremely lucky.¹⁸² The tendency from the described insight above leads to an obvious distinction made by the Court – the only fact that the deprivation of EU citizen rights is possible in the situation where the minors are involved is not in any way let to presume the same possibility for an adult EU citizen in case of analogous circumstances.

We can see now clearly, that the decisions in *McCarthy* and *Dereci* do illuminate the judgment in *Ruiz Zambrano*. On the positive side, they engage with rather than evade established case law on the wholly internal rule, they demonstrate institutional awareness of the limits of judicial law-making and the boundaries marked by instruments of primary Union law and they seek to refine a core new premise of EU citizenship law: the deprivation/genuine enjoyment test. But then, the Court fails properly to consider the implications of possible impediments to movement in either case. The scope of the “genuine enjoyment” test seemed wider in *McCarthy* than the more constricted version just weeks later in *Dereci*. The judgment in *McCarthy* completely ignored the right to respect for family life, in *Dereci*, the Court did discuss it but significantly curtailed its application - even compared to its own previous jurisprudence – the recent decisions are crucial, but they hardly exist in a vacuum. In *Ruiz Zambrano* and *McCarthy*, the Court pronounced its own findings of “fact”, in *Dereci*, it acknowledges that this is the domain of the national court, but factual presumptions clearly steered both the conclusions reached and the reasoning built around them anyway.¹⁸³

More recently, in *O. S. and L.* case¹⁸⁴ the Court confirmed that the principles stated in the *Zambrano* judgment apply only in exceptional circumstances, but specified that their

¹⁸¹ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 366, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

¹⁸² Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 369, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

¹⁸³ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 363, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

¹⁸⁴ Joined Cases C-356/11 and C-357/11 O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=131491&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=39572> accession 2013-10-14

application is not confined to situations in which there is a blood relationship, underlining that the relevant factor is the relationship of dependency - legal, financial or emotional.¹⁸⁵

An resumptive remark makes Tryfonidou, as did similarly S. Adam and P. van Elswege: it can now be said that the rights enjoyed by Union citizens under the market freedoms, and Articles 20 and 21 TFEU, can be likened to a sketch of three concentric circles: the centre of the circle is comprised of the more specific market freedoms which require the exercise of inter-State movement plus the performance of an economic activity in a cross border context; the next circle is comprised of Article 21 TFEU which requires the exercise and an impediment to inter-State movement; and the outer circle is the broader, quasi-constitutional, Article 20 TFEU which covers situations that involve a cross-border element short of free movement, but which can also apply in the absence of a cross-border element, provided that the contested measure deprives a Union citizen of the genuine enjoyment of the substance of his rights.¹⁸⁶

Zambrano principle was attempted to apply in all three cases, but it seems that it was just a onetime occasion when it succeeded. Neither in *McCarthy* or later in *Dereci* the Court did not held that the refusal to grant a residence permit to a third country national member of EU citizen could in any way deprive the genuine enjoyment of the substance of the rights conferred to those citizens under Article 20 TFEU. This means that *Zambrano* could never apply in the case of a dependent Member State national child whose parent and primary carer is an EU national because the primary carer will always be able to reside within the Union in their state of nationality and the child will be also be able to reside in that state. A *Zambrano* right to reside does not apply where the claimant is an EU citizen.¹⁸⁷

We now know that EU law, at least potentially, restrains the national law of the Member States in all situations that are “capable of causing EU citizens to lose the status conferred by Article 9 TEU and the rights attaching thereto”, since any such situation would fall, “by reason of its nature and its consequences, within the ambit of European Union law.” We equally know that any measures, “which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”, are equally within the ambit of EU law.¹⁸⁸ As Kochenov claims, the cross-border

¹⁸⁵ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „On progress towards effective EU Citizenship 2011-2013“//Brussels, 2013, No. 8.5.2013, COM(2013) 270 http://ec.europa.eu/justice/citizen/files/com_2013_270_en.pdf accession 2013-10-25

¹⁸⁶ Tryfonidou A. Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy//European Public Law, 2012, Vol. 18, No. 3. P. 513, <http://uaces.org/documents/papers/1201/tryfonidou.pdf> accession 2013-10-10

¹⁸⁷ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, 18(1). P. 59, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

¹⁸⁸ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, 18(1). P. 59, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf

situation test now has a sound alternative and is no longer the only method by which the Court may frame jurisdictional questions, and this approves the findings the other previously mentioned authors¹⁸⁹ said. The number of situations which can produce the “effect of depriving Union citizens of the genuine enjoyment of the substance of their EU citizenship rights” is truly considerable and undoubtedly covers countless situations that would previously be regarded as entirely confined to one Member State.¹⁹⁰

By introducing a high threshold for satisfying the requirement of a link with EU law in purely internal situations the Court’s judgments in *Dereci* and *McCarthy* indicate that the revolutionary changes in *Rottman* and *Ruiz Zambrano* are more limited than some may have thought initially. Rather than extending the scope of application of EU law in any significant way, the four judgments reflect a change of perspective in defining the boundaries between EU law and national law. Of course, the application of national legislation may not undermine the effective use of the rights protected under EU law. This is, however, the natural consequence in a constitutional order where the Member States accepted that they „shall facilitate the achievement of the Union’s task and refrain from any measure which could jeopardise the attainment of the Union’s objectives“.¹⁹¹

As Kochenov also suggests, it is possible to outline six principal implications of the new approach: 1) the new approach provides much needed clarity for determining the scope of the EU law’s reach and the interplay between national and EU legal orders; 2) the new approach provides EU citizens with certain protections, even from their Member States of nationality, in circumstances where they need such protection the most, where the “genuine enjoyment of the substance” of their EU citizenship rights is potentially undermined; 3) the new approach re-establishes the principle of equality as an important aspect of citizenship, thus reinforcing both EU citizenship and Member State nationalities. 4) the new approach establishes a new vision of the territory of the Union, where inter-State borders within the EU fade in importance; 5) the new approach places an additional burden on the Member States, since they are now required to justify any actions that potentially breach fundamental EU citizenship rights, irrespective of the existence of a cross-border situation. Requiring the Member States to justify any potential infringement upon a citizen’s fundamental EU rights limits the Member States’ discretion, while

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¹⁸⁹ A. Tryfonidou, S. Adam and P. van Elsuwege

¹⁹⁰ Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, 18(1). P. 59, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

¹⁹¹ Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*, 2012. P. 189-190, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

simultaneously protecting EU citizens' rights in a much broader array of situations than ever before; 6) the new approach reinforces a general trend that has developed in the interaction between EU citizenship and the Member States' nationalities; namely, these formerly distinct legal statuses are becoming increasingly fused as a single set of rights. As a result, both legal statuses play important roles in the lives of citizens, making their practical separation as difficult as ever.¹⁹²

With 2013 being designated the "European Year of Citizens" by the EU Commission, it seems an apposite time to reflect on the scope of citizens' rights to move and reside freely within the EU. To that end, the CJEU has gradually sought to strike a balance between legal certainty and protection of rights by eradicating the cross-border approach in favour of setting limits in the genuine enjoyment test, reflecting the severity of Member States' interference with citizens' rights. It must be remembered that the development of the new approach is still in its infancy with only these few cases. The Court would need a larger number of fact situations to determine the exact scope and reach of EU law. The balance is not yet adequate and will only be so when clear and precise limits are set and citizens' rights guaranteed. With its latest judgments, the CJEU has developed a coherent rationale in deciding cases concerning citizenship rights without resorting to cross-border logic. 20 years ago, the former Advocate General Sir Francis Jacobs proclaimed a vision of a "civis europeus sum".¹⁹³ With the Court's new approach, his proclamation is gradually becoming realised, as is the notion of EU citizenship as the true "fundamental status" of the nationals of Member States. It should give EU citizens cause for optimism that the CJEU is moving in the right direction.¹⁹⁴ No approach is perfect and there remain a few problems with the genuine enjoyment test. The CJEU has not dictated a minimum threshold for the protection of rights and how much protection the Court should provide for the substance of EU citizenship rights. It also needs to formulate a clear and precise test to determine what actions taken by Member States would amount to making the citizens' exercise of the essence of EU citizenship rights impossible and thus warrant the Court's intervention. Lastly, it remains for the Court to establish a coherent way of distinguishing between those cases in which

¹⁹² Kochenov D. A real European citizenship: A new jurisdiction test: a novel chapter in the development of the Union in Europe//Columbia Journal of European Law, 2011, 18(1). P. 62-63, http://eudo-citizenship.eu/NationalDB/docs/BIBLIOGRAPHY%20Dimitry%20Kochenov_Columbia%20Journal%20of%20European%20Law%202011.pdf accession 2013-10-10

¹⁹³ Case C-168/91 Konstantinidis v Stadt Altensteig and Landratsamt Calw [1993] ECR I-1191 <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98005&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=255385> accession 2013-11-01, Opinion of Advocate General Jacobs delivered on 9 December 1992 in Case C-168/91 Konstantinidis Stadt Altensteig and Landratsamt Calw [1993] ECR I-1191 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991CC0168:EN:PDF> accession 2013-11-01

¹⁹⁴ Peh F. Striking a balance: The ECJ's changing approach towards EU citizenship law//Warwick student law review, 2013, Vol. 3, Issue.1. P. 40, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?_=13_3peh.pdf accession 2013-10-26

the Court should intervene and those that should be left to the national and the European Convention for the Protection of Human Rights and Fundamental Freedoms legal orders.¹⁹⁵

To conclude it must be said, that after *Ruiz Zambrano* one could have thought that the Court expanded the application of Union law, especially of Article 20 TFEU to all the situations, even purely internal, if even the small risk of citizenship rights conferred upon Article 20 TFEU and the enjoyment of them could be somehow undermined by the actions of a Member State. And despite the fact that the citizen have never left his state of nationality and there could not be found any link to EU was not important for the ability to apply EU law, as the mere status of Union citizenship when possessing the nationality of any Member State was sufficient for the European Union to intervene into wholly internal situations. But then few months later, after the Court's judgment in *McCarthy*, the forseen tendency of the wide EU law application was limited by the Court, when Court's decision in this case confirmed that EU citizen rights to family reunification still depend on the exercise of free movement rights. *McCarthy* judgment showed that the distinction between two cases was the vulnerability and the EU citizen degree of dependency to the third country national family member for the Court to determine the possible deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of the citizenship status for those dependant and vulnerable EU citizens, minor children in *Zambrano* case. Then later in *Dereci* it was further emphasized that those previous rules and the principle provided in *Zambrano* could be only applicable in the very specific situations containing peculiar circumstances. *Dereci* narrowed the *Zambrano* principle application stating that the mere desire of a national of a Member State to stay with his family member who does not have the nationality of a Member State in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted. These judgments confused many, as *Ruiz Zambrano* brought an expectancy of a wide EU citizenship rights application in many, even purely internal situations, causing also the broadening of the third country nationals' rights, but *McCarthy* and *Dereci* judgments made those expectations worthless as the genuine enjoyment test seemed after these judgments to be applicable not as wide the tendency of *Zambrano* could have brought with. This Court's direction evoked many discussions about the protection of fundamental rights when the Article 20 TFEU and the genuine enjoyment test of EU citizenship rights is at question.

¹⁹⁵ Peh F. Striking a balance: The ECJ's changing approach towards EU citizenship law//Warwick student law review, 2013, Vol. 3, Issue.1. P. 39, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?_=13_3peh.pdf accession 2013-10-26

3. European Union citizenship: Article 20 TFEU in the context of the protection of the fundamental rights

There is no dubiousness that this introduction of European Union citizenship was a deliberate affirmation of Member States willingness to firmly establish not just economical but also people's Europe where every single citizen feels a part of the stable community with his protected rights not only as a citizen but also as a human. Therefore we can see the tendency of the Court's EU citizenship case law in the recent family reunification cases¹⁹⁶ going towards more reliable protection of citizen's fundamental rights (comparing them to the first CJEU citizenship cases where this status was firstly recognized), which include one of the most important one – to have a family, and the link to fundamental rights affirmation when applying Article 20 TFEU, which guarantees the protection of the status of European Union citizenship.

The fact is that this intensity in family reunification cases, which include the element of EU citizenship rights covered by Article 20 TFEU, inevitably touches the sensitive area of family rights and creates many difficulties and obscurities for Member States and European Union as such. This is because such a sensitive area as citizens' family rights requires extremely scrutinized application of Union, also national law, as inappropriate application of law might determine the deprivation of one's rights conferred to him under Article 20 TFEU. Generally, family reunification cases touch the immigration policy of Member States, because usually the difficulties arise where one of the family members of European Union citizen is a third country national, as we have seen above. After the famous recent case law trilogy of family reunification cases, the obvious uncertainty was created, whether Member States are even competent to decide their migration policy, as the Court of Justice of the European Union evidently showed his intention to decide issues which were previously assumed to fall under the competence of the Member States. This might be understood as the Courts attempt to avoid the risk that the Member States' decisions, if made internally, could actually or potentially deprive Union citizens' fundamental rights.

¹⁹⁶ Case C-200/02 Zhu and Chen [2004] ECR I-9925

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=255651> accession 2013-09-20,

Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi, [2011] ECR I-0000

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=255737> accession 2013-10-04,

Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department [2011] ECR I-0000

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=82119&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=255874> accession 2013-10-13,

Case C-256/11, Dereci v Bundesministerium für Inneres [2011] ECR NYR

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=114222&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=255933> accession 2013-10-15

In this chapter the link between Article 20 TFEU and fundamental rights protection within the Union will be analyzed, through the recent in previous chapter explored CJEU's judgments in family reunification cases to see how the Union citizenship evolved through the years and what problems now the European Union and its Member States face, while trying to navigate between the protection of fundamental rights of its citizens applying EU law and the rules of migration policy.

3.1. Respect for family life as a leading destination for European Union

Respect for family life and legal, economic and social protection of the family are two pertinent provisions in the Charter of Fundamental Rights of the European Union (hereinafter – the Charter)¹⁹⁷, which has been accorded the same legal value as the Treaties, with effect from 1 December 2009 as a result of the entry into force of the Treaty of Lisbon.¹⁹⁸ It became a key document to ensure the Commission's proposal to defend the fundamental rights – the foundation of European Union, as the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship Viviane Reding said.¹⁹⁹

More precisely, legal status accorded to the Charter of Fundamental Rights of the European Union reinforces not only the supranational competence of the European Union in respect of citizenship of the Union and family life but also in respect of restricting abuse – monitoring Member States in the implementation of the European Union legal principles of proportionality and procedural compliance.²⁰⁰ This latter provision is extremely important especially in family reunification cases, since it illustrates that the Charter recognises that 'the family' in the EU has to be protected in its own right, and not only in the process of achieving other goals whether economic (such as the establishment of the internal market) or not.²⁰¹ Family reunification in these cases describes situations where the sponsor who is resident in the state wishes to be joined by family members left behind when the individual migrated.²⁰²

¹⁹⁷ Charter of fundamental rights of the European Union //OJ C 364 18.12.2000
http://www.europarl.europa.eu/charter/pdf/text_en.pdf 2013-11-02

¹⁹⁸ Ryland D. European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2011. P. 1-2, http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf accession 2013-11-03

¹⁹⁹ Reding V. the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship at a joint CCBE-ERA/Speech at conference on the occasion of the CCBE's 50th anniversary, 26 November 2010, Brussels
http://www.ccbe.eu/fileadmin/user_upload/document/50th_anniversary/Speech_Reding_final.pdf accession 2013-11-03

²⁰⁰ Ryland D. European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2011. P. 1-2, http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf accession 2013-11-03

²⁰¹ Ryland D. European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2011. P. 12, http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf accession 2013-11-03

²⁰² Mole N. Family reunification in EU law and under the ECHR//AIRE centre, 2012. P. 7,
<http://www.udi.no/Global/UPLOAD/Arrangementer/2012/Family%20reunification%20in%20EU%20law%20and%20under%20the%20ECHR.doc%20Nuala%20Mole.pdf> accession 2013-11-04

Before the introduction of the Charter in EU, the fundamental rights set out in the European Convention on Human Rights (hereinafter – ECHR)²⁰³, were not foreign for the EU, since the CJEU has for a long time made it clear that the respect of fundamental rights, such as they are expressed in the European Convention on Human Rights, is fully integrated within the general principles of Community law. Besides, as the EU and the ECHR were products of same cultural heritage, it should not have been difficult to incorporate the ECHR into the Charter.²⁰⁴

Article 7 of the Charter of Fundamental Rights, but recognized distinctly as a general principle of EU law, made its first controversial imprint²⁰⁵ in the Court's judgment in *Carpenter*²⁰⁶. This early case like *Carpenter*, an later *Baumbast*²⁰⁷, were those where the Court asserted the normative priority of the fundamental right of respect for family life enshrined in Article 8 of the European Convention on Human Rights over national migration laws. More specifically, in *Carpenter* the Court inferred a right of residence for Mrs Carpenter, a national of the Philippine and spouse of a UK national who provided cross border services and who was threatened with deportation, from Mr Carpenter's status as service provider, thereby overriding restrictive national immigration rules. It ruled that Mr Carpenters' right to provide and receive services in other Member States „could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin relating to the entry and residence of his spouse“, and hence this right interpreted „in light of the principle of respect for family life, which is recognised by Community law, precluded Mrs Carpenter's deportation.²⁰⁸ EU citizenship has thus become a fundamental status of Union citizens who have increasing expectations about the EU's capacity to deliver and to give meaning and depth to it.²⁰⁹

The competence of the supranational European Union as opposed to that of each Member State, to remove barriers to the immigration of third country family members of the migrant Union citizen was affirmed, as a result of the ruling given by the Court of Justice of the

²⁰³ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.XI.1950
http://www.echr.coe.int/Documents/Convention_ENG.pdf accession 2013-11-04

²⁰⁴ Bilén A. EU charter: Rival or complementary?//LLM Thesis, 2005. P. 6 http://www.justice.gov.tr/e-journal/pdf/Bilen_Thesis.pdf accession 2013-11-04

²⁰⁵ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 373, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

²⁰⁶ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279
<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47095&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=256815> accession 2013-11-01

²⁰⁷ Analyzed in the first chapter

²⁰⁸ Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms//EUSA 12th Biennial International Conference, Boston, 03 - 05 March, 2011. P. 14, http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

²⁰⁹ Kostakopoulou D. European Union Citizenship: Enduring Patterns and Evolving Norms//EUSA 12th Biennial International Conference, Boston, 03 - 05 March, 2011. P. 35, http://www.euce.org/eusa/2011/papers/6b_kostakopoulou.pdf accession 2013-10-05

European Union in July 2008 in the *Metock*²¹⁰ case. A ruling which accorded precedence to family life over lawful residence regardless of where and when the marriage took place, albeit subject to the proviso that there has been no abuse in the form of a marriage of convenience.²¹¹ The Court argued that “the refusal to grant a right of entry to the family members of a Union citizen would be such as to encourage him to leave in order to lead a family life in another member state or in a non-member country”.²¹² If there is a need, Member States, acting proportionately and in accordance with the procedural safeguards of the citizens’ rights Directive, may adopt the necessary measures to refuse, terminate or withdraw any right conferred in the case of abuse of rights or fraud.²¹³ This is not forbidden according to the EU law.

Later, at the time of the Courts decision in *Rottman*, it became clear that it can no longer be doubted that the nationality rules of the Member States have to be in accordance with a number of fundamental principles of Union law. This requirement evidently brought consequences for the immigration laws and policies of the Member States, since the criteria for granting nationality to third country nationals was realized to fall within the scope of Union law. At the same time the Court emphasised that the *Rottmann* judgment in no way changed the fact that the Member States remain exclusively competent to adopt the rules on acquisition and loss of nationality. The Court in *Rottmann* only confirmed that this competence has to be exercised in accordance with Union law as far as situations falling within the scope of Union law are concerned.²¹⁴

Following the above mentioned adoption of primary law in European Union in the area of EU citizens rights protection and the cited CJEU judgments it must be understood that the Court is now turning to the destination of Union’s citizens rights protection as the one of the most important European Union goals as a whole.

²¹⁰ Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=68145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=257094> accession 2013-11-04

²¹¹ Ryland D. European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2011. P. 10 http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf accession 2013-11-03

²¹² Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, para 64 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=68145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=257094> accession 2013-11-04

²¹³ Ryland D. European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2011. P. 10 http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf accession 2013-11-03

²¹⁴ Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 15-16, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

3.2. Dramatic twist in EU citizenship case law as EU link to family rights protection

Nowadays, after the recent well-known rulings in EU citizenship cases of family reunification – *Ruiz Zambrano*, *McCarthy*, *Dereci* – for examining the effects of EU citizenship on the application on EU fundamental rights, it is important to see whether besides citizenship as status application under Article 20 TFEU, the CJEU was also willing to protect citizenship as rights.²¹⁵ These mentioned cases took the place over a period of time in which human rights were increasingly the object of EU attention, whether of the result of adoption of the Charter of Fundamental Rights or the ongoing discussion about accession the European Convention on Human rights. Provisions of those two central human rights documents may be therefore seen as framing the case law.²¹⁶ The consequence is that the status under Article 20 TFEU in itself has to be protected in order to protect the rights attached to it. These rights refer to the rights of citizenship – movement, non-discrimination, social integration – but also could be seen as a reference to the fundamental rights protected under the Charter of Fundamental Rights of European Union and the ECHR. If taken seriously, the combination of citizenship and fundamental rights would have far-reaching effect in the broadening of the scope of application of EU law.²¹⁷

There are some factual elements that should be mentioned and are worth noting of the *Zambrano* case and the two other family reunification cases – *McCarthy* and *Dereci*. They touch upon the general issue of migration in Europe today. In *Zambrano* case the children acquired Belgian nationality by the fact of being born in Belgium since the parents did not take specific steps to have them recognized as Colombian nationals. This was the result of the application of the Belgian Nationality Code at the time of the case. The important element is that the case concerns the children whose identity from a EU law perspective is twofold. They are Union citizens as Belgian nationals. Also, they were dependent to the third country national parents, therefore must be concerned as a fragile population that cannot rely on its own resources. Arguably, the issue of the care was an important feature in this judgment,²¹⁸ even more important than the third country national parents residing illegally in the state.

²¹⁵ Azoulay L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 37, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

²¹⁶ Davies G. The family rights of European children: expulsion of non-European parents//EUI Working paper RSCAS, 2012, No. 2012/04. P. 1, http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_07.pdf?sequence=1 accession 2013-11-04

²¹⁷ Azoulay L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 37, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

²¹⁸ Azoulay L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 34, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

An important part of this short judgment is devoted to examining the possible consequences of not granting the right of residence to the parents. The Court relies on an ‘argument from consequences’. First of all, this is a response to the argument put forward before the Court, the ‘floodgates’ argument that the granting of a right of residence is liable to lead to ‘unmanageable results’ to a loss of control over immigration flows.²¹⁹ In *Ruiz Zambrano* Member States had raised objections before the Court pertaining to the feasibility of managing a vast increase in the number of people eligible to a right of residence under Union law. The problem faced by national governments was not however simply one of volume, but rather also one of reduced competence in the highly politically sensitive area of immigration control.²²⁰ The Court has already responded to a similar argument in a previous case – *Metock*, where it argued that “the refusal to grant a right of entry to the family members of a Union citizen would be such as to encourage him to leave in order to lead a family life in another member state or in a non-member country”. In *Zambrano*, the Court stated similarly that “a refusal to grant a right of residence and a work permit to the father would lead to a situation where the children would have to lead the territory of the Union”. In such reasoning, the argument from consequences in terms of individual rights prevailed over the argument from consequences in terms of state control of immigration. However, there is a shift between *Metock* and *Zambrano*. In *Metock*, the Union citizens involved had circulated within the Union: the recognition of a Union competence to regulate the conditions of entry and residence of third-country nationals was based on the need to protect the freedom of movement of European citizens. In *Zambrano*, the children haven’t circulated within the Union. The EU competence over the domestic competence in the field of immigration was therefore considerably widened to cover the non-mobile citizens.²²¹

The citizenship legislation of some Member States, especially which apply the principle of *ius soli* as a predominantly, have thus realized that the *Zambrano* ruling will have a major effect on the immigration procedures. Such a decision meant a great challenge for the national authorities – both for the courts and the immigration offices – since the Court has not provided any guidance as to the practical application of the *Zambrano* ruling.²²² The decision to grant Mr Zambrano a right of residency under Union law constituted in this way a highly significant

²¹⁹ Azoulay L. Comment by on CJEU’s judgment in *Zambrano* case <http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration> accession 2013-11-03

²²⁰ Lansbergen A., Miller N. Court of Justice of the European Union. *European Citizenship Rights in Internal Situations: An Ambiguous Revolution?* Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l’emploi//*European Constitutional Law Review*, 2011, Vol. 7, Issue 02. P. 300

²²¹ Azoulay L. Comment by on CJEU’s judgment in *Zambrano* case <http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration> accession 2013-11-03

²²² Tottos A. How free are the Member States to decide on their national laws concerning family reunification?//Speech at 5th conference of the National Contact Point Luxembourg within the European Migration Network, 2012, Luxembourg-City. P. 5, http://www.emnluxembourg.lu/sites/default/files/documents/T%C3%B6tt%C5%91s_How%20free%20are%20Member%20States_research.pdf accession 2013-11-04

encroachment into an area previously outwith the scope of Union regulation.²²³ But after the *Zambrano* judgment, the real issue seemed to be no longer the EU competence in the field of immigration. The real issue was to know whether the right of EU citizens to enjoy the European territory prevails over the state competence to regulate entry and access to its territory. According to Loïc Azoulay, the main consequence of the case was the transformation of the status of Mr. Ruiz Zambrano. From asylum seeker, he became a ‘quasi’ European citizen. From transitory residence and illegal status, he got permanent and legal residence. Not only that – the Court enabled him to be granted a work permit in Belgium, to be socially integrated in this country. This case illustrates the commutability of personal statuses in Europe. The Union has multiplied the statuses conferred to migrants.²²⁴

The new approach, with the help of the Court, thus provided EU citizens with protection in circumstances where they needed protection the most, where their genuine enjoyment of the substance of their citizenship was potentially denied, for instance in cases where Member States are unwilling to step in to correct the problems. As this later case have shown, this means that previously wholly internal situations could fall within the scope of EU law and would be protected by the Court, so long as the core citizenship rights of the EU citizen are at stake.²²⁵ In such circumstances an inter-state element will no longer be required. In essence, the Court was merely drawing the consequences from its *Rottmann* judgment. If a measure taking away one’s Union citizen status falls within the scope of Union law in the absence of a cross-border dimension, the same should be the case for a national measure completely rendering it impossible for someone to exercise the rights attached to that status. Put differently, national measures which de iure or de facto annihilate one’s Union citizenship should be treated equally and be held to fall within the scope of Union law even in the absence of a cross-border dimension.²²⁶ This is arguably a more satisfactory response to protecting citizenship rights than the previous test, as its emphasis is firmly directed at ensuring that citizens are able to exercise the substance of their rights. The new approach is sensible and cogent, and reflects the Court’s important role in seeing that the rights of EU citizens are secure.²²⁷ One of the consequences of the decision in *Ruiz Zambrano* is that this issue is likely to receive renewed attention with regard

²²³ Lansbergen A., Miller N. Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l’emploi//European Constitutional Law Review, 2011, Vol. 7, Issue 02. P. 300

²²⁴ Azoulay L. “Euro-Bonds”. The Ruiz Zambrano judgment or the Real Invention of EU Citizenship//Perspectives on Federalism, 2011, Vol. 3, Issue 2. P. 37, http://www.on-federalism.eu/attachments/097_download.pdf accession 2013-10-18

²²⁵ Peh F. Striking a balance: The ECJ’s changing approach towards EU citizenship law//Warwick student law review, Vol.3/Issue.1, 2013, p. 29, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?_=13_3peh.pdf accession 2013-10-26

²²⁶ Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics?//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 23, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

²²⁷ Peh F. Striking a balance: The ECJ’s changing approach towards EU citizenship law//Warwick student law review, 2013, Vol. 3, Issue 1. P. 29, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?_=13_3peh.pdf accession 2013-10-26

to any action taken by member states to restrict access to European citizenship.²²⁸ But the irony of *Ruiz Zambrano* may be that in extending the scope of citizenship rights through judicial activism and in the absence of member state support in the context of immigration policy, the pioneering decision of the Court would undermine rather than enhance the development of European citizenship,²²⁹ as the Member States are not willing to give away the competence in such an important sphere.

After the controversial decision was made, some Member States were worried of having to apply such an extension of residence rights in a broader sense, so they just hoped that the *Zambrano* case would not take away their discretionary power to decide upon residence issues, and hoped for a restrictive application of this matter. Fortunately for them, the *Zambrano* case was soon followed by another judgement of the CJEU in the *McCarthy* case.²³⁰

Following the audacious judgment in *Zambrano* the Court is recognized to take the view of putting the protection of EU citizens rights in the first place instead of caring the issue of illegal migration or problematic granting of residence permits in Member States. Notwithstanding the fact, that in *Ruiz Zambrano* there was no mention about the fundamental rights of family members, no reference to the Charter or ECHR, it seems that the Court having that in mind concluded the very favourable decision either for the *Zambrano* children or the third country national parents of the case.

3.3. Further Article 20 TFEU application as a cautious use of *Zambrano* method of family protection

However, *McCarthy* too is subject to academic criticism. In respect of human rights issues, Kochenov submits that the Court's reading of *Zambrano* is so "impermissibly narrow" that it did not recognise here the right to family life as a fundamental right of EU citizenship, even though it is enshrined in the Charter of Fundamental Rights and the European Convention on Human Rights. He argues that the Court's failure to treat this right as fundamental disregards the established case law on the importance of this issue and describes the apparent dismissal of

²²⁸ Lansbergen A., Miller N. Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi//European Constitutional Law Review, 2011, Vol. 7, Issue 02. P. 301

²²⁹ Lansbergen A., Miller N. Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi//European Constitutional Law Review, 2011, Vol. 7, Issue 02. P. 303

²³⁰ Tottos A. How free are the Member States to decide on their national laws concerning family reunification?//Speech at 5th conference of the National Contact Point Luxembourg within the European Migration Network, 2012, Luxembourg-City. P. 5, http://www.emnluxembourg.lu/sites/default/files/documents/T%C3%B6tt%C5%91s_How%20free%20are%20Member%20States_research.pdf accession 2013-11-04

EU citizens' right to family life as "truly alarming" for the protection of fundamental rights²³¹ in later cases, such as *McCarthy*.

Niamh Nic Shuibhne confirms that in *McCarthy* – or in *Ruiz Zambrano* – there was no discussion on the right to respect for family life at all. In *Ruiz Zambrano*, the Court construed the potential departure of minor Union citizens from the territory of the Union as a deprivation of the genuine enjoyment of the substance of citizenship rights. It may seem odd that the right to respect for family life was not mentioned, but in strict terms, it was not needed given the Court's approach to the resolution of the case.²³²

The impossibility for *Mrs McCarthy* to be joined by her husband, by contrast, did not have the effect of the genuine enjoyment deprivation, because it did not oblige her to leave the territory of the Union. The same was true, presumably, for the applicants in *Dereci*. Looking at the balance of the Court's case law before *McCarthy*, it is absolutely questionable how could it not be, as the potential separation with her husband was highly possible if the residence permit will not be given. But reflecting now on the strict limitations drawn in later case – *Dereci* – it is another question, how do they fit with that broader case law provided in *Zambrano*.²³³ After *McCarthy* and *Dereci*, however, the European Union citizenship framework remains, as we see, not without criticisms of reverse discrimination and questions of competence concerning human rights.²³⁴ And again, thinking of the result effected in *Ruiz Zambrano* (even though respect for family life is not mentioned anywhere in that judgment either), it is incomprehensible why did that family receive protection there, but not in following cases.

Notwithstanding the Advocate's General Sharpston insight invoked by the European Court of Human Rights case law the right to respect for family life that the "removal of a person from his family members is permissible only when it is shown to be 'necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the aim pursued'", the European Court of Human Rights protects, however, a family's right to live somewhere, not somewhere in particular. That became the benchmark applied implicitly in *McCarthy* and overtly in *Dereci*.²³⁵ Still, although the Court merely observed that the fact that a

²³¹ Peh F. Striking a balance: The ECJ's changing approach towards EU citizenship law//Warwick student law review, 2013, Vol. 3, Issue 1. P. 36, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?i=13_3peh.pdf accession 2013-10-26

²³² Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 375, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

²³³ Dr. Cambien N. Union Citizenship And Immigration: Rethinking The Classics//European Journal of Legal Studies, 2012, Vol. 5, Issue 1. P. 23, <http://www.ejls.eu/10/124UK.pdf> accession 2013-10-22

²³⁴ Ryland D. European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?, 2011. P. 1-2, http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf accession 2013-11-03

²³⁵ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 373, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

situation does not satisfy the above requirements for the deprivation to constitute, it did not mean that a Member State may not be obliged to permit third-country nationals to reside in its territory, since this may amount to a violation of human rights and, in particular, of the right to the protection of family life.²³⁶ It was designated for national court to examine the circumstances of the case in the framework of the provisions on the protection of fundamental rights which are applicable in each case.²³⁷ Thus, in *Dereci* the CJEU emphasized that if the referring court considers, in the light of the circumstances of the disputes in the main proceedings of the *Dereci* case, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8 of the ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8,²³⁸ and this provision, which has been regularly relied upon by the Court to emphasize the separation of family members, including parents and children, must be sufficiently justified.²³⁹

But as we can see, the Court's treatment of fundamental rights in *Dereci* will afford little comfort to those struggling to satisfy the 'genuine enjoyment' test. In leaving the national court to determine whether the applicants' situations fall within the scope of EU law, the Court highlights that Article 7 of the Charter is triggered only in those 'exceptional' circumstances in which the *Ruiz Zambrano* test is satisfied and thus is not a 'purely internal situation' outwith the scope of EU law. In those situations in which reliance upon a fundamental rights argument would be most needed, Article 7 will thus not bind Member States, and when Article 7 is applicable it will be redundant in light of an infringement of citizenship rights already having been established.²⁴⁰

On the other hand, the absence of consideration of fundamental rights in *McCarthy* cannot, however, be overlooked, given that the Court engaged with impediments to Mrs McCarthy's right to move and not just the genuine enjoyment test. Furthermore, neither the Ruiz Zambrano children (via their parents) nor Mrs McCarthy were self-sufficient at the time of their

²³⁶ Tryfonidou A. Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy//European Public Law, 2012, Vol. 18, No. 3. P. 506, <http://uaces.org/documents/papers/1201/tryfonidou.pdf> accession 2013-10-10

²³⁷ Davies G. The family rights of European children: expulsion of non-European parents//EUI Working paper RSCAS, 2012, No. 2012/04. P. 1, http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_07.pdf?sequence=1 accession 2013-11-04

²³⁸ Tottos A. How free are the Member States to decide on their national laws concerning family reunification?//Speech at 5th conference of the National Contact Point Luxembourg within the European Migration Network, 2012, Luxembourg-City. P. 5, http://www.emnluxembourg.lu/sites/default/files/documents/T%C3%B6tt%C5%91s_How%20free%20are%20Member%20State%20s_research.pdf accession 2013-11-04

²³⁹ Davies G. The family rights of European children: expulsion of non-European parents//EUI Working paper RSCAS, 2012, No. 2012/04. P. 1, http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_07.pdf?sequence=1 accession 2013-11-04

²⁴⁰ Anja Lansbergen, 'Case Summary and Comment on *Dereci*'

<http://eudo-citizenship.eu/docs/Dereci%20Case%20Summary%20and%20Comment.pdf> accession 2013-11-03

respective cases, so that factor cannot, of itself, constitute a sufficient distinguishing feature. Linking respect for family life with the impediments to movement test, we have to focus on the prospective exercise of those rights in both *McCarthy* and *Dereci*, given that none of the Union citizens involved had moved anywhere by the time of the proceedings. There is simply no engagement with these points in *McCarthy* or *Dereci*. The discussion on family life in the latter case is related exclusively to the genuine enjoyment test. The Court is trying to be both local immigration adjudicator and supranational standard-setter in these cases: but this is not proving to be an effective or appropriate blend of functions, and the performance of both is now suffering.²⁴¹

Ironically, that in *Dereci*, even the references to the Charter Article 7 and ECHR Article 8 was made for the national referring court to apply, it seems there was no Courts intention to take a responsibility of the family rights protection in this case, if we take into consideration what the decision the Court made in this case.

3.4. Pursue of balance in family rights protection and ambiguous perspective of Article 20 TFEU application

After the judgment in *Ruiz Zambrano*, which was very favourable in the context of human and family rights, *Dereci* judgment seems now to cut the actual bounds between EU citizenship rights and fundamental human rights. So as S. Adam and P. van Elsuwege argues, Mr Dereci after not propitious judgment in his case, might have thought of the idea to use more advantageous regimes resulting from international agreements of the European Union, as the non-application of EU citizenship rights does not prejudice the protection of family life under 8 ECHR. Yet, as was already mentioned above, these caveats cannot conceal the continued existence of grey areas of reverse discrimination.²⁴²

The case law has become very individualistic and very facts-specific. As Niamh Nic Shuibhne claims, the circumstances in *Ruiz Zambrano*, *McCarthy* and *Dereci* should have been treated either all purely internal to one Member State, on a strict construction of the plain facts (and diluting the dual nationality point in *McCarthy*), or the actual likelihood of forced departure from the Union should have been established rather than presumed in all of them, via the referring courts, or they should all come within a more rights-infused genuine enjoyment test, or the catch-all net of impediments to prospective movement, drawing from case law such as *Garcia Avello* and *Rottmann*. All three references were really about the extent to which national

²⁴¹ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 375-377, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

²⁴² Adam S., Elsuwege P. van Analysis and reflections. Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci, 2012. P. 183, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/Dereci-AdamVan-Elsuwege-ELR.pdf> accession 2013-11-01

immigration authorities should be mindful of the right to respect for family life in cases involving the third country national family members of their own citizens.²⁴³

To conclude the analyzed, Ruiz Zambrano established a Union citizen's right of residence in the Union, and thus in their own state. The question which remains is what degree of interference with this right can be tolerated by EU law. The answer may lie in the limits of Article 8 ECHR, or Article 7 of the Charter, but it is more probable that the answer is a compound of the right to family life, the interests of the child, Union citizenship, the imperatives of integration, and whatever other interests Member States can find to throw into the pot, leading to the inevitable question of whether the right balance of them all has been found: proportionality. This made Ruiz Zambrano potentially a far-reaching case.²⁴⁴ However, as Niamh Nic Shuibhne argues, that while in *Ruiz Zambrano* the Court moved the law on from the first fundamental premise, in *McCarthy* it struggled to pretend that it didn't and it fudged the second (movement) dimension. In *Dereci*, it fastened both harder edges into place. The Court may have wished to be seen as construing *Ruiz Zambrano* narrowly in order to dampen controversy stirred in the wake of that judgment. But reducing the degree of protection in certain cases that has already been extended in others is just unacceptable, on so many levels.²⁴⁵ Many children, citizens of the Union will have a non-European parent with a fragile residence status but who is involved in their life in important ways. As Gareth Davies argues, if EU citizens are community linked by a mix of history, descent, birth, and preferences, then the substance of these things must be protected from national formalities and rules which would prevent that citizenship from being expressed and acknowledged in one of its rightful owners. To not do so would be to treat the substance of EU citizenship and the community to which it adheres as unimportant, as irrelevant to the law, and it is hard to imagine the Court doing this.²⁴⁶

The accession of the EU to the ECHR is likely to cause further difficulties, since the CJEU will soon become subject to decisions of the European Court of Human Rights. This could potentially have a significant practical impact for both rights protection and certainty as regards EU citizenship.²⁴⁷

²⁴³ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 379, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

²⁴⁴ Davies G. The family rights of European children: expulsion of non-European parents//EUI Working paper RSCAS, 2012, No. 2012/04. P. 20, http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_07.pdf?sequence=1 accession 2013-11-04

²⁴⁵ Shuibhne N. N. (Some Of) The Kids Are All Right: Comment on McCarthy and Dereci//Common Market Law Review, 2012, Vol. 491. P. 379, <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/McCarthy-i-Dereci-Shuibhne-CMLR.pdf> accession 2013-10-26

²⁴⁶ Davies G. The family rights of European children: expulsion of non-European parents//EUI Working paper RSCAS, 2012, No. 2012/04. P. 20, http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_07.pdf?sequence=1 accession 2013-11-04

²⁴⁷ Peh F. Striking a balance: The ECJ's changing approach towards EU citizenship law//Warwick student law review, 2013, Vol. 3, Issue 1. P. 39, http://media.wix.com/ugd/430120_1b9ab1b5752696fa26bbcd7741d2e07c.pdf?_=13_3peh.pdf accession 2013-10-26

All in all it could be said that when the Court expands his competence to decide issues in at first glance the internal situation, and concludes that the EU citizenship rights might be deprived concerning the Article 20 TFEU by not granting residence permit to third country national family member in family reunification case (*Ruiz Zambrano*), those who stand for the protection of human rights and the right to a normal family life seem to win and could be satisfied, but the problem of the abuse of law than is highly possible with this wide EU citizenship rights interpretation and it surely brings misunderstandings in the Member States' dominion of immigration. In contrary, if the Court concludes that the mere desire, not the necessity, is required to conclude the EU citizen rights deprivation under Article 20 TFEU and the residence permit for the third country national family member must not necessarily be provided by the Member State (*Dereci*), it could be said that the abuse of the EU citizenship rights can be avoided, but the threat then appears to the deprivation of fundamental rights to a normal family life for EU citizens and the risk of reverse discrimination, when the third country nationals will be put in the more favorable situations than EU citizens. The right balance between those issues seems to not been discovered yet.

CONCLUSIONS

1. After the analysis of early citizenship case law we can conclude that the mere declaratory status of EU citizenship became a vital institution of the Member States citizens. Due to increasing importance of European Union citizenship and the rights attached to it, the Court had many opportunities to disclose and to clarify the meaning of this status and the applicability of the provisions of EU citizenship provided in EU primary law and it did so for the past 20 years with the introduction of many important cases.
2. The analysis of early citizenship cases of *Michelletti*, *Martinez Sala*, *Grzelczyk* and *Baumbast* confirms that the Court took the approach to require the inter-state and cross-border elements for the Article 20 TFEU, followed by Articles 18 TFEU (non-discrimination provision) and Article 21 TFEU (the right of movement within EU provision), to apply. The Article 20 TFEU after these judgments was found to be the reliable source of rights for many Member States' citizens, in this way – European Union citizens, not performing economic activities, to enjoy.
3. The analysis of later citizenship cases like *Garcia Avello*, *Zhu and Chen* and *Rottman* confirms that by the case by case development of EU citizenship the Court wandered away from its initial approach for the Article 20 TFEU in the case to apply. It declared that the actual intra-state movement and the board crossing is not relevant anymore for the situation to be acknowledged as falling within the scope of EU competence and accordingly Article 20 TFEU to apply. These cases confirm that the Court kept and followed the tendency of its competence extension for the application of EU citizenship provisions in considerably purely internal cases and the analysis of these cases endorse that any national measure could lead to the deprivation of EU citizens rights if that measure creates an obstacle to enjoy and to use, even potentially or in the future, one of many rights attached to the EU citizenship status.
4. After the analysis of CJEU's judgments in EU citizenship cases of family reunification, we ascertain that by the introduction of *Zambrano*, *McCarthy* and *Dereci* rulings the Court expanded its competences to decide issues that have previously been undoubtedly within the competence of Member States. The so-called *Zambrano* principle formally established that any national measure is forbidden if it has the effect of undermining the European Union citizen rights deriving from the EU citizenship status established in Article 20 TFEU. The Court chose to decide case by case what actually in every particular situation deprives EU citizenship rights and the genuine enjoyment of the substance of these rights.

5. Latest rulings in family reunification cases confirms that the Court is not always going to use its liberal approach of *Zambrano principle* in the context of Article 20 TFEU application and the mere desire of a national of a Member State to stay with his family member who does not have the nationality of a Member State in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted. Additionally, the Court supports the idea that the vulnerability and the EU citizen degree of dependency to the third country national family member is crucial when there is a need to decide whether the deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of the citizenship status is found in the particular situation.
6. The analysis prove that *Zambrano principle* was attempted to apply many times after the latter judgment, but it was just a onetime occasion when it succeeded. Successive judgments of CJEU affirmed that the refusal to grant a residence permit to a third country national member of EU citizen could not in any way deprive the genuine enjoyment of the substance of the rights conferred to those citizens under Article 20 TFEU. After the analysis we can assume that latest family reunification cases narrowed *Zambrano principle* application as the real deprivation of the genuine enjoyment of the substance of EU citizenship rights conferred to one under Article 20 TFEU is possible only when EU citizen must leave the Union territory as a whole. The principle provided in *Zambrano* could be only applicable in the very specific situations containing peculiar circumstances.
7. The research of the citizenship cases confirms that not much has been left for the Member States to decide the issues if the Court anticipates even the smallest risk of the deprivation of the citizens rights conferred to them under Article 20 TFEU. The wide application of EU citizenship rights in *Zambrano* case leads at the assumption that the Court wanted to avoid the negative affect to minor EU citizens' rights, but did not presume, how many controversies such liberal approach in the judgment will bring after. The example of using minor EU citizens rights at stake in family reunification cases shows perfectly, that namely minor EU citizens having parents without nationality of neither of EU Member States get more protected rights than the same minor children, who have one of their parent possessing EU citizenship. Therein lies also the obvious true that the adults – parents of minor EU citizens – in these two at first glance similar situations win also more, if they are third country nationals, not EU citizens, as they get to stay with their children in European Union. This brings to the problem of reverse discrimination. Notwithstanding the insight of reverse discrimination, the analysis leads to conclusion that

Dereci seems to have put everything in the right places, while after *Zambrano* judgment there could have emerged many possible situations of the abuse of EU law and migration laws using this very beneficial and favourable Court's justification for the third country nationals residence in European Union territory.

8. The analysis of the Court's application of Article 20 TFEU in latest family reunification cases affirms the impact to family rights of EU citizens after such application is found mostly in all situations. When the Court expanded its competence and concluded that the EU citizenship rights might be deprived when residence permit to third country national family member in family reunification case is not granted, those who stand for the protection of human rights and the right to a normal family life seem to win – family rights in this way get to be protected by not requiring one or both third country national family members to leave the European Union territory. However, in such situation the risk of the abuse of law exercised by third country national family member is highly possible and besides this, it surely brings misunderstandings in the Member States' dominion of immigration.
9. The analysis confirms that, in contrary, if the Court concludes that the mere desire, not the necessity, is required to conclude the EU citizen rights deprivation under Article 20 TFEU and the residence permit for the third country national family member must not necessarily be provided by the Member State, it could be said that the abuse of the EU citizenship rights can be avoided, but the threat then appears to the deprivation of fundamental rights to a normal family life for EU citizens and the risk of reverse discrimination, when the third country nationals will be put in the more favourable situations than EU citizens.
10. The hypothesis of this research is confirmed – by the introduction of EU citizenship in the Maastricht Treaty the Court of Justice of the European Union broadened its competence into purely internal cases for the Article 20 TFEU to be applied and this extension, particularly in EU citizenship cases of family reunification, caused the ambiguity in defining the boundaries of Article 20 TFEU application and increased the threat to family rights protection. We can see that the right balance of Article 20 TFEU application seems not have been discovered yet, as the Court is trying to be both – the family right protector of European Union citizens in one cases and at the same time the guardian of European Union legal certainty in another ones.

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SUMMARY

2013 year is the Year of European Citizens. European Union citizenship, which was first introduced by the Maastricht Treaty, celebrates 20th anniversary of the movement from a market union to a political union. The main idea and purpose of this research work is to analyze what is the meaning of the status of European citizenship under Article 20 of TFEU, how it evolved through the years according to case by case development and how it came to be the result of the Court's competence broadening in the recent ground-breaking family reunification cases where the risk of the deprivation of citizen's rights genuine enjoyment conferred under Article 20 TFEU was highly possible. These ground-breaking cases are not by accident containing the element of a very sensitive area of European Union policy nowadays – the right for every Union citizen to have a normal family life – as the Court with these judgments moves decisively towards the intention of high protection of fundamental rights of EU citizens. The attempt of the Court to be the protector of these rights and to secure the legal certainty in European Union creates many ambiguities in the application of Article 20 TFEU – the guardian provision of EU citizenship status. In the first part of this work the introduction of the origin and the evolution of early case law of the status of European Union citizenship is introduced. The cross-border and inter-state movement approach of the Court for the application of Article 20 TFEU is presented. Then the Court's movement towards the broadening its competence in the application of Article 20 TFEU is shown using later EU citizenship case law. In the second part of this work, the significant EU citizenship case law in cases of family reunification is analyzed as the further CJEU's competence broadening into purely internal situations while applying Article 20 TFEU. The Court's interpretation of the enjoyment of the substance of the rights conferred to every EU citizen under Article 20 TFEU in family reunification cases is analyzed. In the third part, the Court's protection of fundamental rights in the context of the citizenship case law in family reunification cases is analyzed. The consequences of the Court's protection of family rights in family reunification cases, when Article 20 TFEU was applied in considerably purely internal situations, is revealed and the problems that the Court's intention to be both the fundamental rights protector and the safeguard of EU legal certainty in the context of Article 20 TFEU application is explored.

SANTRAUKA

2013-ieji – Europos Sąjungos piliečių metai. Europos Sąjungos (toliau – ES) pilietybės institutas, įtvirtintas Maastrichto sutartimi švenčia dvidešimties metų jubiliejų tuo įrodydamas, jog Sąjunga žengia tvirtą žingsnį nuo pirminės ekonominės sąjungos link užtikrintos politinės sąjungos. Šio darbo tikslas yra išanalizuoti Europos Sąjungos pilietybės instituto reikšmę ir taikymą Sutarties dėl Europos Sąjungos veikimo (toliau – SESV) 20 straipsnio atžvilgiu. Darbo metu apžvelgta šio instituto taikymo evoliucija ES Teisingumo Teismo praktikoje nuo Europos Sąjungos pilietybės įtvirtinimo Maastrichto sutartyje iki ES Teisingumo Teismo kompetencijos išplėtimo šio straipsnio taikyme naujausioje teismų praktikoje šeimų susijungimo bylose, kuriose pilietybės instituto apimtis pagal SESV 20 straipsnį ir ES piliečiams garantuojamų teisių apsauga buvo esminis klausimas. Šios šeimų susijungimo bylos pasirinktos neatsitiktinai, kadangi šeimoms teisių apsauga pastaraisiais metais yra opi problema Europos Sąjungos kontekste, todėl šių bylų sprendimuose juntama aiški ES Teisingumo Teismo tendencija užtikrinti maksimalią Europos Sąjungos piliečių teisių apsaugą. Teismo tikslas būti ir Europos Sąjungos piliečių teisių saugotoju ir tuo pačiu metu užtikrinti ES teisinio tikrumo principą taikant SESV 20 straipsnį, įtakoja daugelį pastarojo meto daugumos kritikų dviprasmiškai vertinamų Teismo sprendimų, priimtų Europos Sąjungos pilietybės bylose. Pirmoje šio darbo dalyje pristatoma ES pilietybės idėja, kilmė ir ES Teisingumo Teismo praktika, bylų sprendimuose pirmą kartą taikant ES pilietybės instituto nuostatas įtvirtintas ES sutartyse. Taip pat analizuojamas judėjimo tarp valstybių narių principo naudojimas taikant Sutarties dėl Europos Sąjungos veikimo 20 straipsnį ES Teisingumo Teismo ES pilietybės bylose bei laipsniškas šio principo įtakos mažėjimas ir Teismo kompetencijos plėtimas į valstybių narių kompetencijai priklausančias sritis, taikant SESV 20 straipsnį. Antroje darbo dalyje nagrinėjimos ES Teisingumo Teismo šeimų susijungimo bylos, kuriose Teismas, toliau plėsdamas savo kompetenciją spręsti galimai valstybių narių kompetencijai priklausančias problemas, svarstė ES piliečių teisių pažeidimus taikydamas SESV 20 straipsnį. Šioje dalyje analizuojama, kas, anot Teismo, atima galimybę ES piliečiams veiksmingai naudotis pagrindinėmis teisėmis, kurios jiems priklauso, kaip Sąjungos piliečio statusą turintiems asmenims. Trečioje darbo dalyje nagrinėjami žmogaus teisės turėti šeimą apsaugos aspektai ES Teisingumo teismui taikant SESV 20 straipsnį šeimų susijungimo bylose. Šioje dalyje nagrinėjama ES teisės taikymas, kuomet Teismas savo sprendimuose išreiškdamas siekiamybę saugoti žmogaus teisę turėti šeimą susiduria su teisinio tikrumo principo užtikrinimo Europos Sąjungoje problema.

ANNOTATION

Škimelytė Ieva. European Union citizenship. Problematic aspects/European Union law and governance master thesis. Supervisor: Lekt. E. Šilinytė. Consultant: Prof. dr. S. Katuoka, Vilnius: Mykolas Romeris University, Institute of International and European Union law, 2013.

Key words: the substance of the rights conferred to European Union citizens; the scope of Article 20 TFEU; cross-border and inter-state movement requirements under Article 20 TFEU; EU and Member States competences in family reunification cases; residence permit to third country national in Member States; Article 20 TFEU application in family reunification cases; protection of family rights in EU; reverse discrimination; third country national family members in EU.

This master thesis analyzes the status of European Union citizenship and the substance of the rights conferred to every European Union citizen under Article 20 TFEU. The growing tendency of CJEU's competence extension into purely internal situations is explored by analyzing citizenship case law since the Maastricht Treaty until nowadays. For the comprehensive analysis of Article 20 TFEU application, the case law in family reunification is chosen in this research work. Not by the accident the recent CJEU case law of family reunification analyzed in this work contains the problem of third country national family member residence in EU. The attention is paid to the sensitive issue of family rights protection in EU while Article 20 TFEU is applied in every certain situation. The possibility of reverse discrimination is also analyzed, which appears as a threat caused by Article 20 TFEU application in the judgments of these ground-breaking EU citizenship cases of family reunification.

ANOTACIJA

Škimelytė Ieva. Europos Sąjungos pilietybė. Probleminiai aspektai/Europos sąjungos teisės ir valdymo magistro baigiamasis darbas. Darbo vadovė: Lekt. E. Šilinytė. Konsultantas: Prof. dr. S. Katuoka, Vilnius: Mykolo Romerio universitetas, Tarptautinės ir Europos Sąjungos teisės institutas, 2013.

Raktiniai žodžiai: pagrindinės Europos Sąjungos piliečio teisės; SESV 20 straipsnio apimtis; judėjimo tarp valstybių narių sienų reikalavimas SESV 20 straipsnio taikymo atžvilgiu; Europos Sąjungos ir valstybių narių kompetencija šeimų susijungimo bylose; leidimo gyventi valstybėje narėje suteikimas trečios šalies piliečiams; SESV 20 straipsnio taikymas šeimų susijungimo bylose; šeimos teisių apsauga Europos Sąjungoje; netiesioginė diskriminacija; trečiųjų šalių piliečiai Europos Sąjungoje.

Šis magistro baigiamasis darbas analizuoja Europos Sąjungos pilietybės institutą ir pagrindines teises, kurias kiekvienam Europos Sąjungos piliečiui garantuoja SESV 20 straipsnyje įtvirtintas Europos Sąjungos pilietybės statusas. Magistro darbe akcentuojamas laipsniškas Europos Sąjungos Teisingumo Teismo kompetencijos plėtimas į valstybių narių kompetencijai priklausančias sritis, taikant SESV 20 straipsnį Europos Sąjungos pilietybės bylose, nuo Maastrichto sutarties pasirašymo iki šių dienų. Šiame darbe išsamiai išanalizuojamas SESV 20 straipsnio taikymas Europos Sąjungos Teisingumo teismo šeimų susijungimo bylose. Analizei visiškai neatsitiktinai pasirinktos garsios šeimų susijungimo bylos, kuriose nagrinėjama trečios šalies piliečio, kaip Europos Sąjungos piliečio šeimos nario, galimybės apsigyventi Europos Sąjungoje problema ir kaip valstybės narės sprendimas tokį leidimą suteikti arba ne įtakoja jo šeimos narių, Europos Sąjungos piliečių, teises SESV 20 straipsnio atžvilgiu. Darbe didelis dėmesys skiriamas šeimos teisių apsaugos klausimui Europos Sąjungoje, kuomet SESV 20 straipsnio taikymas ir Teismo sprendimas kiekvienoje konkrečioje byloje kelia potencialią grėsmę šioms teisėms, o taipogi neretai sąlygoja netiesioginę diskriminaciją Europos Sąjungos piliečių atžvilgiu.