Case Note

Court of Justice of the European Union

European Union Citizenship and the Purely Internal Rule Revisited

Decision of 5 May 2011, Case C-434/09 *Shirley McCarthy* v. *Secretary of State for the Home Department*

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Introduction

Less than a month after the groundbreaking *Ruiz Zambrano* judgment, the European Court of Justice (ECJ) again discussed the scope of application of European Union (EU) citizenship rules.[1] Where the decision in *Ruiz Zambrano* opened the door to the application of EU citizenship rights in purely internal situations, the outcome of *Shirley McCarthy* reveals the limits to such approach.[2] EU citizens who never exercised their right to free movement cannot invoke Union citizenship to regularize the residence of their non-EU spouse. Moreover, dual nationality is in itself an insufficient linking factor with EU law.

The *McCarthy* decision confirms the Court's established position that Treaty provisions on EU citizenship cannot be applied to purely internal situations which have no link with EU law.[3] Only in specific circumstances, i.e., when the genuine enjoyment of EU citizenship rights is at stake or the right to move and reside

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[1] ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi*. For comments, *see*, e.g., A. Lansbergen and N. Miller, 'European Citizenship Rights in Internal Situations: An Ambiguous Revolution?', 7 *EuConst* (2011) p. 287-307; P. Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law', 38 *Legal Issues of Economic Integration* (2011) p. 263-276.

[2] ECJ 5 May 2011, Case C-434/09, *Shirley McCarthy* v. *Secretary of State for the Home Department*.

[3] ECJ 5 June 1997, Joint Cases C-64/96 and C-65/96, *Kari Uecker and Vera Jacquet* v. *Land Nordrhein Westfalen*, para. 23; 2 Oct. 2003, Case C-148/02, *Garcia Avello*, para. 26; 12 July 2005,

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freely within the territory of the member states is impeded, a purely internal situation falls within the scope of the Treaties.[4] In the Court's logic, this explains why a child which was granted the nationality of a member state and never left the territory of that state has a right to family reunification on the basis of EU law whereas an adult EU citizen has no such right when he/she cannot prove a prior use of free movement to another EU member state.

This case note aims to explain the rationale behind the fuzzy boundaries between situations falling inside or outside the material scope of EU citizenship law. Arguably, this division is more complicated than a mere distinction between cross-border and purely internal situations. Rather than the formal existence of a cross-border element or a situation where all relevant facts are confined within the territory of a single member state, the effective use of free movement and the implications of national measures for the future use of EU citizenship rights, in particular the right to move and reside freely within the territory of the member states, are the decisive criteria.

The factual background

Mrs McCarthy has dual British and Irish nationality. She was born in the United Kingdom and has always resided there without ever having exercised her right of free movement to other EU member states. Her husband, a Jamaican national, has no right to reside in England under British immigration rules. Following her marriage, Mrs McCarthy applied for an Irish passport for the first time and obtained it. She then applied together with her husband for a residence permit in the United Kingdom on the basis of EU law as respectively, a Union citizen and the spouse of that citizen. The British Secretary of State refused these applications on the ground that Mrs McCarthy did not qualify as a worker, self-employed person or self-sufficient person under EU law. She was in receipt of state benefits and never stayed in any other country than the United Kingdom. As a result, it was argued that also her husband could not benefit from any residence rights under EU law. The referring court essentially asked whether the situation of Mrs McCarthy fell within the scope of application of EU citizenship law by virtue of her dual nationality notwithstanding the fact that she never exercised her right of free movement and always resided in one member state of which she is a national.

Case C-403/03 *Schempp*, para. 20; 1 April 2008, Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government*, para. 39.

[4] *Supra* n. 2, para. 49.

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The opinion of Advocate-General Kokott

The opinion of Advocate-General Kokott is in many respects the antithesis of the Opinion delivered by Advocate-General Sharpston in the case of *Ruiz Zambrano.*

First, where Sharpston recommended the Court to recognise that Article 21 TFEU contains a separate right of residence that is independent of the right of free movement,[5] Kokott considered that EU citizenship law only applies in a cross-border context. This conclusion is essentially based upon the parallelism between primary and secondary EU law. Both the wording and objective of Directive 2004/38 restrict its application to situations where Union citizens are moving to or reside in a member state other than that of which they are a national. Without further considerations, it is concluded that 'the right of free movement of Union citizens which is enshrined in primary law (Article 21 (1) TFEU and Article 45 (1) of the Charter of Fundamental Rights) does not alter this view.'[6]

Second, on the issue of reverse discrimination, Advocate-General Kokott merely recalled the Court's established position that 'EU law provides no means of dealing with this problem.'[7] Significantly, she also acknowledged that 'it cannot be ruled out that the Court will review its case-law when the occasion arises' but considered that the *McCarthy* case did not provide the right context for such a step.[8] Her argument is that Mrs McCarthy does not satisfy the requirements for the acquisition of longer-term residence rights under Directive 2004/38 irrespective of her status as 'static' or 'mobile' Union citizen. From this perspective, there is no discrimination between static and migrant Union citizens.

Third, with regard to fundamental rights, Advocate-General Kokott bluntly observed that this is not an issue of EU law. Whereas it cannot be ruled out that the United Kingdom might be obliged to grant Mr McCarthy a residence right under Article 8(1) (respect for family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), this is a matter that exclusively falls within the jurisdiction of the national courts and the European Court of Human Rights.[9] Again, this position stands in sharp contrast to the Opinion of Advocate Sharpston in *Ruiz Zambrano*, who suggested to extend the scope of EU fundamental rights protection to all areas falling within the scope of material EU competence.[10]

Finally, on the question whether the dual nationality of Mrs McCarthy brings the situation within the scope of EU law, Advocate-General Kokott proposed the

[5] Opinion of Advocate-General Sharpston in Case C-34/09, *Ruiz Zambrano*, paras. 100-101.
[6] Opinion of Advocate-General Kokott in Case C-434/09, *Shirley McCarthy*, para. 31.
[7] Ibid., para. 40.
[8] Ibid., paras. 42-43.
[9] Ibid., para. 60.
[10] Sharpston, *supra* n. 5, para. 163.

Court to adopt a purposive approach.[11] Taking into account that the main purpose of the right of residence under EU citizenship law is to facilitate free movement within the territory of the member states, this is the relevant context to consider whether the position of Mrs McCarthy fundamentally differs from Union citizens who are nationals of the host member state only. This is not the case because, from the point of view of the law on residence, she is in the same situation as all other British nationals who never left their country of origin. The fact that Mrs McCarthy also has an Irish passport is a formal issue which does not affect her right of free movement in comparison to other British nationals.

Judgment of the Court

In contrast to the reasoning of the Court in *Ruiz Zambrano*, which has been described as 'frustratingly opaque',[12] the *McCarthy* decision provides some more information on the limits to the scope of application of primary and secondary EU citizenship law.

With regard to the question whether Mrs McCarthy can benefit from a residence right under Article 3(1) of Directive 2004/38, the Court observes that 'a literal, teleological and contextual interpretation of that provision leads to a negative reply to that question.'[13] Directive 2004/38 only applies to citizens who move to or reside in a member state other than that of which they are a national. This right of residence in another member state is conditional and linked to the exercise of the freedom of movement for persons. *A contrario*, the conditions laid down in Directive 2004/38 cannot apply to static Union citizens because, as a principle of international law, member states cannot refuse its own nationals the right to reside in its territory. Hence, a Union citizen who has never exercised his right of free movement and has always resided in the member state of which he is a national falls outside the scope of application of Directive 2004/38. The mere fact that a static Union citizen is a national of more than one member state does not change this situation.[14]

As a result of the hierarchy of norms, the non-application of Directive 2004/38 does not necessarily imply that static Union citizens cannot derive any rights from their EU citizenship status under primary EU law. The Court therefore examines the application of Article 21 TFEU to the case at stake even though the preliminary questions only concerned Directive 2004/38. It first recalls the established case-law that EU Treaty rules governing freedom of movement for persons do not apply to

[11] Kokott, *supra* n. 6, para. 36.
[12] Lansbergen and Miller, *supra* n. 1, at p. 287.
[13] *Supra* n. 2, para. 31.
[14] Ibid., para. 41.

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situations which have no linking factor with EU law and are confined in all relevant respects within a single member state. It then refers to three relevant cases mitigating against a strict barrier between cross-border and purely internal situations. First, in *Schempp* it was found that a person who has not made use of his right to freedom of movement cannot, for that single reason, be excluded from the scope of application of EU law.[15] Second, it follows from *Ruiz Zambrano* that internal situations fall within the scope of application of primary EU citizenship law when national measures deprive EU citizens of the possibility to enjoy their citizenship rights.[16] Third, in *Jipa* the Court concluded that a Union citizen can invoke his EU citizenship rights against his member state of origin, in particular when his right to move and reside freely within the territory of the member states is at stake.[17]

Based upon those judgments, the Court concludes that EU citizenship precludes the adoption of national measures that 'have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status, or of impeding the exercise of the right to move and reside freely within the territory of the Member States.'[18] The situation of Mrs McCarthy does not fall within one of those scenarios. According to the Court, the failure of the British authorities to grant her a right of residence in the United Kingdom does not affect her right of free movement or any other EU citizenship right. In contrast to the Belgian children of Ruiz Zambrano she did not face a threat to leave the territory of the Union which would make the benefit of EU citizenship rights impossible. Moreover, she enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom as a national of this country.[19]

The Court also notes the differences with other cases involving persons having a double nationality. In *Garcia Avello* and *Grunkin and Paul*, the applicants did not exercise their physical right to free movement either but the dispute concerning the spelling of their surnames constituted an obstacle to their freedom of movement in the future. Hence, also in those cases, the impact of national measures on the effective enjoyment of their citizenship rights constituted the main criterion.[20] The absence of such an effect on the position of Mrs McCarthy explains why EU citizenship law is not applicable in this case.

[15] ECJ 12 July 2005, Case C-403/03, *Schempp*, para. 22.
[16] *Supra* n. 1, paras. 41-42.
[17] ECJ 10 July 2008, Case C-33/07, *Jipa*, para. 17.
[18] *Supra* n. 2, para. 49.
[19] Ibid., para. 50.
[20] Ibid., paras. 51-52.

Comments

A clarification of the purely internal rule

The principle, generally known as the 'purely internal rule', that the Treaty provisions governing freedom of movement for persons – including the rules on EU citizenship – cannot be applied to situations which are confined in all relevant respects within a single member state, came under serious pressure in a number of recent judgments. In *Rottmann*, the Court for the first time accepted that a situation could fall 'by reason of its nature and its consequences' within the ambit of EU citizenship law, without mentioning any cross-border element at all.[21] The opening towards the application of citizenship rules to purely internal situations was perhaps even more outspoken in the case of *Ruiz Zambrano*, where it was accepted that a child with the nationality of a member state could rely on EU citizenship rights without having exercised his right to free movement.[22] Whereas both *Rottmann* and *Ruiz Zambrano* raised questions about the continued relevance of the purely internal rule and the regulatory autonomy of the member states as protected under Article 5 TEU,[23] the McCarthy decision tempers the potential far-reaching consequences of those judgments.

The exercise of free movement rights is still a key element to bring a situation within the scope of EU citizenship law. The absence of any cross-border movement on the part of Mrs McCarthy excludes her from the benefit of EU citizenship rights. On the other hand, the decision also clarifies that a situation which is confined in all relevant respects within a single member state can nevertheless fall within the scope of application of EU law under two scenarios. First, this is the case when a national measure 'has the effect of depriving a Union citizen of the genuine enjoyment of the substance of the rights associated with the status of EU citizenship.' A second possibility is that a national measure impedes the right to move and reside freely within the territory of the member states.

The subtle distinction between those two scenarios is somewhat ambiguous. One could argue that an impediment of the right to move and reside throughout the Union already deprives Union citizens of the genuine enjoyment of their citizenship rights. The fact that the Court nevertheless makes this distinction gives support to the thesis that under certain specific circumstances the rules of EU citizenship can apply in the absence of any actual or potential cross-border movement. In other words, it does not seem that the 'genuine enjoyment test' introduced in *Ruiz Zambrano* can simply be reduced to a check whether or not the future

[21] ECJ 2 March 2010, Case C-135/08, *Rottmann*, para. 42.
[22] *Supra* n. 1.
[23] N. Nic Shuibhne, 'Seven Questions for Seven Paragraphs', 36 *ELRev.* (2011) p. 161.

exercise of free movement rights is at stake.[24] The impact of a national measure on the right to move and reside freely within the Union is a prominent but not the only criterion to decide whether or not EU citizenship rights apply.[25]

Apparently, the threshold to conclude that a measure deprives a Union citizen of the genuine enjoyment of his citizenship rights is rather high. Only in exceptional circumstances, such as situations where a citizen's residence in the Union or his status as citizen of the Union is at stake, EU citizenship law can be expected to apply to purely internal situations. It does not imply a right of family reunification for static Union citizens with a stable residence in the Union. Arguably, the Court could have decided differently. It could, for instance, have argued that in the absence of a right to family reunification in the United Kingdom, Mrs McCarthy may be required to leave the territory of the Union when she wants to live with her partner. This could be regarded as a deprivation of her citizenship rights in line with the principles developed in *Ruiz Zambrano*.[26] By not following this line of reasoning, the Court significantly reduces the potential impact of its *Ruiz Zambrano* judgment to such an extent that it even becomes difficult to imagine any other situation that could satisfy this condition. In any event, it seems that the rather ambiguous reference to 'the substance of the rights conferred by EU citizenship' provides no license to extend the scope of application of EU citizenship law to virtually all purely internal situations.

Hence, the most important criterion to decide whether or not a situation that is in its factual circumstances confined within a single member state comes within the scope of application of EU citizenship law concerns its impact on the future exercise of movement rights. Here, the threshold is remarkably lower. The exercise of a right to move and reside in another member state should not be made impossible, as under the *Ruiz Zambrano* and *Rottmann* circumstances, but rather become more difficult. For instance, the different spelling of surnames for persons with dual nationality and its practical complications in the event of cross-border movement is sufficient to trigger the application of the citizenship rules.[27] Of

[24] D. Kochenov, 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the European Union', 18 *Columbia J. Eur. L.* (2011 forthcoming).

[25] This is supported by the conclusion of the Court that the decision of the United Kingdom not takes into account the Irish nationality of Mrs McCarthy 'in no way affects her in her right to move to and reside freely within the territory of the Member States *or any other right conferred on her by virtue of her status as a Union citizen.*' *Supra* n. 2, para. 49 [emphasis added].

[26] In *Ruiz Zambrano*, the Court considered that without a resident and work permit for the non-EU parents, the EU children would have to leave 'the territory of the Union.' This constituted the main criterion to conclude that '[i]n those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.' *Supra* n. 1, para. 44. On the importance of the concept of the 'territory of the Union', *see*: Kochenov, *supra* n. 24.

[27] ECJ 2 Oct. 2003, Case C-148/02, *Garcia Avello*; 14 Oct. 2008, Case C-353/06, *Grunkin and Paul*.

course, this condition is easier to reconcile with the traditional interpretation of the purely internal rule. After all, the purely internal rule only excludes the application of EU law to national situations 'which have no factor linking them with any of the situations governed by European Union law.'[28] The potential future exercise of free movement rights provides for such a link with EU law.

A teleological interpretation of the cross-border requirement

The Court's clarification of the purely internal rule goes hand in hand with a teleologicial interpretation of the cross-border requirement. The Court essentially checks whether the decision of the British authorities to take into account the British nationality of Mrs McCarthy affects the *effet utile* of her EU citizenship rights, in particular her right to move and reside freely within the Union, and does not consider her dual nationality as a sufficient ground for the application of EU law. In other words, a purely formal cross-border element which in no way affects the ability of EU citizens to fully benefit from their citizenship rights does not bring a situation within the scope of EU law. Alternatively, purely internal situations with negative consequences for the full benefit of EU citizenship rights do fall within this scope.

In principle, a teleological interpretation of the Treaty provisions on free movement of persons is nothing new. For instance, the general principle to assimilate a member states' own nationals who made use of their right to freedom of interstate movement with that of other member state nationals is obviously inspired by the *effet utile* of the free movement provisions. On several occasions, the ECJ proclaimed that:

> All of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.[29]

In recent years, however, the Court increasingly adopted a flexible approach to bring certain situations within the scope of its jurisdiction. Particularly in the area of family reunification, the link between a contested national measure and its deterrent effect on the exercise of one of the fundamental freedoms has not always

[28] ECJ 1 April 2008, Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government*, para. 33.

[29] ECJ 7 July 1992, Case C-370/90 *Singh*, para. 16; 26 Jan. 1999, Case C-18/95 *Terhoeve*, para. 37; 27 Jan. 2000, Case C-190/98 *Graf*, para. 21; 15 June 2000, Case C-302/98 *Sehrer*, para. 32 and 16 May 2002, Case C-209/01, *Schilling and Fleck-Schilling*, para. 24.

been very straightforward.[30] In *Carpenter*, for instance, the occasional provision of services to persons established in other member states by a British national living in the United Kingdom constituted a sufficient link with EU law to guarantee a right of residence for his Philippine spouse. Despite the Court's reasoning that 'the separation of Mrs. and Mrs. Carpenter would be detrimental to their family life, and, therefore to the conditions under which Mr. Carpenter exercises a fundamental freedom',[31] there appeared to be no real connection between the applicant's ability to provide services abroad and the residence right granted to his wife.

The disconnection between the existence of a cross-border element triggering the application of EU law and the aims of the relevant EU Treaty provisions not only raised questions about the residual competences of the member states[32] but also largely undermined the legitimacy and predictability of the Court's decisions.[33] Under such circumstances, 'lottery rather than logic would seem to be governing the exercise of EU citizenship rights', as argued by Advocate-General Sharpston in her Opinion on *Ruiz Zambrano*.[34] The McCarthy decision at least has the merit to impose a clear limit on the tendency to accept formal cross-border elements void of any impact on the effective benefit of EU Treaty rights as a sufficient ground for invoking EU citizenship rights.

Remarkably, in an attempt to ensure the consistency of its case-law the Court also brings old judgments such as *Garcia Avello* and *Grunkin and Paul*, which have been criticized for being based on a tenuous cross-border link,[35] in line with its teleological interpretation. What mattered, according to the Court, was not the dual nationality or the simple discrepancy in the spelling of surnames but its implications for the effective exercise of the right to move and reside freely within the territory of the member states.[36] However, a careful reading of those judgments reveals that the Court did not refer to the implications of the dual nationality and the spelling rules in order to decide whether or not EU citizenship law applied to

[30] A. Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach', 15 *ELJ* (2009) p. 634.

[31] ECJ 11 July 2002, Case C-60/00, *Carpenter*, para. 39.

[32] 'Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State', Editorial comments, 40 *Common Market Law Review* (2003) p. 537.

[33] D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Paper (NYU Law School) 08*/10, p. 43-45, <http://centers.law.nyu.edu/jeanmonnet/papers/10/100801.html>, visited 20 June 2011.

[34] Sharpston, *supra* n. 5, para. 88.

[35] Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?', 46 *Common Market Law Review* (2009) p. 34; S. Currie, 'The Transformation of Union Citizenship', in S. Currie and M. Dougan (eds.), *50 Years of the European Treaties. Looking Back and Thinking Forward* (Hart 2009) p. 383; Kochenov, *supra* n. 33, at p. 45.

[36] *Supra* n. 2, paras. 51-52.

those cases. Only at a later stage, to conclude about the existence of discrimination on the basis of nationality under ex Articles 12 and 17 EC (now Article 18 and 20 TFEU), those implications were taken into account. With regard to the question of applicability of EU law, the Court simply observed that the children were nationals of one member state and lawful residents in the territory of another member state, thus creating the impression that dual nationality in itself constituted the single relevant triggering factor for the application of EU citizenship rules.[37] It is noteworthy that both Advocate-General Shapston and Kokott seemed to confirm this interpretation in their Opinions on *Ruiz Zambrano* and *McCarthy* respectively.[38]

The Court's decision to avoid a formal interpretation of the cross-border requirement is a welcome development. Accepting that a person can benefit from EU citizenship provisions on the basis of a rather artificial construction is difficult to reconcile with the logic of conferred powers as laid down in Article 5 TEU. Moreover, it reinforces the perception that the purely internal rule and its implications of (potential) reverse discrimination are fundamentally unfair. Hence, taking into account the implications of a national measure for the exercise of EU rights raises the legitimacy of the Court's reasoning.[39] On the other hand, a strict application of this approach may significantly reduce the number of situations falling under EU law. Based upon the McCarthy reasoning it may well be argued that no element in the situation of Mr. Carpenter prevented him to exercise his right to provide services abroad or to move and reside freely within the territory of the member states. A comparison between the *McCarthy* and *Carpenter* cases thus reveals the remaining uncertainties surrounding the exact definition of what constitutes a cross-border element that brings a situation within the ambit of EU law. Would it, for instance, have made a difference if Mrs McCarthy ever went on a holiday trip to another member state? Would that in itself be sufficient to bring her in the scope of the Treaties?[40]

It remains to be seen how the Court will further develop the criteria to delineate between situations falling within or outside EU law. In broad lines, the case-law appears to go in the direction of a double test. In the first place, the Court checks whether there is any evidence of actual cross border-movement. Significantly, this does not necessarily require physical movement from one member state to another as illustrated in *Zhu and Chen* but at least a 'more than formal' relationship between two member states. When this condition is not satisfied, the Court takes into account the implications of a national measure for potential cross-border

[37] *Supra* n. 27, at para. 27 (*Garcia Avello*) and para. 17 (*Grunkin and Paul*) respectively.
[38] Sharpston, *supra* n. 5 para. 84; Kokott, *supra* n. 6 para. 34.
[39] Tryfonidou, *supra* 35, at p. 1620.
[40] Sharpston, *supra* n. 5, para. 86.

movement in the future (Article 21 TFEU) as well as its impact on the exercise of other EU citizenship rights (Article 20 TFEU). The combination of both tests reconciles the Court's traditional case-law on the requirement of a cross-border requirement with the more recent judgments of *Rottmann* and *Ruiz Zambrano*.

A self-standing right of residence or a right to reside and move freely?

Despite the argument of Advocate-General Sharpson in *Ruiz Zambrano* that 'it would be artificial not to recognise that [...] Article 21 TFEU contains a separate right to reside that is independent of the right of free movement'[41] and the uncertainty created by the Court's judgment in that case,[42] the *McCarthy* decision reveals the inextricable links between the EU citizenship rights of movement and residence within the territory of the Union. This derives, in particular, from the observation that EU citizens have an unconditional right of residence in the country of their nationality under international law.[43] As a result, the right of residence granted under EU citizenship law can only have a significant meaning when applied in an inter-state context.

It is true that Article 21 TFEU, in contrast to the traditional free movement rights of the internal market, does not contain a clear cross-border requirement. However, the 'right to move and reside freely within the territory of the member states' is 'subject to the limitations and conditions laid down in the Treaties *and by the measures adopted thereunder.*'[44] Directive 2004/38 adopted under this provision is clearly restricted to cross-border situations, as observed by the Court in both *Ruiz Zambrano* and *McCarthy*.[45] Proceeding from the assumption that Directive 2004/38 intends to clarify the proper scope of application of Article 21 TFEU, granting a self-standing right of residence to static EU citizens – and a derived right of residence for their third country family members – would defy the will of the EU legislature. Hence, a consistent interpretation of Article 21 TFEU and Directive 2004/38 leads to the conclusion that the right of residence cannot be disconnected from actual or potential movement from one member state to another. A close reading of the Court's McCarthy judgment seems to confirm this interpretation. After observing that Directive 2004/38 only applies when a Union citizen has made use of his right of freedom of movement, the Court focuses on the potential obstacles for the future exercise of the right to move in accordance with Article 21 TFEU.[46]

[41] Ibid., para. 100.
[42] Lansbergen and Miller, *supra* n. 1.
[43] *Supra* n. 2, para. 29.
[44] Emphasis added.
[45] *Supra* n. 1, para. 39; *supra* n. 2, para 43.
[46] *Supra* n. 2, paras. 41-49.

How then to understand the right of residence granted to the Ruiz Zambrano family despite the absence of any cross-border movement? Did the Ruiz Zambrano children not have an unconditional right of residence in Belgium on the basis of their Belgian nationality and the rule of international law that a country cannot expel its own citizens? It is at least remarkable that the Court did not refer to this principle in *Ruiz Zambrano* whereas it constituted a key argument to conclude that EU law was not applicable in the case of McCarthy. Two elements seem important to understand the different outcomes in both cases. First, the minor children of Ruiz Zambrano were fully dependent upon their parents. Hence, the *de facto* exercise of the children's right of residence could not be disconnected from that of their parents' right to stay and work. This is different for an adult EU citizen who can exercise his rights independently. Second, the *Ruiz Zambrano* case concerned the application of Article 20 TFEU. This distinction is important. Where Article 21 TFEU exclusively deals with the right to reside and move freely within the territory of the Union, Article 20 TFEU refers to all EU citizenship rights. Arguably, the former is restricted to cross-border situations but the latter is not.[47] This explains why the Court in McCarthy so clearly distinguishes between measures that have the effect of depriving the genuine enjoyment of EU citizenship rights, on the one hand, and measures that impede the exercise of the right to move and reside freely within the territory of the member states, on the other hand. This reflects the distinction between Articles 20 and 21 TFEU respectively.

From this perspective, the granting of a residence right to Ruiz Zambrano is not so much related to his children's right to reside and move within the Union but more to the full application of their citizenship rights as laid down in the non-exhaustive list of Article 20 TFEU. Both in *Ruiz Zambrano* and *Rottmann*, the full benefit of all citizenship rights was at stake because the applicants either had to leave the territory of the Union or would simply lose the status of EU citizen. This was different in the case of Mrs McCarthy who only claimed a right of residence for herself and her husband. This right cannot be disconnected from a requirement of actual or cross-border movement under both Article 21 TFEU and Directive 2004/38. Only when also the genuine enjoyment of other citizenship rights, protected under Article 20 TFEU are at stake, a right of residence can be attributed to family members in the absence of inter-state movement.

The subtle differences in the Court's reasoning have important implications as far as the conditions of a residence right for third country nationals are concerned. With regard to third country family members of EU citizens falling within the

[47] The word 'inter alia' in the Art. 20 TFEU enumeration of EU citizenship rights seems of fundamental importance. This is a crucial difference in comparison to the pre-Lisbon formulation of this provision (ex Art. 17 EC), which only stated that 'Citizens of the Union shall enjoy the rights conferred by the Treaty and shall be subject to the duties imposed thereby.'

scope of Article 21 TFEU and Directive 2004/38 – in other words, in cross-border situations – the condition not to become an unreasonable burden to the public finances of the host member state applies. This was for instance the case in *Zhu and Chen*, where it was assumed that little Catherine, who had acquired the Irish nationality by being born in Belfast but never left the United Kingdom, exercised her right of free movement under Article 21 TFEU from birth.[48] In this case, the Court observed that Catherine and her Chinese mother had sufficient resources and a sickness insurance to claim a residence right under EU citizenship law.[49] In *Ruiz Zambrano*, on the other hand, the Court did not refer to those conditions for the simple reason that they are laid down in Directive 2004/38, which was not applicable to that case given the absence of any cross-border movement. Hence, by deriving a right of residence on the basis of Article 20 TFEU it seems possible to circumvent the strict residence conditions for third country family members. Of course, the Court in *Ruiz Zambrano* acknowledged that apart from the right of residence, the third country parents also obtained a work permit and a right to work but this in itself seems not necessarily a guarantee that they also find a job and do not become a burden to the social security system of the state concerned.

The unresolved issue of reverse discrimination

It is well-known that the non-application of EU law in purely internal situations potentially leads to reverse discrimination, i.e., the less favourable treatment of a member state's static nationals in comparison to its migrant compatriots and nationals of other member states.[50] This phenomenon is particularly widespread with regard to the right of family reunification where the member states' national rules are generally more stringent than the EU law rules for family members of migrant Union citizens. Moreover, 'static' EU citizens who cannot find a link with EU law – either on the basis of some cross-border movement or on the basis of the 'genuine enjoyment test' – are often also subject to stricter family reunification rules in

[48] See footnote 34 in the opinion of Advocate-General Kokott in Case C-434/09, *Shirley McCarthy*.

[49] ECJ 19 Oct. 2004, Case C-200/02, *Zhu et Chen*, paras. 27-28.

[50] *See*, e.g., P. Van Elsuwege and S. Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance soins flamande', 5-6 *Cahiers de droit européen* (2008) p. 659; E. Cannizzaro, 'Producing "Reverse Discrimination" Through the Exercise of EC Competences', *Yearbook of European Law* (Clarendon Press Oxford 1997) p. 29; M. Poiares Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination', in C. Kilpatrick, T. Novitz and P. Skidmore (eds.), *The Future of Remedies in Europe* (Hart 2000) p. 117; C. Dautricourt and S. Thomas, 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?', 34 *ELRev.* (2009) p. 433.

comparison to third country nationals residing lawfully in the territory of a member state. The latter can benefit from the conditions laid down in Directive 2003/86, which explicitly excludes family members of Union citizens.[51] This implies that the legal status of a third country national could deteriorate upon acquiring nationality in a member state which has less favourable rules for its own citizens.[52] In other words, by becoming a citizen of the Union a person may become subject to stricter conditions on family reunification unless, of course, that person exercises his right of free movement. This rather paradoxical outcome as well as the remaining uncertainties about the exact boundaries between situations falling inside or outside the scope of EU law make reverse discrimination difficult to accept in light of principles such as legal certainty and equal treatment of Union citizens.[53] On the other hand, it can be regarded as a logical consequence of the division of powers between the Union and the member states.[54]

The *McCarthy* decision does not deal explicitly with this issue but *de facto* upholds the possibility of reverse discrimination in the future. The right to family reunification under EU law is either reserved to citizens in cross-border situations falling within the scope of Directive 2004/38 or to Union citizens that are otherwise deprived of the genuine enjoyment of their Union citizenship rights. The addition of the latter condition is a direct result of *Ruiz Zambrano*, which reduced the margin for reverse discrimination to a certain extent.[55] However, as illustrated in *McCarthy*, it may appear rather difficult to prove that a national measure deprives a person of his EU citizenship rights. Moreover, a general right of equality under national constitutional law does not automatically lead to a treatment of purely internal situations comparable to that of situations falling within the scope of EU law.[56] Even though this outcome is difficult to accept when EU citizenship is truly the fundamental status of all EU nationals, it appears that a certain margin for reverse discrimination is therefore unavoidable under the current legal provisions.[57]

[51] Art. 3(3) of Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification, *OJ* (2003) L 251/12.

[52] Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008)610 final, p. 4.

[53] D. Kochenov, 'Ius Tractum of Many Faces. European Citizenship and the Difficult Relationship between Status and Rights', 15 *Columbia J. Eur. L.* (2009) p. 169. *See*, in this respect, also the opinion of Advocate-General Sharpston in Case C-34/09, *Ruiz Zambrano*, paras. 133-138.

[54] D. Hanf, 'Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity or Judicial Choice?', 18 *Maastricht Journal of European and Comparative Law* (2011) p. 29.

[55] P. Van Elsuwege, *supra* n. 1.

[56] P. Van Elsuwege and S. Adam, 'The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination', 5 *EuConst* (2009) p. 327-339.

[57] It is noteworthy that the European Commission proposed to include 'static' Union citizens in the scope of application of the Directive on family reunification. However, this article was deleted

The right to family life and the protection of fundamental rights in the legal order of the Union

The *McCarthy* judgment remains silent on the question whether the refusal to grant a residence right to the spouse of the applicant constitutes an infringement of the fundamental right to family life and thus implicitly confirms the vision of Advocate-General Kokott that this is not a matter of EU law. This may seem somewhat surprising given the importance attributed to this issue in the Court's case-law[58] and the multiple references to respect for family life in the Charter of Fundamental Rights.[59] However, EU fundamental rights may only be invoked when the contested measure comes within the scope of application of EU law.[60] In other words, there has to be a connection with another provision of EU law. The absence of such a link in the situation of Mrs McCarthy also excludes any scrutiny of fundamental rights on the part of the Court of Justice.

The Court's self-restraint not to deal with issues of fundamental rights in purely internal situations that do not have a link with EU law reflects the division of competences between the Union and the member states. Arguably, a far-reaching interpretation of the EU citizenship and fundamental rights provisions potentially affects the regulatory autonomy of the member states, which is protected in Article 5 TEU, to such an extent that it could lead to allegations of an *ultra vires* application of EU law.[61] Taking into account the warning issued in the Lisbon ruling of the German Constitutional Court[62] as well as the multiple barriers included in the Treaties to protect against judicial activism and competence creep – in particular as far as the application of the Charter is concerned[63] – the Court's approach in *McCarthy* is understandable. Also Advocate-General Sharpston acknowledged that her proposals to deal with the protection of fundamental rights

in light of the preparations of the new citizenship Directive 2004/38 and it was decided that 'the alignment of all Union citizens to family reunification will be reviewed later.' *See*: Proposal for a Council Directive on family reunification, COM(1999)638 final, p. 14 and the amended proposal, COM(2002)225 final, p. 3.

[58] *Supra* n. 31, para. 38; ECJ 25 July 2002, Case C-459/99, *MRAX*, para. 53; 25 July 2008, Case C-127/08, *Metock*, para. 62; 11 Dec. 2007, Case C-291/05, *Eind*, para. 44.

[59] Art. 7 (respect for private and family life); Art. 9 (right to marry and right to found a family); Art. 33 (family and professional life).

[60] ECJ 28 Oct. 1975, Case 36/75 *Rutili*, para. 26; 15 May 1986, Case 222/84 *Johnston*, paras. 17-19; 15 Oct. 1987, Case 222/86 *Heylens*, paras. 14-15.

[61] On this notion, *see*: P. Craig, 'The ECJ and *Ultra Vires* Action: A Conceptual Analysis', 48 *Common Market Law Review* (2011) p. 395.

[62] Decision of 30 June 2009, *BVerfGE* 2/08, paras. 240-241.

[63] Art. 6(1) TEU; Art. 51(2) Charter of Fundamental Rights and Declaration 1 annexed to the intergovernmental conference which adopted the Treaty of Lisbon all refer to the principle that the Charter cannot be applied outside the competences of the Union.

in the legal order of the Union cannot be pushed through without the involvement of the member states.[64]

At the current stage of the European integration process, the right to family reunification is not a self-standing right under EU law. In principle, a Union citizen can only benefit from this right in a context of inter-state movement and under the conditions laid down in Directive 2004/38.[65] However, in *Ruiz Zambrano* the Court accepted that residence (and working) rights can also be granted to third country national family members of static EU citizens when those are indispensible for the genuine enjoyment of the latter's EU citizenship rights. In all other occasions, family reunification is a matter of member state competence, which is to be applied within the margins of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[66]

Concluding remarks

The *McCarthy* decision provides another step in the dynamic development of the EU's citizenship case-law. In particular, it clarifies the complex relationship between primary EU citizenship law, Directive 2004/38 and the member state competences to deal with purely internal situations. On the one hand, the Court confirms that the application of Article 21 TFEU and Directive 2004/38, i.e., the right to reside and move freely within the territory of the member states, remains essentially based on a migration paradigm. The formal circumstance of dual nationality without any effects on actual or potential cross-border movement does not bring a situation within the scope of EU law. On the other hand, Article 20 TFEU has a more general scope of application. It concerns all rights connected to the status of EU citizenship and is not necessarily confined to cross-border situations. National measures affecting the genuine enjoyment of those rights also fall within the ambit of EU law. All other internal situations remain within the exclusive competence of the member states.

With this new approach, the ECJ tries to find a balance between the preservation of meaningful EU citizenship rights and the regulatory autonomy of the member states. It curtails the at first sight revolutionary consequences of *Ruiz Zambrano* in the sense that this judgment did not abolish the purely internal rule

[64] *Supra* n. 5, para. 173.

[65] With regard to the right to family reunification for third-country nationals residing lawfully in the territory of the member states, Directive 2003/86/EC applies, *OJ* (2003) L 251/12.

[66] According to the settled case-law of the European Court of Human Rights, the removal of a person from his family members is permissible only when this is 'necessary in democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.' *See*: ECtHR 26 Sept. 1997, Case No. 25017/94, *Mehemi* v. *France*, para. 34 and 19 Feb. 1998, Case No. 26102/95, *Dalia* v. *France*, para. 52.

nor the potential of reverse discrimination. This may seem regrettable in light of the idea that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' but appears to be an unavoidable consequence of the division of competences between the Union and the member states.

Notwithstanding the Court's efforts to find some logic in defining the boundaries between the scope of application of EU and national law, the criteria of 'cross-border movement' and 'genuine enjoyment of citizenship rights' cannot rule out a feeling of legal uncertainty.[67] Individual circumstances rather than a systematic and predictable interpretation of the EU Treaty rules seem to guide the Court's rulings.[68] This is, of course, an unpleasant observation and it will be for the Court to clarify the exact meaning of its criteria to distinguish between situations that do or do not have a link with the law of the Union.

[67] Helena Wray, for instance, observes that 'While lawyers may be able to conceptualise distinctions based on different legal systems and different sources within those legal systems, their clients, for whom the issue is both more urgent and more opaque, are likely to feel that their personal lives are subject to a series or arbitrary distinctions.' H. Wray, 'Family Life and EU Citizenship: A Commentary on McCarthy C-434/09, 5 May 2011', <http://eudo-citizenship.eu/citizenship-news/479-family-life-and-eu-citizenship-a-commentary-on-mccarthy-c-43409-5-may-2011>, visited 20 June 2011.

[68] N. Nic Shuibhne, *supra* n. 23; Lansbergen and Miller, *supra* n. 1.