

Fundamental Rights: The Missing Pieces of European Citizenship?

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A. Introduction

All nationals of a Member State are Union citizens, and so, in principle, these citizens fall within the scope of European Union (EU) law *ratione personae*. However, the protection of European citizenship status (ECS) is a necessary but not a sufficient condition for enjoying European citizenship rights (ECRs). In order to bring a case within its jurisdiction, the Court of Justice of the European Union (CJEU) should also ascertain what the link is between ECRs and the scope of EU law (*ratione materiae*). Recently, the CJEU ruled that securing the “genuine enjoyment of the substance of the rights attaching to the status of European Union citizenship” is a sufficient condition to bring a case within the scope of EU law.¹ This new formula challenges the traditional cross-border test: by referring to “genuine enjoyment,” it entails rethinking the CJEU’s current practice of depicting the conditions under which a citizenship case should be considered *ratione personae* and *ratione materiae* within the scope of EU law.² Importantly, the interpretative crux of this new formula concerns whether the Court has really opted for an innovative test of its jurisdiction, which may detach the protection of ECRs from the current exercise of fundamental freedoms. This paper critically maps out how the CJEU has gradually

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¹ Case C-34/09, *Zambrano v. Office Nat’l de l’Emploi*, 2011 E.C.R. I-01177, para. 42 [hereinafter *Zambrano*].

² With regard to the traditional cross-border test, *see id.* para. 69.

It is trite law that, in order to be able to claim classic economic rights associated with the four freedoms, some kind of movement between Member States is normally required. Even in that context, however, it is noteworthy that the Court has accepted the importance of not hindering or impeding the exercise of such rights and has looked askance at national measures that might have a dissuasive effect on the potential exercise of the right to freedom of movement.

For many citizenship cases, there is a clearly identifiable cross-border element that parallels the exercise of classic economic free movement rights. Moreover, when nationals of a Member State are invoking rights arising from citizenship of the Union against their own Member State, there has usually been some previous movement away from that Member State followed by a return. *See id.* paras. 75–80.

strengthened both the protection of the ECS and the protection of rights attaching to such status. It argues that the Court has recognized that the *de facto* exercise of fundamental freedoms is not the only way to establish a link between a EU citizenship case and the scope of EU law. On the contrary, the Court ruled that Art. 20 TFEU (on Union citizenship and European citizenship rights) can be invoked by Union citizens, even if they have never exercised their free movement rights, in order to challenge national measures, which “deprive 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.”³ This interpretative move raises the question whether the new test concerning the substance of the rights attaching to the status of European citizens enhances the protection of fundamental freedoms, by also safeguarding the potential exercising of these freedoms in the future, or whether it calls for including the actual protection of fundamental rights (such as the right to respect family life) in the so-called “substance” of European citizenship rights.⁴ This paper argues that the Court’s present approach indicates that the former is the case, casting doubts on the central position of fundamental rights with regards to European citizenship.

The new formula, “genuine enjoyment of the substance of the rights attaching to the status of European Union citizenship,” has been used to uphold the argument that ECS is not dependent on the status of the individual concerned as an economically active person, nor is the bundle of individual entitlements, which come necessarily attached to such a status (i.e. the ECRs) dependent on the current exercise of free movement rights.⁵ By dissociating the protection of ECS from the issue of a current exercise of free movement rights, the CJEU moved beyond the traditional cross-border test. To this end, thanks to the new formula concerning “the genuine enjoyment,” the CJEU made a direct connection between the “substance of EU citizenship” and the scope of EU law. The CJEU held that ECS

³ Case C-434/09, *McCarthy v. Sec’y of State for the Home Dep’t*, 2011 E.C.R. I-03375, para. 46 [hereinafter *McCarthy*]. Case C-256/11, *Dereci v. Bundesministerium für Inneres*, para. 61 (CJEU, 2013) [hereinafter *Dereci*].

⁴ Fundamental Rights and Fundamental Freedoms are two distinct legal categories with two different objectives in the European integration process. Fundamental rights are subjective rights whose intention is to protect individual freedom vis-à-vis the emerging supranational Union powers. Fundamental freedoms, instead, have performed the specific function to remove national obstacles to intra-Union mobility with the primary goal of pursuing market integration. For a systematic and critic analysis on the distinction between Fundamental rights and Fundamental Freedoms, see generally Ferdinand Wollenschläger, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L. J. 1 (2011).

⁵ The criteria of being “economically active” or “self-sufficient” and, so, the condition of being able to support themselves (sufficient means of existence; comprehensive health insurance) without recourse to public funds define the categories of persons eligible for claiming the ECRs to move and reside. The legal position of economically inactive persons is regulated by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L229/35).

allows a Union citizen, who has never exercised his freedom of movement, to rely on EU law if a national measure deprives him of the “genuine enjoyment of the substance of the rights conferred by virtue of Union citizenship.”⁶ This interpretative move may enable individuals to enhance their capability to claim protection of their individual entitlements within the scope of EU law, even in situations that previously would have been considered “purely internal” ones. In fact, the two criteria (*ratione personae* and *ratione materiae*), traditionally used by the CJEU in testing when a case falls within the scope of EU law, appear merging together thanks to the new direct connection between the substance of EU citizenship and the scope of EU law. Further in this paper, selected case law will be analyzed to cast light on how to draw a threshold line for what will constitute a loss of enjoyment of rights that come with ECS—a matter that the CJEU has not spelled out exactly. In the following sections, I will consider how the CJEU has defined the genuine enjoyment test in deciding cases concerning EU citizens who have never exercised free movement rights. I will explain more extensively how ECS should be protected in itself as the essential pre-condition to claim ECRs (*Rottmann*), and in doing so, show how the status itself rather than the current exercise of fundamental freedoms has been used by the CJEU to bring a case within the scope of EU law.⁷ Hence, ECS might also provide access to protection of ECRs in purely internal situations, independent of the fact that the claimant has never before made use of his fundamental freedoms. We then ask, under which conditions are the enjoyment of rights that come with ECS in jeopardy and, in what sense is the recent line of EU citizenship case law introducing an alternative condition to the traditional cross-border test (*Ruiz Zambrano*,⁸ *McCarthy*⁹)? I will draw attention to the paradox that the CJEU highlighted the issue concerning the substance of ECRs but keeps missing the opportunity to clarify what rights can be claimed as an integral part of the status of European citizenship (*Dereci*¹⁰). In fact, at the end of the day, the CJEU ruled that national interference with fundamental rights (such as the right to respect family life) should be seen as a menace to the genuine enjoyment of the substance of ECRs only when it would result in forcing EU citizens to leave the territory of the Union.

The purpose of this paper is to test whether the protection against the expulsion from the territory of the Union might be considered a satisfactory and coherent legal answer to the question of what type of protection does ECS provide for individual entitlements, or whether, on the contrary, the fundamental rights argument should come into play in defining the substance of ECRs. The main argument running through the case law analysis

⁶ ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 148 (2012).

⁷ See generally Case C-135/08, *Rottmann v Freistaat Bayern*, 2010 E.C.R. I-1449.

⁸ See generally *Zambrano*, *supra* note 1.

⁹ See generally *McCarthy*, *supra* note 3.

¹⁰ See generally *Dereci*, *supra* note 3.

is that the formula referring to the substance of ECRs calls for fundamental freedoms to be reinterpreted in connection with fundamental rights when the individuals who are entitled to those freedoms hold ECS. More precisely, on the one hand, the protection against expulsion from the territory of the Union functions as a safeguard to future possible exercise of fundamental freedoms; while, on the other hand, the present protection of fundamental rights would be required to ascribe a protected legal meaning to the physical presence of EU citizens within the territory of the Union.

B. European Citizenship: A Status to Acquire Rights?

The role of individuals and the protection of their entitlements within EU law were affirmed for the first time by the CJEU in *Van Gend en Loos*,¹¹ well before the official introduction of ECS in 1992.¹² In the beginning, EU citizenship was not unanimously hailed as a revolutionary step within the European integration process. Rather, it was welcomed with skepticism as being one more buzzword in the lexicon of the symbolic language of the EU.¹³ However, the case law of the CJEU contributed to making ECS a meaningful legal concept and as something “destined to be the fundamental status of nationals of the Member States.”¹⁴ At first, the judicial protection of ECRs has been building on the evolutionary interpretation of free movement rights beyond the logic of the internal market.¹⁵ Indeed, European fundamental freedoms have traditionally served as *trait d’union* between individual claims and the scope of EU law. On the one hand, the CJEU recognized Union citizens as falling, by definition, within the personal scope of the Treaty.¹⁶ However, on the other hand, in order to delineate its jurisdiction, the CJEU is asked to ascertain, case-by-case, the link between ECRs and the material scope of EU law. In this regard, European fundamental freedoms have been setting the pace of the CJEU’s interpretative evolution. The exercise of the fundamental freedoms granted by the European Treaties, in particular the freedom to move and reside within the territory of

¹¹ See generally Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

¹² See generally Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1.

¹³ EU Citizenship was greeted by scholars as a “pie in the sky” and “a symbolic plaything without substantive content” or as a “cynical exercise in public relations on the part of the High Contracting Parties.” See Hans Ulrich Jessurun d’Oliveira, *Union Citizenship: Pie in the Sky?*, in *A CITIZENS’ EUROPE: IN SEARCH OF A NEW ORDER* (A. Rosas & E. Antola eds., 1995); Joseph H. H. Weiler, *Citizenship and Human Rights*, in *REFORMING THE TREATY ON EUROPEAN UNION – THE LEGAL DEBATE* (J. A. Winter et al. eds., 1996).

¹⁴ Case C-184/99, *Grzelczyk v. Centre Pub. d’Aide Sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193, para. 31 [hereinafter *Grzelczyk*].

¹⁵ See generally Wollenschläger, *supra* note 4.

¹⁶ See generally Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, 45 COMMON MKT. L. REV. 13 (2008).

another Member State, are considered “part of the material scope of EU law.”¹⁷ By making a connection between the Treaty provisions concerning EU citizenship and the effective exercise of fundamental freedoms, Union citizens have been able to claim an enhanced right to challenge the rules imposed by Member States, whenever these rules jeopardize their right not to be discriminated against on the grounds of nationality.¹⁸

EU citizenship provisions first came into play as provisions of last resort¹⁹ in the EU law system. The reference to ECS was used to protect individuals who exercised freedom of movement and were not protected by other provisions—their situations did not fall within the scope of freedom of movement of workers, freedom of establishment, or freedom to provide services.²⁰ Gradually, the CJEU began referring to ECS as a legal construct that protects individual entitlements, over and beyond the constitutional systems of the different Member States. The protection granted to ECRs was grounded on the premise that EU citizens may make an appeal to their belonging to the European legal system in order to claim protection for their interests through EU law. The traditional CJEU jurisdiction test, which hinges on free movement rights and on cross-border situations, was innovatively complemented with reference to ECS and to the rights attached to such a condition. Thus, ECS has been used to bring within the scope of EU law those persons who were excluded from the free movement regime, as it focused on market actors and market activities. By doing so, the CJEU upheld free movement rights as ECRs, whose enjoyment shall not necessarily pursue an economic goal. This process of decoupling the protection of free movement rights from market activities is the incipient affirmation of the ECS as a general source of rights. For this reason, it is a decisive transition in interpreting the enjoyment of ECRs as something more than a restricted appendix generated by purpose of market integration. In fact, free movement rights have assumed a central role to empower EU citizens in drawing attention to the idea that existing economic factors should not affect their position of citizens as rights holders. Thus, “the free movement of persons becomes the movement of free citizens.”²¹ Traditionally, the CJEU has interpreted those situations in which European citizens have exercised their migration rights, even if a

¹⁷ Case C-224/98, *D’Hoop v Office Nat’l de l’Emploi*, 2002 E.C.R. I-6191, para. 29 [hereinafter *D’Hoop*]; Grzelczyk, *supra* note 14, para. 33.

¹⁸ See Consolidated Version of the Treaty on the Functioning of the European Union art. 18, 2008 O.J. C 115/47. See generally *D’Hoop*, *supra* note 17 (stating that a Member State cannot impose rules which have the effect of placing at a disadvantage their own citizens who have exercised the right to move).

¹⁹ See Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-228/07, *Petersen v. Arbeitsmarktservice Niederösterreich*, 2008 E.C.R. I-6989, para. 34 [hereinafter Opinion of Advocate General Colomer].

²⁰ With regard to the legislative evolution conferring rights of residence to nationals of Member States who are not employees or self-employees, see generally Council Directive 90/364, 1990 O.J. (L 180) 1; Council Directive 90/365, 1990 O.J. (L 180) 1, Council Directive 93/96, 1993 O.J. (L 317) 1.

²¹ Opinion of Advocate General Colomer, *supra* note 19, para. 28.

connection between the right to move and an economic element was no longer needed, as falling within the material scope of EU law. After confirming that Union citizens are covered by the personal scope of EU law, the CJEU clarified that EU citizenship is a fundamental status that is not conditional upon pursuing an economic activity.²² When Member State borders have been physically crossed, the case is considered as falling within the scope of EU law.

However, the cross-border test has been gradually construed by the CJEU in a more sophisticated way. For example, the CJEU considered applied EU law to a case where fundamental freedoms were not exercised directly by the claimant but by his former wife with an indirect effect on the claimant's situation.²³ These constructions call into question whether free movement rights, as cardinal ECRs, exhaust all the potentiality of ECS as a source of rights. Another way to approach the issue of ECRs is by asking whether the CJEU can seriously engage in defining the substance of ECS and in protecting ECRs and at the same time overlook the role of fundamental rights within the EU legal system. The Lisbon Treaty has been considered a major step forward in the promotion of fundamental rights within EU law, indeed a milestone also in the delicate architecture of European citizenship. Because of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union has been granted with the same binding legal force as the Treaties, becoming a more visible catalogue of parameters that should be considered in testing the legal validity of the Union's legislative acts and policy actions. The Union's accession to the European Convention on Human Rights (ECHR) was made possible (Art. 6(2) TEU), and by permitting the European Court of Human Rights (ECtHR) to directly review Union acts, the system to protect fundamental rights will be enhanced. It seems then that the standards protecting fundamental rights to which the EU is committed shall be used to give concrete content to what the CJEU has defined as the "substance of ECRs." For this reason, the European integration may be regarded as being at the crossroads between relying on mere rhetorical references to ECS or providing EU citizens with legal protection of a bundle of rights, which is consistent with the EU's commitment to protect fundamental rights.

However, is this really the only way to phrase ECS dilemma? Here, a decisive point needs to be clarified with regard to the role of fundamental rights and fundamental freedoms in shaping the substance of ECRs. We still have to postulate a necessary link between EU citizenship and the scope of EU law. Suppose we ground this link on free movement rights conceived as entitlements one may not only enjoy actually but also potentially—suppose one is entitled to enjoy them in the future. In such a case, will the reference to an actual violation of fundamental rights, as part of the substance of European citizenship and as a possible interference with the future enjoyment of fundamental freedoms, be a sufficient

²² See Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, para. 83 [hereinafter *Baumbast*].

²³ See generally Case C-403/03, *Schempp v. Finanzamt München*, 2005 ECR I-6421 [hereinafter *Schempp*].

condition for bringing a case within the scope of EU law in spite of the lack of a cross-border element?

C. European Citizenship's Rights: Two Cases, Two Steps Forward?

I. The Rottmann Case: The Right to Not be Deprived of the European Citizen Status

Art. 9 TEU states that "every national of a Member State shall be a citizen of the Union," and that "citizenship of the Union shall be additional to and not replace national citizenship." The sufficient condition for being entitled to ECS is to be a national of an EU Member State. Since its attribution and its enjoyment are not just a matter of EU law, some scholars have described Union citizenship as a "contingent"²⁴ condition or as a "*ius tractum*," and so as a "derivative status."²⁵ It may seem to follow, as a general rule, that a EU citizen loses his entitlement to hold the European status if the Member State of which he is a national withdraws the national citizenship. In the light of this requirement, it would seem that the EU could scarcely influence Member States' laws concerning nationality. Indeed, Member States, by regulating their citizenship criteria, can thereby include or exclude individuals from the enjoyment of ECS. The Rottmann ruling challenged this reading of the relationship between the European status and national citizenship.²⁶ In fact, the CJEU interpreted the provisions on EU citizenship as capable of altering the essence of the Member States' nationalities from which ECS is derived, by establishing a direct link between individuals and EU law. This link allows the CJEU to test whether the rules of loss and acquisition of Member States' nationalities are compatible with EU law principles, such as the principle of proportionality.

Dr. Rottmann was a naturalized German national who, as a consequence of his naturalization in Germany, had lost his previous Austrian nationality. When applying for German nationality, Dr. Rottmann failed to disclose the fact that he was the subject of a judicial investigation in Austria. Since the naturalization was acquired by deception it was regarded as a fraud entailing the annulment of the previous concession of nationality. The referring court asked the CJEU whether the withdrawal of German nationality would be in accordance with EU law when the concerned person would thereby become stateless, and therefore be also deprived of the status as citizen of the Union.

²⁴ See Willem Maas, *Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union*, 15 COLUM. J. EUR. L. 265 (2009).

²⁵ See D. Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169 (2009).

²⁶ See generally Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449.

Rottmann could be read as the most recent follow-up of the argument developed by the CJEU since the '90s: each Member State shall "have due regard to Community law" when laying down the conditions for the acquisition and loss of nationality.²⁷ However, compared to the earlier cases, the *Rottmann* decision placed a greater emphasis on the nature and consequences of ECS. The Court lacked jurisdiction to explicitly decide on the loss of Dr Rottmann's nationality, since that would amount to excluding the competence of the Member States in regulating the conditions of nationality of their own State. Nevertheless, the reference to the principle of proportionality implicitly imposed on Member States an obligation, derived from EU law, to limit their discretion in creating their rules of nationality law. The most innovative effect deriving from *Rottmann* was that EU citizenship as "the fundamental status of nationals of the Member States"²⁸ was used to replace the cross-border test, which was traditionally used to bring cases within the scope of EU law, and so within the jurisdiction of the CJEU.²⁹ ECS was protected as a necessary precondition for the enjoyment of ECRs. For this reason the danger of losing this status was recognized by the CJEU as a freestanding ground to bring a case within its jurisdiction.

According to the *Rottmann* conclusions, ECS confers to individuals at least the entitlement to appeal directly to legal principles (such as the principle of proportionality) derived from the existence of a European legal system. These principles may be used to modulate citizens' access to protected positions and to claim rights in a legal space broader than their own national legal orders.³⁰ Hence, the basic form of protection attached to ECS shall consist in the right to not be deprived of European status. That status, according to Advocate General (AG) Maduro, is the expression of a new form of civic and political allegiance on a European scale, grounded on the very existence of the EU as a legal area, and so grounded on a common set of protected legal positions granted to EU citizens:

[C]onstrued as an "interstate citizenship" which confers on nationals of a Member State rights in the other Member States, in essence the right of

²⁷ See generally Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239. See also Case C-179/98, *Belgium v. Mesbah*, 1999 E.C.R. I-7955, para. 29; Case C-192/99, *The Queen v. Sec'y of State for the Home Dep't*, 2001 E.C.R. I-1237, para. 19; Case C-200/02, *Zhu v. Sec'y of state for the Home Dep't*, 2004 E.C.R. I-09925, para. 37.

²⁸ *Grzelczyk*, *supra* note 14, paras. 31, 43. But see also, *inter alia*, *D'Hoop*, *supra* note 17, para. 28; *Baumbast*, *supra* note 22, para. 82; Case C-148/02, *Avello v. État Belge*, 2003 E.C.R. I-11613, para. 22; Joined Cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, 2004 E.C.R. I-5257, para. 65; *Schempp*, *supra* note 23, para. 15.

²⁹ See generally *Dimitry Kochenov, A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe?* 18 COLUM. J. EUR. L. 55 (2011).

³⁰ See generally *Rainer Bauböck, Why European Citizenship? Normative Approaches to Supranational Union*, 8 THEORETICAL INQUIRIES IN L. 453 (2007).

movement and residence and the right to equal treatment....It confers on the nationals of the Member States a citizenship beyond the State....European citizenship is more than a body of rights which, in themselves, could be granted even to those who do not possess it. It presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people....It is based on their mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale. It does not require the existence of a people, but is founded on the existence of a European political area from which rights and duties emerge.³¹

For that very reason, ECS might empower its holders to claim not only the right to maintain the physical connection with the EU's territory, but it also may be construed as the condition to have granted legal standing within the whole territory of the EU, understood as a common space of distribution of rights.³² Difficulties arise, however, when an attempt is made to map out what rights are unavoidably at stake with the withdrawal of ECS, and so what rights, in the end, shall be considered as truly ECRs.

II. The Ruiz Zambrano Case: the Right to Not be Expelled from the Territory of the European Union.

As the *Rottmann* decision suggests, ECS is a meaningful legal construct as soon as it may be considered an access condition for the enjoyment of ECRs. For that very reason, citizens shall be protected against its loss. However, in *Rottmann*, the CJEU dealt with the issue of enhancing the protection of ECS without inquiring into what rights precisely EU citizenship entails. *Rottmann* also did not cast light on the further question concerning the conditions under which rights derived from the status can be exercised. This follow-up question needs to be answered by making clear how the enjoyment of the rights derived from the status links to the scope of European law.

³¹ Opinion of Advocate General Poirares Maduro, Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-01449, paras. 16–20, 23.

³² Loic Azoulai, *A Comment on the Ruiz Zambrano Judgement: A Genuine European Integration*, EUDO CITIZENSHIP CONSORTIUM, <http://eudo-citizenship.eu/search-results/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration> (last visited Aug. 28, 2013).

The *Ruiz Zambrano* judgment begs to reconsider whether the enjoyment of free movement rights, not only actual but also the potential exercise (i.e., in view of future exercise), is still the irreplaceable link between a citizenship case and the scope of EU law. In fact, the CJEU has launched a new jurisdiction test, which is based on the severity of a Member State's interference with ECRs rather than on a pure cross-border test. By doing so, the CJEU opened the path to a broader reflection on what rights should be counted as ECRs. In *Ruiz Zambrano* the rights at stake were the right of respect for family life and the best interest of the child, both fundamental rights. The CJEU was asked to decide when economically inactive citizens, such as minors, who have not yet exercised their free movement rights, may fall within the scope of EU law. The CJEU was also asked to decide whether and under which conditions EU citizens' parents who were third-country nationals were able to derive rights from their children's status. The novelty of the *Ruiz Zambrano* outcome resulted from the factual situation examined by the Court that, according to the traditional approach, would have been considered wholly internal.

Mr. Ruiz Zambrano and his wife, both Colombian nationals, arrived in Belgium in 1999 and requested asylum there. They were parents of two Belgian minors residing in Belgium and asked, as care givers, for a right of residence connected with the citizenship rights of the minors. In fact, their applications for asylum were refused but with a non-refoulement clause, which forbade the expulsion of Mr. and Mrs. Ruiz Zambrano into their home country, since they might be again subjected to persecution in Colombia. Even though Mr. Ruiz Zambrano did not hold a work permit, he obtained full-time employment with a Belgian company for an unlimited period. Mr. Ruiz Zambrano claimed that the birth of the two children, who were Belgian nationals and thus EU citizens, entitled him to a residence right and a work permit in Belgium.

In deciding *Ruiz Zambrano*, the CJEU launched a test on its jurisdiction which links together the Treaty provisions about citizenship (Art. 20 TFEU), with the substance of ECS and the genuine enjoyment of ECRs. Namely, the CJEU stated that: Art. 20 TFEU precludes national measures that 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.³³ Hence, the CJEU created a direct link between the citizenship of the Union and the scope of application of EU fundamental rights within the EU legal system. This link has the significant advantage of tailoring the new CJEU's jurisdiction test to the enhancement of the EU's commitment in protecting fundamental rights. However, the CJEU failed to give a resolute clue on the matter concerning the substance of ECRs, especially on whether this substance shall be defined with regard to fundamental rights or merely to fundamental freedoms. In fact, the formula created by the CJEU did not clarify the relationship between Art. 20 TFEU and Art. 21 TFEU. Art. 20 TFEU does not contain an exhaustive list of ECRs, while Art. 21 TFEU specifically refers to the right to move and reside freely within the

³³ See Zambrano, *supra* note 1, para. 42.

Union. The Court's reference to Art. 20 TFEU seems to suggest that the "genuine enjoyment of ECRs" cannot be simply reduced to a test on the severity of the interference of national measures with the exercise of the right to move and reside freely within the EU's territory, which might be more specifically protected by referring to Art. 21 TFEU. However, the *Ruiz Zambrano* judgment did not follow the more generous interpretation of the Treaty provisions on citizenship proposed by the AG Sharpston in her Opinion on the case.³⁴ According to the AG Sharpston, a case might be considered as falling within the scope of EU law when the effective enjoyment of the substance of EU citizenship is in jeopardy because fundamental rights are at stake (with regard to *Ruiz Zambrano*, the right to family life and the duty to protect children's rights).

Actually, the CJEU kept the application of the innovative formula created in the *Ruiz Zambrano* judgment within stricter boundaries by treating the situation within the scope of EU law as more of an exception rather than a general rule. The EU citizens in this case were children, and thus particularly vulnerable, since for them the potential threat was to have to leave the territory of the Union for good, preventing future enjoyment of the status of European citizens. According to this second interpretation, the *future* exercise of fundamental freedoms rather than the *current* enjoyment of fundamental rights would be considered at the heart of EU citizenship. Note that the CJEU did not explicitly take into account any consideration concerning the right to family life and the best interest of the child in so many words.³⁵ The CJEU decided that Belgium should grant third-country nationals who were parents of dependent minors who were EU citizens a residence and a work permit, since refusal of these permits would have meant depriving the children of the genuine enjoyment of the substance of their ECRs. If, on the one hand, the new formula brings *Ruiz Zambrano* within the scope of EU law; on the other hand, it remains agnostic as to what the ECRs' substance consists of.

In summary, according to the *Ruiz Zambrano* ruling, it seems that whomever enjoys ECS, for that very reason can claim protection of ECRs, even against the Member State of nationality, and even when no European fundamental freedoms have yet been exercised.³⁶ The only condition that needs to be fulfilled is that the genuine enjoyment of the substance of ECRs would be in jeopardy. The key problem with this reasoning is that the CJEU failed to specify whether the threat to the genuine enjoyment of EU citizenship's substance shall correspond *sic et simpliciter* to situations when EU citizens are obliged to

³⁴ See generally Opinion of Advocate General Sharpston, Case C-34/09, *Zambrano v. Office Nat'l de l'Emploi*, 2011 E.C.R. I-01177, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0034:EN:HTML> (last visited Aug. 29, 2013).

³⁵ See generally Helen Oosterom-Staples, *To What Extent Has Reverse Discrimination Been Reversed?*, 14 EUR. J. IMMIGR. L. 171 (2012).

³⁶ See Opinion of Advocate General Sharpston, Case C-212/06, *Gov't of the French Cmty. and the Walloon Gov't v. the Flemish Gov't*, 2008 E.C.R. I-1683, paras. 142–44.

leave the territory of the Union. Consequently, the *Ruiz Zambrano* judgment turns out to be elliptical. Paradoxically, there is a lack of explanation exactly about the crux of the matter that the decision was expected to clarify: ECS implies the prohibition to be forced to leave the EU's territory because the CJEU considered this prohibition necessary to protect the substance of the ECRs, but at the same time, the CJEU did not say what this substance is. In the next sections I will address the issue whether the right to be physically present in the EU territory exhausts all the possible innovative paths opened by the new formula concerning the "genuine enjoyment of the substance of the ECRs."

D. Is There a Place for Fundamental Rights Among European Citizenship Rights? Two Cases, Two Steps Back.

I. The McCarthy Case: The Right to Respect for Family Life as a Matter of National Law and Compliance with the ECHR.

The innovative conclusion introduced by *Ruiz Zambrano* was that ECS might provide access to rights also in purely internal situations, independent from the fact that the claimant has never before made use of his fundamental freedoms. The *McCarthy* case seems to run along similar lines: once again, the right to family life—reunification with a third-country national, in this case, Mrs. McCarthy's husband—was at the heart of a static EU citizen's claim. The CJEU confirmed that a static EU citizen, like Mrs. McCarthy, could not be, by definition, out of the material scope of EU law.³⁷ The CJEU proposed again the genuine enjoyment test but, this time, by referring to Art 21 TFEU (and so to the specific provision on free-movement rights as ECRs) rather than to Art 20, as it did in *Ruiz Zambrano*. However, the Court ruled that the Treaty provisions concerning European citizenship (Article 21 TFEU) were not applicable to Mrs. McCarthy's situation. Thus, on the one hand, European citizens by virtue of the status they hold shall be protected both from the risk to be deprived of ECS itself (*Rottmann*) and from the risk to be expelled from the EU's territory (*Ruiz Zambrano*). But, on the other hand, the enhanced link between ECS and the scope of EU law does not serve to define the role of ECS as a source of rights. In fact, the Court decided not to rely on Art. 20, which might be interpreted as an open list, and preferred to base ECS on the right to move and reside freely. For that reason, interpreting the genuine enjoyment test results in a riddle: shall this test be referred only to the future potential enjoyment of free movement rights (Art. 21 TFEU), or shall fundamental rights be counted as belonging to the open list of ECRs (Art. 20 TFEU), thus having fundamental rights shape the substance of EU citizenship?

Mrs. McCarthy was a British and Irish national. She had always lived in England, so she was able to naturally reside in England without necessarily having to rely upon EU law in order to obtain a right of residence in the Member State of her nationality. Mrs. McCarthy's

³⁷ See McCarthy, *supra* note 3, para. 46.

spouse, a Jamaican national, however, had no right to reside in England under the United Kingdom's (UK) domestic provisions on immigration. Thus, Mrs. McCarthy wanted to invoke her ECRs, on the basis of her Irish nationality, in order to obtain for herself a right to reside in England by virtue of EU law, and to generate a derived right of residence for her husband that would enable them to live together in England. Being a static EU citizen was not the only common feature between the Ruiz Zambrano children and Mrs. McCarthy, since she too was not or had not been a worker, a self-employed person or economically self-sufficient for the purposes of EU law. But instead of depending on her third-country national family member as in *Ruiz Zambrano*, Mrs. McCarthy was receiving State benefits from England.

As in *Ruiz Zambrano*, the CJEU decided *McCarthy* by referring to ECS, but it did not recognize the examined national measures as capable of depriving Mrs. McCarthy of the genuine enjoyment of the substance of ECRs. Consequently, the situation of Mrs. McCarthy was determined as falling outside the scope of EU law. For this reason, *McCarthy* may be analyzed as an interesting *variatio* to test the consequences of the *Ruiz Zambrano* precedent and to sketch out the limits of the formula concerning the "genuine enjoyment of the substance of ECRs." In this regard, in the *McCarthy* judgment, the CJEU stated:

Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.³⁸

The Court made clear how the formula concerning the genuine enjoyment test shall be understood—as not abolishing but complementing the traditional role of fundamental freedoms in bringing cases within the scope of EU law. In fact, the CJEU used a disjunction ("or") to describe two constellations in which EU law applies to EU citizens who have not exercised their free movement rights: (a) national measures that would have the effect of impeding the EU citizen in the exercise of his free movement rights or (b) national measures that would have the effect of depriving the EU citizen of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen. Thus,

³⁸ *Id.* para. 56.

even if the Court has not yet clearly defined what the substance of ECRs consists of, at least the interpretation of the formula shall not be reduced to protecting the exercise of free movement rights. With regard to the (a) hypothesis (EU law applies to EU citizens who have not exercised their free movement rights when national measures would have the effect of impeding EU citizens in the exercise of his free movement rights), *McCarthy* was not a situation where the exercise of a static EU citizen's right of free movement and residence within the territory of the Member States was in jeopardy. Mrs. McCarthy had an unconditional right to reside in England. The Court specified that even if Mrs. McCarthy's husband was expelled, she could choose to remain in the UK because she was not dependent on her third-country national family member, as the Ruiz Zambrano children were. Thus, with the *McCarthy* decision, the CJEU applied the same criterion as in *Ruiz Zambrano*, but the different factual circumstances created different outcomes. In fact, the "dependence" of the two Ruiz Zambrano children on their third-country nationals parents brought the parents' derivative rights of residence within the territory of the EU under the genuine enjoyment of the substance of the ECRs of the EU citizens who were minors. The genuine enjoyment test conducted with regard to Mrs. McCarthy, by contrast, did not take into consideration derivative rights of her family members—the right of her husband to not be expelled from the territory of the EU. Thus, concepts such as dependence and care played a central role in determining the different outcomes of the two cases. The Ruiz Zambrano children were surely economically dependent on their parents. However, it is not clear whether the economic reasoning was the only rationale behind the CJEU's decision to keep the unity of the Ruiz Zambrano family within the territory of the Union. In fact, even if a Belgian work-permit was not granted to Mr. Ruiz Zambrano, he may have been able to support his children financially from abroad. Hence, the reasoning followed by the CJEU may also be interpreted as aiming to set parameters, based on EU law, to establish when a refusal to grant derivative rights to third-country nationals who are family members of a dependent EU citizen might amount to an interference with the right to respect for family life. A more elaborate explanation of the CJEU's understanding of the criteria of dependence and care would have helped to clarify why the enjoyment of Mrs. McCarthy's ECRs were considered genuine despite the fact that the expulsion of her husband may amount to an interference with her right to respect for family life.³⁹

In her Opinion on the case, AG Kokott pointed out that Mrs. McCarthy's fundamental right to respect for family life may be in jeopardy.⁴⁰ Nevertheless, according to the AG's Opinion,

³⁹ See Opinion of Advocate General Kokott, Case C-434/09, *Shirley McCarthy v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-03375, para. 59 [hereinafter Opinion of Advocate General Kokott]. With regard the criteria elaborated by the European Court of Human Rights concerning national measures that are unjustified interferences of public authority with family life, see *Beldjoudi v. France*, 12083 Eur. Ct. H.R. 86 (1992). See generally *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 1179; *Sen. v. Neth.*, App. No. 31465/96, Eur. Ct. H.R. 888 (2001). *Da Silva and Hoogkamer v. Neth.*, App No. 50435/99, Eur. Ct. H.R. (2006); *G.R. v. Neth.*, Eur. Ct. H.R. (2012).

⁴⁰ See Opinion of Advocate General Kokott, *supra* note 39, paras. 59–60.

the risk of breaching this fundamental right, which is also guaranteed under Art. 8 (1) of the ECHR, shall not be related to the genuine enjoyment of the substance of ECRs. Since all the Member States are parties to the ECHR, the interference with Mrs. McCarthy's right to respect for family life is not a question of EU law. The interference was only a question of the UK's obligation under the ECHR, the assessment falls exclusively within the jurisdiction of the national courts and the ECtHR. One major drawback of the approach suggested by AG Kokott is that the risk of violating the right to respect for family life is not to be regarded as a question of EU law, and so, holding ECS would make no difference in cases like Mrs. McCarthy's. From the AG's reasoning, it follows that the formula concerning the substance of ECRs does not seem having a lot to say about the conditions under which a EU citizen shall not be forced to leave the territory of the Union. Hence, the mere physical presence within the Union's territory would result in a half-hearted protection since, according to the AG Kokott's argument, the CJEU would not have jurisdiction to balance the right to reside within the EU with other parameters, such as the relevant interests under Art. 8 (1) ECHR, which are essential to grant a genuine enjoyment of that very right of residence. However, after the Lisbon Treaty, the EU is formally committed to protect fundamental rights, and it is negotiating the accession to the ECHR. Thus, in the light of this enhanced EU's commitment, the AG's argument shows a serious weakness, to wit: it seems shifting the responsibility for protecting fundamental rights only among national laws, without taking into consideration that fundamental rights might complement the genuine enjoyment of the substance of ECRs.

II. The Dereci Case: is the Right to Respect for Family Life Included in the Genuine Enjoyment of the Substance of ECRs?

The CJEU returned to the issue of interpreting the genuine enjoyment of the substance of ECRs in *Dereci*. Should ECRs be read in a minimalistic sense, by focusing on European freedoms to move and reside, and on the right to not to be expelled from the territory of the EU, or should fundamental rights provide a decisive argument to consider the ECRs' substance as not simply limited to fundamental freedoms' enjoyment? In *Dereci* the CJEU was asked to clarify whether the impossibility of leading a family life in a Member State could, by itself, deprive Union citizens of the enjoyment of the substance of ECRs. Thus, the role of fundamental rights in defining the substance of ECRs was explicitly put under scrutiny, and the CJEU had to determine the level of protection of ECS when considering physical presence in Union territory in terms of access to fundamental rights protection.

Dereci concerned five third-country nationals' applications, seeking residence rights in Austria. The claimants asked for a derivative right of residence within the EU, and their requests were grounded on family relationships with EU citizens who had never exercised their right of free movement, and who were not dependent on a third-country national family member for their subsistence. The CJEU left open the issue whether the different five situations fall within the scope of EU law, since the solution shall be determined by the referring court, in line with their evaluation of whether or not the family members of the

applicants were deprived of the genuine enjoyment of the substance of the rights by the decision of national authority.⁴¹

As AG Mengozzi noted in his Opinion on the case,⁴² based on the position taken by the CJEU in *Ruiz Zambrano* and, in particular, in *McCarthy*, the right to respect family life appeared to be not sufficient by itself to bring the cases within the scope of EU law. Indeed, the two precedents originated from the premise that the substance of rights attached to the status of EU citizens does not necessarily include the right to respect family life as stated in Article 7 of the EU Charter and in Article 8 (1) ECHR. In deciding *Dereci*, the CJEU embraced a similar line of reasoning. It ruled that the criteria relating to the denial of “the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status” refers to situations in which the Union citizen has to leave not only the territory of the Member State of which the citizen is a national, but also the territory of the Union as whole.⁴³ In the interpretation offered by the CJEU in the *Dereci* ruling, the test for the genuine enjoyment of the substance of ECRs focuses on the threat of expulsion from the territory of the Union. Nevertheless, the judgment fails to give a legally qualified account of the protected presence of the EU citizen within the territory of the Union. In fact, the prohibition of expulsion does not explicitly entails a set of rights, whose protection is granted by way of territorial presence within the EU. The link between ECS and the European legal system is described only by negative criteria: as a prohibition to deprive EU citizens’ from their status and as a prohibition to expel EU citizens from the EU’s territory. But the CJEU’s understanding of the genuine enjoyment test does not seem to imply also a positive account in terms of individual entitlements deriving from EU citizens belonging to the European legal order. Hence, questions about ECRs are still open, both with regard to what rights come with the ECRs’ substance, and with regard to what standards of protection make the enjoyment of those rights genuine.

The Court did not face the question whether, under certain conditions, a serious risk of breach of fundamental rights could amount to a jeopardy equivalent to the risk to be forced to leave the territory of the Union, which would be sufficient to invoke the genuine enjoyment test. In fact, if individuals have no way to ground valid claims of protection of their rights on their presence within the EU’s territory, their being physically present within the territory of the EU will probably not make any difference from a legal perspective. The wide range of family situations presented to the CJEU in *Dereci* showed that the different factual situations can lead to very different judicial outcomes even when the legal background and the rights claimed are the same. AG Mengozzi, in his Opinion, extensively

⁴¹ *Dereci*, *supra* note 3, paras. 70–72.

⁴² See Opinion of Advocate General Mengozzi, Case C-256/11, *Dereci v. Bundesministerium für Inneres*, 2013 E.C.R. I-nyr, paras. 37-38 [hereinafter Opinion of Advocate General Mengozzi].

⁴³ *Dereci*, *supra* note 3, para. 66.

examined the contradictions that arose in determining the rights of Union citizens, relying on the prohibition of expulsion from the EU's territory. For example, the AG stressed that if Mrs. Dereci were, for whatever reason, unable to work and thus unable to provide for the needs of her children, then there would be a serious risk that the refusal to issue a residence permit to her husband and, *a fortiori*, the expulsion of Mr. Dereci to Turkey "would deprive the couple's children of the genuine enjoyment of the substantive rights attaching to citizenship of the Union by forcing them, *de facto*, to leave the territory of the Union."⁴⁴ Hence, *Dereci* is a further confirmation that the current case-by-case approach is the most visible consequence of the lack of a set catalogue of ECRs. The CJEU has preferred relying on the already existent mechanisms of protection (constitutional systems of the MS and ECtHR), rather than proposing an autonomous European conceptual framework to grant the robust application and uniform interpretation of Union law in protecting fundamental rights as an essential part of the substance of ECRs. In this regard, the CJEU stated:

European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.⁴⁵

Despite the fact that the 'genuine enjoyment' test should be disambiguated as a matter of interpretation of the scope of EU law, the CJEU did not hesitate to leave the national courts to solve puzzling cases and to have the final say on ECRs. On the one hand, this solution could be read as a step towards a more capillary judicial protection of ECRs, since the CJEU left room for the national judges to interpret the scope of EU law in order to confer rights to EU citizens, even against their national Member States. On the other hand, if the case-by-case approach should not become a sort of rights lottery, it needs to be driven by a

⁴⁴ Opinion of Advocate General Mengozzi, *supra* note 42, para. 47.

⁴⁵ *Dereci*, *supra* note 3, para. 1.

uniform interpretation of the conditions under which EU citizens can claim protection of their fundamental rights at the EU level.

E. Conclusions

At a first reading, the jigsaw emerging from the juxtaposition of CJEU's rulings suggests a gradual strengthening of the capability to claim rights from the part of economically inactive citizens within EU law (for themselves and for their family members who are third-country nationals). However, when the Court was asked to rule explicitly on the inclusion of fundamental rights (such as the right to respect family life and the best interest of the child) within the list of ECRs, it appeared to adopt a restrictive interpretation: ECS entitles its holders to claim protection under EU law, but only against the expulsion from the territory of the Union. When there is a high risk of expulsion from the EU, the protection is provided regardless of the EU citizens' economic situations, even in cases which previously would have been considered as purely internal ones. From these recent decisions, it follows that the CJEU considered that the threat to EU citizens' right to reside and to move within the territory of the Union is still a decisive element to bring cases within the scope of EU law. Presently, the national interference with fundamental rights (such as the right to respect family life) has been seen as a menace to the genuine enjoyment of the substance of ECRs, only when it resulted in forcing EU citizens to leave the territory of the Union.

By reducing the genuine enjoyment test to the right to stay in the Union's territory, the CJEU seems to grant a form of protection that is difficult to make sense of from a legal perspective. In fact, the prohibition of expelling EU citizens from the EU's territory secures only a geographic position without deciding what rights shall be considered as deriving from their ECS. The main weakness in the case law analyzed is the failure to address how the genuine enjoyment test might be used not only to link the scope of EU law and the EU citizens' right to be physically included in the EU's territory, but also to qualify this physical inclusion within the EU territory as a legal construct which secures access to protected positions under EU law. By focusing on the right to stay in the EU's territory, the Court has been hesitant in pushing the new formula beyond the traditional rationale of fundamental freedoms.

Summing up and tying in with the overall topic of this issue: I asked whether the new formula launched by the CJEU presents ECS as a protected legal status, which grants access to a bundle of rights, namely the ECRs, by overcoming the clear-cut dichotomy of fundamental freedoms or fundamental rights. The answer to this question seems to be that the Court has not gone that far. In fact, the main limit of the genuine enjoyment test is that the Court is concerned about the protection of the "substance of the rights attaching to the status of European Union citizen," but without clearly stating what this substance consist of and what ECRs shall be counted as essential constituents of that substance. Thus, from one standpoint the formula concerning the genuine enjoyment has been presented as an alternative way to use EU citizenship in order to bring a case within the

scope of EU law when free movement rights have not been already exercised. But from the other, the Court did not make clear whether this alternative might enlarge the spectrum of rights that EU citizens can invoke under EU law. In fact, the CJEU has not completely succeeded in putting flesh on the bones of the “substance of the rights attaching to the status of European Union citizen.” In particular, there is still room for debate on whether the substance relates to the potential future enjoyment of fundamental freedoms or to the actual enjoyment of fundamental rights.