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EUROPEAN PUBLIC LAW

Volume 18

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Number 3

Rapports

- The Belgian Constitutional Review Procedure under European Scrutiny *Prof. Patrick Peeters* 411
- English Rapport: The Coalition and the Constitution *Cosmo Graham* 423
- Hungary The New Fundamental Law *Attila Vincze & Marton Varju* 437

Scrutiny

- Liberty before Security: Case T-85/09 *Yassin Abdullah Kadi v. Commission (No. 2)* [2010] ECR 00000 (30 September 2010) *Hayley J. Hooper* 457

Featured Articles

- Human Rights and Acts by Troops Abroad: Rights and Jurisdictional Restrictions *Mads Andenas & Eirik Bjorge* 473
- Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy *Alina Tryfonidou* 493
- The French Parliament and European Integration *Arthur Dyevre* 527

Book Reviews

549

Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy

Alina TRYFONIDOU*

In its three recent rulings in the cases of *Zambrano*,¹ *McCarthy*,² and *Dereci*,³ the Court appears to have been determined to redefine the external boundaries of EU law, in cases involving the family reunification rights of Union citizens. These three judgments can be read as an indication that for Article 20 TFEU to apply, there is no longer a requirement of a cross-border element on the facts of the case, and that it is sufficient if the contested national measure has the effect of 'depriving citizens of the Union of the genuine enjoyment of the substance' of their rights (the '*Zambrano* principle'). The cases can, at the same time, also be read as a confirmation that the free movement provisions⁴ do – still – require a cross-border element and, in particular, the exercise of inter-State movement, in order to apply. Though the result in these cases has not been entirely unexpected, especially in the aftermath of the *Rottmann* ruling,⁵ it is rather problematic in that, although it is obvious that the Court wishes to redraw

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¹ Case C-34/09, *Zambrano v. Office national de l'emploi*, Judgment of Mar. 8, 2011, not yet reported. See, *inter alia* P. Van Elsuwege & D. Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13(4) EJML 443 (2011); A. Lansbergen & N. Miller, *European citizenship rights in internal situations: an ambiguous revolution? Decision of Mar. 8, 2011, Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, 7(2) EuConst. 287 (2011); R. Morris, *European Citizenship and the Right to Move Freely: Internal Situations, Reverse Discrimination and Fundamental Rights*, 1-2 MJ (Special Edition) 179 (2011); I. Solanke, *Using the citizen to bring the refugee in: Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, 75(1) MLR 101 (2012); K. Hailbronner & D. Thym, *Annotation Case C-34/09, Gerardo Ruiz Zambrano v Office National de l'Emploi (ONEM)*, 48(4) CMLRev. 1253 (2011).

² Case C-434/09, *McCarthy v. Secretary of State for the Home Department*, Judgment of May 5, 2011, not yet reported. For comments see, *inter alia*, P. Van Elsuwege, *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*, 7(2) EuConst. 308 (2011); N. Nic Shuibhne, *(Some of) The Kids are all Right*, 49(1) CMLRev. 349 (2012); P. Van Elsuwege & D. Kochenov, *supra* n. 1; A. Wiesbrock, *Disentangling the 'Union citizenship puzzle?' The McCarthy case*, 36(3) ELRev. 861 (2011). For an excellent, longer, article analysing *Zambrano* and *McCarthy* see D. Kochenov, *A real European citizenship: A new jurisdiction test: A novel chapter in the development of the Union in Europe*, 18(1) CJEL 55 (2011).

³ Case C-256/11, *Dereci*, Judgment of Nov. 15, 2011, not yet reported. For analysis see N. Nic Shuibhne, *supra* n. 2.

⁴ In this article, the term 'free movement provisions' will be used to refer to the market freedoms (i.e., Arts. 34, 35, 45, 49, 56, 63 TFEU) and Article 21 TFEU.

⁵ Case C-135/08, *Rottmann v. Freistaat Bayern* [2010] ECR I-1449. For comments and annotations see D. Kochenov, 'Annotation of *Rottmann*' 47(6) CMLRev. 1831 (2010); S. Mantu, 'Case Comment: *Janko Rottmann v Freistaat Bayern*' 24(2) IANL 182 (2010); T. Konstadinides, *La Fraternelle Europeene? the Extent of National Competence to Condition the Acquisition and Loss of Nationality*

the line dividing the national and EU spheres of competence, it does not make it entirely clear where this line now lies and leaves many essential questions unanswered, which will obviously require some time to be resolved. EU lawyers are consequently, once more, left with having to decipher as best as they can the real intentions of the Court in this new line of case-law, which has been further complicated by the fact that what the Court seems to have given with one hand in *Zambrano* (and before that in *Rottmann*), has taken it back to a large extent through its rulings in *McCarthy* and *Dereci*, which appear to confine the former two cases to their own exceptional facts.⁶ Moreover, the ‘reverse discrimination Pandora’s box’, the opening of which appears to have been the real target of these references, remains untouched: instead of providing a direct solution to this problem, the Court has chosen to – once again – broaden the scope of the Treaty provisions in order to include within it as many situations as possible and, thus, prevent the emergence of this type of differential treatment on a case-by-case basis. As will be explained, nonetheless, this is by no means an appropriate solution to the reverse discrimination conundrum.

1. THE CASES

1.1 THE MAIN ISSUES

All three cases under examination concerned the family reunification rights of static Union citizens who wished to live with their close family members in their State of nationality. *Zambrano* involved two minor children (Diego and Jessica Zambrano) who were born and had always resided in Belgium, who bore only Belgian nationality and wished to continue living in Belgium with their Colombian parents. In *McCarthy* the claimant was a dual British-Irish national who had always lived in the UK and wished to be accompanied in that State by her Jamaican husband. *Dereci* involved a number of Austrian nationals who had never exercised their free movement rights and who wished to continue living in Austria with their non-EU family members whose applications for a residence permit had been rejected by the Austrian authorities. The main question in all three cases was whether EU law could apply to the facts of the case in order to require the State of nationality of the said Union citizens to accept, or permit to continue living, within its territory their third-country national family members.

from the Perspective of EU Citizenship, 35(3) ELRev. 401 (2010); and R. Morris, *European Citizenship: Cross-Border Relevance, Deliberate Fraud and Proportionate Responses to Potential Statelessness*, 17(3) EPL 417 (2011). See also, the analysis in A. Tryfonidou, *The Impact of EU Law on Nationality Laws and Migration Control in the EU’s Member States*, 25(4) IANL 358, 363–366 (2011).

⁶ Nic Shuibhne observed that *McCarthy* and *Dereci* ‘join a significant minority of decisions constraining the scope of European Union citizenship’, another prominent example of such a case being, according to the same author, case C-158/07, *Förster* [2008] ECR I-8507. See N. Nic Shuibhne, *supra* n. 2, at 349.

1.2 THE OPINIONS OF THE ADVOCATES GENERAL

1.2[a] *Opinion of Advocate General Sharpston in Zambrano*

The Advocate General began her analysis by rearranging the issues to be resolved and explained that the questions referred by the national court envisage three main issues:⁷ (a) whether movement is needed to trigger the Treaty's provisions on citizenship of the Union; (b) what is the function of Article 18 TFEU in protecting individuals against reverse discrimination created by EU law, through the provisions relating to citizenship of the Union; and (c) what is the role that fundamental rights play in determining the scope of application of Articles 20 and 21 TFEU.⁸ After noting that 'the issue of fundamental rights appears as a leitmotif running through all three questions',⁹ she proceeded to consider 'whether it is plausible to think that Mr Ruiz Zambrano and his family run a real risk of suffering a breach of the fundamental right to family life under EU law'.¹⁰ The Advocate General provided a summary of the principles developed through the Court's case-law in relation to this right,¹¹ and concluded that 'the Belgian authorities' decision to order Mr Ruiz Zambrano to leave Belgium, followed by their continued refusal to grant him a residence permit, constitutes a potential breach of his children's fundamental right to family life and to protection of their rights as children; and thus (applying *Carpenter* and *Zhu and Chen*) of Mr Ruiz Zambrano's equivalent right to family life as their father'.¹² The Advocate General further explained that the breach would be likely to be serious since the deportation of Mr Zambrano and his wife would, essentially, mean that the children would also have to leave Belgium since, due to their young age, they would not be able to live an independent life in Belgium.¹³ This would involve 'uprooting them from the society and culture in which they were born and have become integrated'.¹⁴

The Advocate General then proceeded to deal respectively with each of the three main issues that had to be considered: (a) citizenship of the Union and the need for a cross-border element; (b) reverse discrimination and (c) fundamental rights.

When considering the first issue, the Advocate General began by explaining what type of cross-border element the Court has traditionally required in order for

⁷ Opinion in *Zambrano*, *supra* n. 1, at para. 45.

⁸ Opinion in *Zambrano*, *supra* n. 1, at paras. 46–48.

⁹ Opinion in *Zambrano*, *supra* n. 1, at para. 53.

¹⁰ *Id.*

¹¹ Opinion in *Zambrano*, *supra* n. 1, at paras. 54–61.

¹² Opinion in *Zambrano*, *supra* n. 1, at para. 62.

¹³ Opinion in *Zambrano*, *supra* n. 1, at para. 63.

¹⁴ *Id.*

a situation to fall within the scope of the fundamental freedoms;¹⁵ and further noted that '[i]n many citizenship cases, there is a clearly identifiable cross-border element that parallels the exercise of classic economic free movement rights'.¹⁶ The Advocate General, nonetheless, stressed that she is not of the view that 'exercise of the rights derived from citizenship of the Union is always inextricably and necessarily bound up with physical movement. There are also already citizenship cases in which the element of true movement is either barely discernible or frankly non-existent';¹⁷ and she cited the cases of *Garcia Avello*,¹⁸ *Zhu and Chen*,¹⁹ and *Rottmann*,²⁰ in support of her argument.²¹ Moreover, the Advocate General made reference to the various rights found in the citizenship part of the Treaty and explained that not all of them require a cross-border element.²² The important question was posed, however, in paragraph 80 of the Opinion: this is about the 'core' citizenship right – the right provided under Article 21 TFEU – and the question is whether it is a combined right (i.e., the right to 'move-and-reside'), whether it is a sequential right ('the right to move and, having moved at some stage in the past, to reside'), or two independent rights ('the right to move' and 'the right to reside')?²³ As expected having in mind her Opinion in the *Flemish Care Insurance scheme* case,²⁴ the Advocate General recommended that the Court should now recognize the existence of a free-standing, independent, right of residence under Article 21 TFEU.²⁵

The Advocate General then moved on to apply this to the facts of the case. She noted that '[i]f the parents do not have a derivative right of residence and are required to leave Belgium, the children will, in all probability, have to leave with them. That would, in practical terms, place Diego and Jessica in a 'position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto'. It follows – as it did for Dr Rottmann – that the children's situation 'falls, by reason of its nature and its consequences, within the ambit of EU law'.²⁶ Moreover, the Advocate General noted that since the Zambrano children cannot exercise their rights as Union citizens 'fully and effectively without the presence and support of their parents', their father's

¹⁵ Opinion in *Zambrano*, *supra* n. 1, at paras. 69–74.

¹⁶ Opinion in *Zambrano*, *supra* n. 1, at para. 75.

¹⁷ Opinion in *Zambrano*, *supra* n. 1, at para. 77.

¹⁸ Case C-148/02, *Garcia Avello* [2003] ECR I-11613.

¹⁹ Case C-200/02, *Zhu and Chen* [2004] ECR I-9925.

²⁰ *Supra* n. 5.

²¹ Opinion in *Zambrano*, *supra* n. 1, at para. 78.

²² Opinion in *Zambrano*, *supra* n. 1, at para. 79.

²³ Opinion in *Zambrano*, *supra* n. 1, at para. 80.

²⁴ Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government (Flemish Care Insurance scheme case)* [2008] ECR I-1683.

²⁵ Opinion in *Zambrano*, *supra* n. 1, at para. 101.

²⁶ Opinion in *Zambrano*, *supra* n. 1, at para. 95.

situation likewise falls within the scope of EU law.²⁷ Accordingly, it was concluded that ‘a refusal to recognize a derivative right of residence for Mr Ruiz Zambrano is capable, potentially, of constituting an interference with Diego’s and Jessica’s right of residence as Union citizens’ under Article 21 TFEU.²⁸

The Advocate General then proceeded to the second main issue, that of reverse discrimination. She explained that this would only arise in case the Court would decide not to follow her suggestion regarding the first issue, i.e. if it would hold that the situation was a purely internal one. As the Advocate General explained, this would lead to the emergence of reverse discrimination and the question is whether this should be held to be prohibited by Article 18 TFEU.²⁹ The Advocate General pointed out that the introduction and development of Union citizenship and the consequences that ensued from this ‘sit uncomfortably with the idea that one should simply follow, in respect of citizenship of the Union, the orthodox approach to free movement of goods and freedom of movement for employed and self-employed workers and capital’.³⁰ As she explained, ‘the underlying rationale of economic fundamental freedoms is to create a single market by eliminating barriers to trade and enhancing competition’ and it is still the idea of movement that ‘serves as the key to the rights granted by the fundamental freedoms’,³¹ which is, exactly, what causes reverse discrimination which the Court has ruled *not* to amount to a violation of EU law.³²

The Advocate General then referred to three cases (*Carpenter*,³³ *Zhu and Chen*³⁴ and *Metock*³⁵) and pointed out that ‘continuing to apply that traditional, hands-off approach is capable of generating results that are curiously random’.³⁶ Consequently, it was noted that ‘it is time to invite the Court to deal openly with the issue of reverse discrimination’,³⁷ though the Advocate General immediately admitted that ‘[a] radical change in the entire case-law on reverse discrimination is not going to happen overnight’ and explained that her suggestions are confined to cases involving citizenship of the Union, which is the area ‘where a change is perhaps most called for’.³⁸ The Advocate General explained that she does not wish to see the scope of Article 21 TFEU being stretched to include all situations that

²⁷ Opinion in *Zambrano*, *supra* n. 1, at para. 96.

²⁸ Opinion in *Zambrano*, *supra* n. 1, at para. 102.

²⁹ Opinion in *Zambrano*, *supra* n. 1, at paras. 123–124.

³⁰ Opinion in *Zambrano*, *supra* n. 1, at para. 131.

³¹ Opinion in *Zambrano*, *supra* n. 1, at para. 132.

³² Opinion in *Zambrano*, *supra* n. 1, at para. 133.

³³ Case C-60/00, *Carpenter v. Secretary of State for the Home Department* [2002] ECR 6279.

³⁴ *Zhu and Chen*, *supra* n. 19.

³⁵ Case C-127/08, *Metock* [2008] ECR 6241.

³⁶ Opinion in *Zambrano*, *supra* n. 1, at para. 135. *See also* paras. 136–138.

³⁷ Opinion in *Zambrano*, *supra* n. 1, at para. 139.

³⁸ Opinion in *Zambrano*, *supra* n. 1, at para. 140.

have traditionally been considered to be purely internal.³⁹ Her proposal, rather, is that ‘Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law’.⁴⁰ The Advocate General then proceeded to explain that Article 18 TFEU should be triggered when three cumulative conditions are met: (a) the claimant has to be a citizen of the Union resident in his Member State of nationality who has not exercised free movement rights under the TFEU, but whose situation is comparable, in other material respects, to that of other citizens of the Union in the same Member State who are able to invoke rights under Article 21 TFEU;⁴¹ (b) the reverse discrimination complained of has to entail a violation of a fundamental right protected under EU law;⁴² (c) Article 18 TFEU should be available only as a subsidiary remedy, confined to situations in which national law does not afford adequate fundamental rights protection.⁴³ The Advocate General then left it to the national court to apply the above three conditions to the facts of the case.

In the final part of her Opinion, the Advocate General returned to the issue of fundamental rights and, in particular, their scope of application under EU law. She had already noted in paragraph 84 of her Opinion that:

[i]t would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (for example, the provisions on equal pay) or when invoking EU secondary legislation (such as the services directive), but could not do so when merely ‘residing’ in that Member State.

The Advocate General summarized the current approach to the scope of application of EU fundamental rights⁴⁴ and stressed that in her view, the rule should be that ‘provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*’.⁴⁵ However, she recognized that the above proposal could not be put into effect unilaterally by the Court in the present case.⁴⁶

³⁹ Opinion in *Zambrano*, *supra* n. 1, at para. 143.

⁴⁰ Opinion in *Zambrano*, *supra* n. 1, at para. 144.

⁴¹ Opinion in *Zambrano*, *supra* n. 1, at para. 146. In other words, there must be reverse discrimination which arises as a result of the partial application of EU law.

⁴² Opinion in *Zambrano*, *supra* n. 1, at para. 147.

⁴³ Opinion in *Zambrano*, *supra* n. 1, at para. 148.

⁴⁴ Opinion in *Zambrano*, *supra* n. 1, at paras. 156–162.

⁴⁵ Opinion in *Zambrano*, *supra* n. 1, at para. 163.

⁴⁶ Opinion in *Zambrano*, *supra* n. 1, at para. 171.

1.2[b] *Opinion of Advocate General Kokott in McCarthy*

Advocate General Kokott began her analysis by considering whether Mrs McCarthy, a dual British/Irish national who was born and had always lived in the UK, is a ‘beneficiary’ within the meaning of Directive 2004/38.⁴⁷ It was concluded that she is not,⁴⁸ since the Directive aims at facilitating free movement between Member States, noting that ‘[t]his interpretation is confirmed when the legislative context of Article 3(1) of Directive 2004/38 is looked at and the directive’s objective is taken into account’.⁴⁹ The Advocate General then moved on to consider whether ‘the outcome reached so far can be altered in any way by the fact that Mrs McCarthy is a national of two Member States of the European Union – a British national and an Irish national’⁵⁰ and, again, reached the conclusion that it cannot.⁵¹ The Advocate General recalled case-law where the dual nationality of a Union citizen made it necessary, ‘when determining his name, to depart from the domestic rules in one of his Member States of origin governing a person’s name’⁵² and noted that ‘[t]he position that may obtain in relation to fields such as that of the rules governing a person’s name cannot, however, necessarily be transposed to the right of residence at issue here’.⁵³ The Advocate General explained that ‘the issue is whether, in this context too, the position of Union citizens differs, in view of their dual nationality, in a legally relevant way from the situation of other Union citizens who are nationals of the host Member State only’.⁵⁴ As an answer to this question, it was noted that ‘[t]he right at issue here, namely the right of residence of Union citizens, for themselves and their family members, serves to facilitate free movement of Union citizens within the territory of the Member States. In this connection, no particular factors arise from the dual nationality of a Union citizen in Mrs McCarthy’s position. From the point of view of the law on residence, she is in the same situation as all other British nationals who have always lived in England and never left their country of origin: she does not exercise her right of free movement’.⁵⁵

The Advocate General then noted that in such cases where a national of a Member State has never exercised any free movement rights, reverse

⁴⁷ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

⁴⁸ Opinion in *McCarthy*, *supra* n. 2, at paras. 25, 30.

⁴⁹ Opinion in *McCarthy*, *supra* n. 2, at para. 26. See paras. 27–30 for an elaboration on why the 2004 Directive does not cover the situation of Mrs McCarthy.

⁵⁰ Opinion in *McCarthy*, *supra* n. 2, at para. 32.

⁵¹ Opinion in *McCarthy*, *supra* n. 2, at para. 45.

⁵² Opinion in *McCarthy*, *supra* n. 2, at para. 34.

⁵³ Opinion in *McCarthy*, *supra* n. 2, at para. 35.

⁵⁴ *Id.*

⁵⁵ Opinion in *McCarthy*, *supra* n. 2, at para. 37. See also, at para. 38 of the Opinion.

discrimination can arise,⁵⁶ but quickly recalled that ‘EU law provides no means of dealing with this problem’.⁵⁷ She also noted that there have been suggestions in legal literature and by other Advocates General to the effect that a prohibition on reverse discrimination should be inferred from citizenship of the Union,⁵⁸ but also noted that, as repeatedly stressed by the Court, ‘citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link with EU law’.⁵⁹ Of course, despite her rather negative position on the need for the EU to resolve the reverse discrimination conundrum, the Advocate General admitted that ‘[i]t cannot of course be ruled out that the Court will review its case-law when the occasion arises and be led from then on to derive a prohibition on discrimination against one’s own nationals from citizenship of the Union’.⁶⁰ The Advocate General nonetheless concluded that the present case is not the right context for detailed examination of reverse discrimination since the latter does not emerge on the facts: ‘even if it were to be disregarded that Mrs McCarthy has not exercised her right of free movement, and she were in principle allowed to rely on the provisions of Directive 2004/38, she would nevertheless not fulfil the remaining conditions for the acquisition of longer-term rights of residence that are to be met by Union citizens’.⁶¹

1.2[c] *View of Advocate General Mengozzi in Dereci*⁶²

The Advocate General began his analysis by noting that it is necessary to ‘gain a better understanding of the implications’⁶³ of *Zambrano* and it is, therefore, the clarification of the ‘Zambrano principle’, that appears to have been the main aim of the referring court in making this reference. He then recalled the judgments in *Zambrano* and *McCarthy*,⁶⁴ and proceeded to apply the law – as developed in the above cases – to the case under examination. After noting that, like in the above cases, Directive 2004/38 was not applicable to the facts of the present case,⁶⁵ he proceeded to explain that the facts involved are not ‘characterised by a risk of deprivation of the genuine enjoyment of the substance of the rights attaching to

⁵⁶ Opinion in *McCarthy*, *supra* n. 2, at para. 39.

⁵⁷ Opinion in *McCarthy*, *supra* n. 2, at para. 40.

⁵⁸ Opinion in *McCarthy*, *supra* n. 2, at para. 41.

⁵⁹ *Id.*

⁶⁰ Opinion in *McCarthy*, *supra* n. 2, at para. 42.

⁶¹ Opinion in *McCarthy*, *supra* n. 2, at para. 43. For an explanation of why Mrs McCarthy does not fulfil the conditions for acquiring a right of residence under EU law see para. 44 of the Opinion.

⁶² It should be noted that in this case the Advocate General delivered a ‘View’ as opposed to an ‘Opinion’, under an accelerated procedure to the reference.

⁶³ See Advocate General’s View in *Dereci*, *supra* n. 3, at para. 17.

⁶⁴ View, *supra* n. 3, at paras. 18–31.

⁶⁵ View, *supra* n. 3, at para. 32.

citizenship of the Union or an impediment to the exercise of the right of the Union citizens concerned to move and reside freely within the territory of the Member States'. This was mainly because none of the Union citizens involved on the facts was dependent, either from an economic or a legal point of view, on their third-country national family member and, thus, the refusal of the Austrian authorities to allow the latter to reside within its territory would not make it necessary for the former to leave the territory of the EU.⁶⁶

The Advocate General then stressed that "the substance of the rights attaching to the status of European Union citizen" within the meaning of the abovementioned judgment in *Ruiz Zambrano* does not include the right to respect for family life enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8(1) of the ECHR;⁶⁷ and explained that 'this position can be explained less by respect for the wording of Article 20(2) TFEU, in which the list of rights enjoyed by Union citizens is clearly not exhaustive, than by the concern that the Union's powers and those of its institutions should not encroach on those of the Member States in the field of immigration or on those of the European Court of Human Rights in the field of protection of fundamental rights, in accordance with Article 6(1) TFEU and Article 51(2) of the Charter of Fundamental Rights'.⁶⁸ He then noted that on the facts of the case under examination, 'the refusal to issue a residence permit and/or the expulsion orders made against any of the claimants in the main proceedings – parent, child or spouse of a national of a Member State – may constitute a breach of respect for family life guaranteed by Article 8(1) of the ECHR'⁶⁹ but explained that 'such an infringement would stem from the Republic of Austria's obligations under the ECHR and not as a Member State of the European Union'.⁷⁰

Unlike his colleagues in the other cases under discussion, Advocate General Mengozzi only implicitly touched upon the issue of reverse discrimination. In particular, he noted that one of the paradoxes that emerge as a consequence of the simple application of *Zambrano* and *McCarthy* on the facts in *Dereci* is that 'in order to be able actually to enjoy a family life within the territory of the Union, the Union citizens concerned *have to* exercise one of the freedoms of movement laid down in the TFEU'.⁷¹ Finally, after providing a few examples of situations where it is unclear how they will be decided in the light of the *Zambrano* reasoning,⁷² the Advocate General noted that the situation is 'not very satisfactory

⁶⁶ View, *supra* n. 3, at para. 33. For an analysis of the reasons see paras. 34–36 of the View.

⁶⁷ View, *supra* n. 3, at para. 37. See also, para. 38.

⁶⁸ View, *supra* n. 3, at para. 39. See also, para. 40.

⁶⁹ View, *supra* n. 3, at para. 41.

⁷⁰ View, *supra* n. 3, at para. 42.

⁷¹ View, *supra* n. 3, at para. 44.

⁷² View, *supra* n. 3, at paras. 45–48.

from the point of view of legal certainty' and that '[t]hese are the different specific situations which will be referred to the Court in references for preliminary rulings which will determine the precise scope of *Ruiz Zambrano*'.⁷³

1.3 THE JUDGMENTS OF THE COURT

1.3[a] *The judgment in Zambrano*

The Court held that 'Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.⁷⁴

The Court began its analysis by considering whether – as argued by all the governments submitting observations to the Court – the situation was a purely internal one, given that the two *Zambrano* children reside in the Member State of which they are nationals and have never left the territory of that Member State.⁷⁵

The Court firstly pointed out that Directive 2004/38 is not applicable on the facts of the case since it 'applies to "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members ..."'.⁷⁶ The Court then noted that Article 20 TFEU confers the status of Union citizen on every person holding the nationality of a Member State and pointed out that the two *Zambrano* children who possess Belgian nationality 'undeniably enjoy that status'.⁷⁷ In the subsequent paragraph, it recalled the, by now, well-known 'mantra' that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'.⁷⁸

The Court then proceeded to the main paragraph of the judgment, where it pronounced that '[i]n those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' and cited *Rottmann*,⁷⁹ as the authority for this new

⁷³ View, *supra* n. 3, at para. 49.

⁷⁴ *Zambrano*, *supra* n. 1, at para. 45.

⁷⁵ *Zambrano*, *supra* n. 1, at para. 37.

⁷⁶ *Zambrano*, *supra* n. 1, at para. 39.

⁷⁷ *Zambrano*, *supra* n. 1, at para. 40.

⁷⁸ *Zambrano*, *supra* n. 1, at para. 41.

⁷⁹ *Supra* n. 5.

proposition.⁸⁰ It then applied this to the facts of the case and stressed that '[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect'.⁸¹ It further explained this by saying that '[i]t must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In 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'.⁸²

1.3[b] *The judgment in McCarthy*

In the first half of its judgment the Court considered whether the situation of Mrs McCarthy falls within the scope of Directive 2004/38.⁸³ The Court concluded that it does not, given that Mrs McCarthy has not exercised her right to free movement; and since the latter does not fall within the scope of the Directive, her husband cannot derive any rights from that Directive either.⁸⁴

In the second half of the judgment, the Court proceeded to consider whether Mrs McCarthy's situation is covered by Article 21 TFEU. Again, the Court answered this question in the negative. The Court began its analysis by recalling the doctrine of purely internal situations⁸⁵ and – citing *Schempp*⁸⁶ – it noted that just because a Union citizen has not made use of her right to freedom of movement that does not mean that her situation is purely internal to a Member State.⁸⁷ The Court then made reference to 'the Zambrano principle',⁸⁸ and concluded that 'no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen or of impeding the exercise of

⁸⁰ *Zambrano*, *supra* n. 1, at para. 42.

⁸¹ *Zambrano*, *supra* n. 1, at para. 43.

⁸² *Zambrano*, *supra* n. 1, at para. 44.

⁸³ *Supra* n. 47.

⁸⁴ *McCarthy*, *supra* n. 2, at para. 42.

⁸⁵ *McCarthy*, *supra* n. 2, at para. 45.

⁸⁶ Case C-403/03, *Schempp* [2005] ECR I-6421.

⁸⁷ *McCarthy*, *supra* n. 2, at para. 46.

⁸⁸ *McCarthy*, *supra* n. 2, at para. 47.

her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU'.⁸⁹ It further explained this by saying that 'the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move 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'.⁹⁰

The Court then went on to distinguish the facts of the case firstly, from *Zambrano*⁹¹ and, secondly, from those in *Garcia Avello*, which was another case that involved persons who held the nationality of two Member States and who had never exercised their right to move between Member States.⁹² As regards the former, the Court stressed that 'by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union'.⁹³ With regards to *Garcia Avello*, the Court noted that 'what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued'.⁹⁴

The Court concluded that Mrs McCarthy's situation is a purely internal one and has no factor linking it with any of the situations envisaged by EU law⁹⁵ since 'the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU'.⁹⁶

⁸⁹ *McCarthy*, *supra* n. 2, at para. 49.

⁹⁰ *Id.*

⁹¹ *Supra* n. 1.

⁹² *Supra* n. 18.

⁹³ *McCarthy*, *supra* n. 2, at para. 50.

⁹⁴ *McCarthy*, *supra* n. 2, at para. 52.

⁹⁵ *McCarthy*, *supra* n. 2, at para. 55.

⁹⁶ *McCarthy*, *supra* n. 2, at para. 54.

1.3[c] *The judgment in Dereci*⁹⁷

The judgment is characterised by a strong emphasis on the interpretation of the law, rather than on its application to the facts of the case: the Court was obviously more interested in providing further guidance on the interpretation of the ‘Zambrano principle’, rather than in applying the above principle to the particular facts of the case.

The Court began its analysis by stating that the facts of the case are covered neither by Directive 2003/86⁹⁸ (because this measure does not apply to the family members of Union citizens),⁹⁹ nor by Directive 2004/38 (which only applies to Union citizens who have moved across borders and which rely on it in a Member State other than that of their nationality).¹⁰⁰

After recalling the purely internal rule,¹⁰¹ the Court observed that the situation of a Union citizen who has not made use of the right to freedom of movement ‘cannot, for that reason alone, be assimilated to a purely internal situation’.¹⁰² It then repeated the *Grzelczyk* pronouncement that ‘citizenship of the Union is intended to be the fundamental status of nationals of the Member states’,¹⁰³ and noted that ‘[a]s nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin’.¹⁰⁴

The Court then quoted the main paragraphs of the judgment in *Zambrano*,¹⁰⁵ and subsequently stressed the following, by way of clarification:

It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.¹⁰⁶

That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, *exceptionally*, be refused to a third country

⁹⁷ For reasons of space, the analysis in this piece will be confined to the part of the judgment where the Court examines the application of Article 20 TFEU.

⁹⁸ Directive 2003/86 on the right to family reunification, (2003) OJ L251/12.

⁹⁹ *Dereci*, *supra* n. 3, at paras. 46–49.

¹⁰⁰ *Dereci*, *supra* n. 3, at paras. 50–57.

¹⁰¹ *Dereci*, *supra* n. 3, at para. 60.

¹⁰² *Dereci*, *supra* n. 3, at para. 61.

¹⁰³ *Dereci*, *supra* n. 3, at para. 62; Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para. 31.

¹⁰⁴ *Dereci*, *supra* n. 3, at para. 63.

¹⁰⁵ *Dereci*, *supra* n. 3, at paras. 64–65.

¹⁰⁶ *Dereci*, *supra* n. 3, at para. 66.

national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.¹⁰⁷

Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.¹⁰⁸

The Court did not subsequently seek to apply the above principles to the facts of the case, but merely observed that the fact that a situation does not satisfy the above requirements, does not mean that a Member State may not be obliged to permit third-country nationals to reside in its territory, since this may amount to a violation of human rights and, in particular, of the right to the protection of family life.¹⁰⁹ The Court was not willing, however, to dwell extensively on this issue and, after stressing the limits to the scope of application of the EU Charter of Fundamental Rights,¹¹⁰ it simply noted that ‘in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR’,¹¹¹ to which all Member States are parties.¹¹²

2. ANALYSIS

2.1 REDRAWING THE OUTER BOUNDARIES OF EU LAW: DISPENSING WITH THE NEED FOR A CROSS-BORDER ELEMENT WHEN APPLYING ARTICLE 20 TFEU?

Since the relatively early days of the EU’s existence, one of the cardinal features of EU free movement law has been the purely internal rule. According to this rule, situations which are purely internal to a Member State and, thus, do not present any link with the aims of the free movement provisions, fall outside the scope of application of these provisions and, therefore, are governed by the laws of the

¹⁰⁷ *Dereci*, *supra* n. 3, at para. 67. Emphasis added.

¹⁰⁸ *Dereci*, *supra* n. 3, at para. 68.

¹⁰⁹ *Dereci*, *supra* n. 3, at para. 69.

¹¹⁰ *Dereci*, *supra* n. 3, at para. 71.

¹¹¹ *Dereci*, *supra* n. 3, at para. 72.

¹¹² *Dereci*, *supra* n. 3, at para. 73.

relevant Member State.¹¹³ The important question, of course, is what makes a situation a purely internal one?

As noted by Advocate General Sharpston, the question of whether a situation presents a sufficient link with a certain EU provision ‘must be answered in the light of the goals of the relevant’ provision.¹¹⁴ Hence, a situation which is not connected in any way with the aims of a particular provision, should not be governed by it. In line with this, when the purely internal rule was firstly articulated by the Court in the context of free movement law back in the late 1970s, it was explained that situations should be excluded from the ambit of the free movement provisions if they are deemed to be purely internal and this is so ‘where there is no factor connecting them to any of the situations envisaged by’ EU law.¹¹⁵ This pronouncement obviously fails to give an exact definition of what qualifies as a purely internal situation, but it is here, exactly, where its beauty lies. By keeping the meaning of the phrase ‘purely internal’ quite vague, the Court has maintained enough freedom in order to be able to tweak its meaning in a way that takes into account any developments concerning the aims that are ascribed to the relevant Treaty provision.

The market freedoms are – together with the competence given to the EU institutions to enact harmonizing legislation¹¹⁶ – the tools that are used in pursuing the internal market policy of the EU. They are, in essence, prohibitions on the application by the Member States of any measures that are capable of impeding the movement of products and factors of production *from one Member State to another*. In other words, the main notion that defines their scope is that of ‘restriction on free (inter-State) movement’. This is immediately apparent from a quick perusal of the relevant Treaty provisions: Articles 34 and 35 TFEU prohibit quantitative restrictions and measures having equivalent effect on ‘imports’ and ‘exports’, the two latter terms having always been interpreted in this context as referring to imports from and exports to *other Member States*;¹¹⁷ Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a

¹¹³ In the context of EU free movement law, a situation which is purely internal is, also, at the same time one which lacks a sufficient link with EU law. In other EU law areas, nonetheless, the fact that a situation is purely internal to a Member State does not, necessarily, mean that it also falls outside the scope of application of the relevant Treaty provisions. See, for instance, Article 157 TFEU and Case 43/75, *Defrenne v. Sabena (No. 2)* [1976] ECR 455. See also, the comments by Advocate General Sharpston in paragraph 136 of her Opinion in the *Flemish Care Insurance Scheme* case, *supra* n. 24; and M. Poiares Maduro, ‘The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination’ in Kilpatrick, Novitz and Skidmore (eds.), *The Future of European Remedies* (Hart, 2000), at p. 121

¹¹⁴ Opinion of Advocate General Sharpston in the *Flemish Care Insurance Scheme* case, *supra* n. 24, at para. 136.

¹¹⁵ Case 175/78, *R v. Saunders* [1979] ECR 1129, para. 11.

¹¹⁶ This is, mainly, provided by Article 114 TFEU.

¹¹⁷ See, for instance, Joined Cases 314–316/81 and 83/82, *Waterkeyn* [1982] ECR 4337. Contrast this with the Court’s relatively recent case-law in the area of customs duties (Article 30 TFEU): Joined

Member State *in the territory of another Member State*; Article 56 TFEU prohibits restrictions on the freedom to provide services by persons ‘who are established in a Member State other than that of the person for whom the services are intended’; and Article 63 TFEU prohibits restrictions on the movement of capital between Member States (and, also, *between Member States* and third countries). Even Article 45 TFEU, which does not make it clear that its aim is to ensure that workers can move freely *between Member States*, has been read to this effect and, hence, it has been held to exclude from its scope situations where it is only the free movement of a worker *within* a Member State that is impeded.¹¹⁸

Accordingly, the market freedoms have, always, been interpreted as requiring a cross-border element, this, traditionally, having been read as a requirement that the situation in question must involve the exercise of free *movement* between Member States which has an economic purpose, and the contested measure must be capable of impeding that movement.¹¹⁹ Yet, as argued elsewhere,¹²⁰ in recent years the Court has come to accept other types of cross-border elements – short of free movement for an economic purpose – as establishing a sufficient link with the aims of the market freedoms and, thus, as bringing within the scope of these provisions situations which would, traditionally, be deemed to be purely internal. In particular, there has been case-law where the exercise and impediment of free movement which was *not* for an economic purpose,¹²¹ sufficed for bringing a situation within the scope of the market freedoms, if this movement meant that the applicant was exercising an economic activity in one Member State, whilst residing in the territory of another.¹²² Moreover, there have been cases where the Court did not appear to be insisting on a link between the contested measure and an impediment to the inter-State movement for an economic purpose that was exercised on the facts.¹²³ This approach has been particularly prevalent in recent

Cases C-363, 407, 411/93, *Lancry* [1994] ECR I-3957; Case C-72/03, *Carbonati Apuani* [2004] ECR I-8027; Joined Cases C-485&486/93, *Simitzi and Kos* [1995] ECR I-2655.

¹¹⁸ This, actually, was the factual background in *Saunders*, *supra* n. 115, the case where the Court firstly pronounced on the meaning of a purely internal situation. This has, also, more recently been affirmed in the *Flemish Care Insurance Scheme* case, *supra* n. 24.

¹¹⁹ For an explanation of the Court’s traditional approach to the requisite link with the market freedoms see A. Tryfonidou, *Reverse Discrimination in EC Law* Ch. 2 (Kluwer, 2009).

¹²⁰ *Id.* Ch. 3.

¹²¹ In Case C-112/91, *Werner* [1993] ECR I-429 the Court held that a situation is purely internal and escapes the ambit of the provisions on freedom of establishment if the movement that is exercised is not for an economic purpose but merely in order to take-up residence in another Member State.

¹²² This is what I have called the ‘Ritter-Coulais saga’. See, *inter alia*, Case C-152/03, *Ritter-Coulais* [2006] ECR I-1711 and Case C-470/04, *N* [2006] ECR I-7409. For an explanation see A. Tryfonidou, *In search of the aim of the EC free movement of persons provisions: Has the Court of Justice missed the point?*, 46(5) *CMLRev.* 1591 (2009).

¹²³ See, for instance, Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano Spa* [2000] ECR I-4139.

family reunification case-law,¹²⁴ but can also be seen in older cases where the Court interpreted Article 7(2) of Regulation 1612/68 as covering situations where the refusal of a social or tax advantage to a migrant worker or his family, did not appear to be capable of impeding the former's exercise of inter-State movement.¹²⁵ Furthermore, Article 45 TFEU (read together with Articles 18 and 20 TFEU), has been held to apply to a situation which did not involve physical inter-State movement, but rather the job-finding efforts of a national of one Member State in the territory of another, after arriving in the latter directly from a third country.¹²⁶

As is well-known, in 1993 the Treaty of Maastricht introduced the status of Union citizenship. The (strictly speaking) 'citizenship provisions' can be found in Part Two of the FEU Treaty. As explained by Advocate General Sharpston in her Opinion in *Zambrano*, some of the citizenship rights found in the FEU Treaty 'can only be invoked in a Member State other than the Member State of which the person concerned is a national' (i.e., Article 22 TFEU), others (Articles 227 and 228 TFEU) 'appear to be capable of being exercised without geographical limitation', whilst the right to diplomatic or consular protection provided under Article 23 TFEU is exercisable in any third country without there being a requirement of an intra-EU cross-border element.¹²⁷

The difficulty, nonetheless, lies in the interpretation of Article 21 TFEU. This provision refers to 'the right to move and reside freely within the territory of the Member States'. This, clearly, can be interpreted as prohibiting restrictions on free movement between Member States, but also restrictions on free movement *within* Member States; and, in adopting the latter approach, the Court would be emulating the approach it has followed in its customs duties case-law.¹²⁸ Nonetheless, despite some arguments in favour of adopting the latter approach, the Court has shied away from taking this step and has insisted in its case-law on the

¹²⁴ See, for instance, *Carpenter*, *supra* n. 33; Case C-291/05, *Eind* [2007] ECR I-10719; *Metock*, *supra* n. 35; Case C-551/07, *Sahin*, Order of 19 December 2008; Case C-310/08, *Ibrahim* [2010] ECR I-1065; Case C-480/08, *Teixeira* [2010] ECR I-1107. For more on this see A. Tryfonidou, *Family reunification rights of (migrant) Union citizens: Towards a liberal approach*, 15(5) ELJ 634 (2009); P. Starup & M. Elsmore, *Taking a logical step forward? Comment on Ibrahim and Teixeira*, 35(4) ELRev. 571 (2010).

¹²⁵ Case 32/75, *Cristini v. SNCF* [1975] ECR 1085; Case C-237/94, *O'Flynn* [1996] ECR I-2617; Case 65/81, *Reina* [1982] ECR 33; Case 59/85, *Reed* [1985] ECR 1283. For excellent analyses of this case-law see D. O'Keefe, *Equal Rights for Migrants: the Concept of Social Advantages in Article 7(2), Regulation 1612/68*, 5(1) YEL 93 (1985); C. Barnard, *The Substantive Law of the EU: The Four Freedoms 282-294* (OUP 2010).

¹²⁶ Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703, para. 63.

¹²⁷ Opinion of AG Sharpston in *Zambrano*, *supra* n. 1, at para. 79.

¹²⁸ See *Lancry, Simitzi and Kos* and *Carbonati Apuani*, *supra* n. 117. For a detailed explanation of these cases see A. Tryfonidou, *Resolving the reverse discrimination paradox in the area of customs duties: The Lancry saga*, 22(3) EBLR 311 (2011).

existence of a cross-border element before this provision is held to apply.¹²⁹ Therefore, according to the Court's traditional approach, a situation in this context does not qualify as purely internal if it involves an impediment to free movement that has been exercised between Member States. Nonetheless, like with the market freedoms, in this context as well, the Court appears to have adopted a more lax approach to the establishment of a link with EU law, in recent years. Hence, it has included within the scope of Article 21 TFEU situations where the contested national measure did not appear capable of impeding the inter-State movement that was exercised on the facts; and in the *Zhu and Chen* case,¹³⁰ the Court appears to have dispensed altogether with the requirement of physical inter-State movement, since baby Chen and her mother had moved from one part of the UK to another and, yet, the situation was held to fall within the scope of Article 21 TFEU because the former held the nationality of a Member State other than the one in which she was seeking to reside. The Court went even further in the *Schempp* case,¹³¹ where the situation of a German national who had always resided in Germany was held to fall within the scope of Article 21 TFEU as a result of the fact that his former wife's exercise of her right to free movement under that provision 'had an effect on his right to deduct [the maintenance payments made to her from his taxable income] in his Member State of residence'.¹³²

Apart from the above provisions which bestow specific rights on Union citizens, Part Two of the Treaty includes a more generic provision – Article 20 TFEU. The first paragraph of this Article introduces the notion of Union citizenship. Obviously, this provision is of a different 'genre' from that of Article 21 TFEU; although the latter has been considered to form a group with the market freedoms and all are collectively referred to as 'the free movement provisions', Article 20 TFEU does not make any reference to free movement. In fact, the terminology used attributes to it a constitutional nature which implies that this provision is about much more than just free movement: it does not merely seek to ensure that Member State nationals can move freely between Member States but rather, especially when read in its entirety, it seeks to ensure that all Union citizens enjoy the rights provided for by the Treaties (including, of course, the right to free movement).¹³³

¹²⁹ See, *inter alia*, the *Flemish Care Insurance Scheme* case, *supra* n. 24.

¹³⁰ *Supra* n. 19.

¹³¹ *Supra* n. 86.

¹³² *Id.* at para. 25.

¹³³ See the second paragraph, Art. 20 TFEU. As noted by Spaventa, 'Art. [20(1) TFEU] establishes Union citizenship, and there is no mention in that Article of the need to satisfy any other requirement but that of nationality of a Member State before being able to claim citizenship rights under the

Until quite recently, it had been assumed that although physical inter-State movement is not necessary for activating this provision, some kind of a cross-border element is still required. For instance, in *Garcia Avello* the Court held that despite the fact that the applicants had not moved between Member States, Article 20 TFEU was applicable because they were lawfully resident in the territory of a Member State other than that of their nationality,¹³⁴ though, as will be seen below, the Court in its judgment in *McCarthy* has recently provided a different reading for this ruling.¹³⁵

From the above analysis, it appears that the answer to the question of what qualifies as a purely internal situation is not a monolithic one: the Court in recent decades has tweaked its approach to this question and has shown a tendency of making it increasingly easy for a situation to fall within the scope of the free movement provisions. And although this appears to be clearly beneficial if viewed from the narrow lens of the individual that got to be favoured on the specific facts of each case, it has also come at a cost: although, as noted before, it has never been possible to predict with complete certainty whether a specific situation would be judged to present a sufficient link with EU law as this is a matter that is decided by the courts on a case-by-case basis, the uncertainty persisting in this area has been further exacerbated as a result of the Court's case-law in the last few decades. In particular, since the Court has departed from a strict adherence to the requirement that a situation involves the exercise of inter-State *movement* and an impediment to *that* movement, which appears to be the cross-border element that corresponds to the aim that has classically been attributed to the free movement provisions, it is now difficult to identify what is the (broader) aim that the free movement provisions purport to achieve and, hence, how the various cases which have been included within the scope of these provisions, contribute to the achievement of this aim.

Accordingly, it is not surprising that in its judgments in *Zambrano*,¹³⁶ *McCarthy*,¹³⁷ and *Dereci*,¹³⁸ as well as the nationality case of *Rottmann*,¹³⁹ the Court sought to draw more clearly the outer boundaries of the free movement and citizenship provisions of the Treaty. From these rulings, it can be concluded that in order for a situation to fall within the scope of these two sets of provisions it must either a) involve the exercise of, and a restriction on, inter-State

Treaty or secondary legislation' – see E. Spaventa, *Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects*, 45(1) CMLRev. 13, at 18 (2008),.

¹³⁴ *Garcia Avello*, *supra* n. 18, at para. 27.

¹³⁵ *McCarthy*, *supra* n. 2, at paras. 51–52.

¹³⁶ *Supra* n. 1.

¹³⁷ *Supra* n. 2.

¹³⁸ *Supra* n. 3.

¹³⁹ *Supra* n. 5.

movement, or b) involve the application of a measure which has the effect of depriving EU citizens of the genuine enjoyment of the substance of their EU citizenship rights. More specifically, the free movement provisions appear to still be requiring proof of an obstacle to inter-State *movement*, in order to apply. Article 20 TFEU, on the other hand, focuses on the idea that Union citizens should be free to enjoy the rights granted to them by EU law and, thus, any situation which involves a measure that deprives them of the genuine enjoyment of the substance of their rights, falls within the scope of that provision, even if it does not involve any kind of a cross-border element and all its facts are confined within the territory of a single Member State.¹⁴⁰ Although there were hints to this effect in *Rottmann* and *Zambrano*, the Court made its intentions clearer in *McCarthy*, where it held that Mrs McCarthy's situation is purely internal, since the contested national measure does not have 'the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen [which, the Court noted in paragraph 47 of its judgment, is prohibited by Article 20 TFEU] or of impeding the exercise of her right to move and reside freely within the territory of the member States, in accordance with Article 21 TFEU'.¹⁴¹

One point that should be made clear here, however, is that the Court's express pronouncement that for Article 20 TFEU to apply there is no need for a cross-border element, does not cancel out its reasoning in its previous case-law such as *Martínez Sala*¹⁴² and *García Avello*,¹⁴³ where the above provision was employed for bestowing rights on Union citizens who had not exercised the right to free movement or residence under Article 21 TFEU, but whose situation was found, nonetheless, to present a sufficient cross-border element in that the applicants bore the nationality of one Member State whilst they lawfully resided in the territory of another by virtue of the national law of the 'host' Member State. In other words, situations which fail to pass the *Zambrano* threshold for Article 20 TFEU to apply, and which do not involve the exercise and/or impediment of free inter-State *movement* and, thus, cannot be covered by the free movement provisions, should still fall within the scope of the former provision, if they present a cross-border element akin to the one that was involved in *Martínez Sala* and *García Avello*.

¹⁴⁰ As explained by P. Van Elsuwege & D. Kochenov, *supra* n. 1, at 448, in *Zambrano*, '[i]nstead of a cross-border element, the severity of Member States' interference with EU citizenship rights was used as the decisive criterion to bring a situation within the ambit of EU law.'

¹⁴¹ *McCarthy*, *supra* n. 2, at para. 49. Emphasis added. See also, P. Van Elsuwege, *supra* n. 2, at 317–318, for a similar view.

¹⁴² Case C-85/96, *Martínez Sala v. Freistaat Bayern* [1998] ECR I-269.

¹⁴³ *Supra* n. 18.

Consequently, it can now be said that the rights enjoyed by Union citizens under the market freedoms, and Articles 20 and 21 TFEU, can be likened to a sketch of three concentric circles: the centre of the circle is comprised of the (more specific) market freedoms which require the exercise of inter-State movement plus the performance of an economic activity in a cross border context; the next circle is comprised of Article 21 TFEU which requires the exercise and an impediment to inter-State movement; and the outer circle is the broader, quasi-constitutional, Article 20 TFEU which covers situations that involve a cross-border element short of free movement, but which can also apply in the absence of a cross-border element, provided that the contested measure deprives a Union citizen of the genuine enjoyment of the substance of his rights.¹⁴⁴

The present author cannot but agree with the Court's pronouncement that in certain circumstances, EU law can govern the situation of a Union citizen, even in the total absence of a cross-border element; this, after all, is not entirely unprecedented, given that certain EU law provisions do not require the existence of a cross-border element in order to apply.¹⁴⁵

If we take the *Rottmann*¹⁴⁶ case as an example, it is quite obvious why EU law should be applicable on its facts. There, the contested German act of depriving Dr Rottmann of his German nationality meant that the latter would, in turn, also be deprived of his status as a Union citizen and, with it, of all the rights bestowed by it. Therefore, in that case we had the complete refusal of the existence of EU rights, as a result of the application of the contested national measure. It was not just a mere impediment to the exercise of a specific right attached to the status of Union citizenship but, rather, the Union citizen was completely stripped of his status and concomitant rights. It is hard to imagine a more outright negation of his rights as a Union citizen. Hence the Court was right in considering that a national decision with such a huge impact on the enjoyment, and even existence, of EU rights should be subjected to review for its compatibility with the general principles of EU law.

The Court in *Zambrano*, nonetheless, appears to have wished to make it clear that it is not only in the case where a Union citizen is completely stripped of his EU rights, that Article 20 TFEU applies in the absence of a cross-border element, and hence it extended the scope of that provision to cover any national measure that deprives the Union citizen 'of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen'. Nonetheless, as will be

¹⁴⁴ As noted recently by Lenaerts, *Zambrano* 'has emancipated EU citizenship from the constraints inherent in its free movement origins'. See K. Lenaerts, "Civis europeus sum": from the cross-border link to the status of citizen of the Union, 3 Online J. Free Movement Workers EU 7 (2011). Available at ec.europa.eu/social/BlobServlet?docId=7281&langId=en (accessed Feb. 6, 2012).

¹⁴⁵ See *supra* n. 113.

¹⁴⁶ *Supra* n. 5.

seen below, in its subsequent rulings in *McCarthy* and *Dereci*, the Court took a backward step,¹⁴⁷ by qualifying the ‘Zambrano principle’ and confining its application to facts that are akin to those of that case, thus making it rather hard for a situation to be brought within the scope of Article 20 TFEU through that route.

The main question that emerged after *Zambrano* was, naturally, what exactly is meant by the ‘Zambrano principle’. How should the words ‘genuine enjoyment’ and ‘substance’ of rights be interpreted? Also, what must be proved in order to establish that a Union citizen is deprived of the *enjoyment* of his citizenship rights? The Court, following its classic approach, has not provided a clear definition for these terms,¹⁴⁸ but appears to have chosen to decide on a case-by-case basis whether a measure falls within the protective net of Article 20 TFEU; and, to date, it has sought to provide some clarification – and containment – of the meaning of these terms, through its judgments in *McCarthy* and *Dereci*.¹⁴⁹

In *Zambrano*, the Court found that the requirement of deprivation of the genuine enjoyment of the substance of EU rights was satisfied, because the refusal to grant a right of residence (and a work permit) to the third-country-national parents of *minor* Union citizens would, in practice, mean that the latter ‘would have to leave the territory of the Union in order to accompany their parents’.¹⁵⁰ Conversely, in *McCarthy*, the Court held that this requirement was not satisfied since the contested national measure did not have the effect of obliging Mrs McCarthy, an adult who – allegedly – was not dependent on her third-country-national husband, to leave the territory of the EU. Similarly, in *Dereci*, the scope of the ‘Zambrano principle’ was further curtailed, when the Court explained that the above principle ‘refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole’¹⁵¹ and noted, in addition, that the rights granted to third-country-nationals in situations satisfying the ‘Zambrano principle’ are only granted ‘exceptionally’, in order to ensure that

¹⁴⁷ Other commentators have also viewed the case-law that followed *Zambrano* as backward steps – see, *inter alia* A. Lansbergen and N. Miller, *supra* n. 1, at 298.

¹⁴⁸ See, for instance, Joined Cases C-267&268/91, *Keck*, [1993] ECR I-6097, where the Court established the notion of ‘selling arrangements’, which has been key for determining whether a measure is caught by Article 34 TFEU, and yet it did not provide a definition for this term, but rather left it to be decided on a case-by-case basis whether a measure is a selling arrangement.

¹⁴⁹ In addition to these, two joined cases are, currently, pending before the Court (Joined Cases C-356 & 357/11, *O and S and L* (not yet decided)) where the Court has been called to provide further clarification of the ‘Zambrano principle’.

¹⁵⁰ *Zambrano*, *supra* n. 1, at para. 44.

¹⁵¹ *Dereci*, *supra* n. 3, at para. 66.

the effectiveness of Union citizenship is not undermined.¹⁵² Accordingly, the Court said, the criterion that the Union citizen is forced to leave Union territory if rights to family reunification are not granted, can only be deemed to be satisfied in exceptional circumstances and not, merely, when the citizen considers it 'desirable' for his non-EU family members to reside with him in the territory of the EU.¹⁵³

With utmost respect, the mode of reasoning in *McCarthy* and *Dereci* appears to be contradicting the actual words used in the 'Zambrano principle', requiring an impediment to the genuine enjoyment of the *substance* of the rights of Union citizens, before a situation can qualify for EU protection. It is true that Mrs McCarthy and (most) of the Union citizens involved in the *Dereci* case, being adults, do not need to reside with their family members in order to be able to (simply) live in the UK; moreover, they do not need to be joined by their family members in order to be able to (simply) move and reside in any part of the EU. However, if we are talking here about the genuine enjoyment of the *substance* of the right to move and reside within the EU or, as a matter of fact, of any other EU citizenship right and, thus, not merely the ability to physically exist in a Member State, things are different. The substance of the right to reside in a particular State does not involve merely the right to actually reside, but, also, all the further 'ingredients' which are necessary for allowing the genuine enjoyment of this right, such as the ability to live and reside in a State with close members of your family. I suspect that if Mrs McCarthy and the (adult) *Dereci* claimants were told that they cannot be accompanied by their family members in their State of nationality, then they would probably decide to leave the latter (and, perhaps, EU territory) in order to move to a country where they can live together with the latter. Hence, the refusal of the national authorities to allow Mr McCarthy and the third-country nationals in *Dereci* to join their family members in the Member State of their nationality might, in the end, have the same impact on the latter as the refusal of the Belgian authorities to permit the Zambrano parents to continue living in Belgium with their children: in all cases, the parties would probably decide to leave EU territory and move to the State of nationality of their non-EU family member and, as a result of this, they would effectively be unable to exercise any of their EU citizenship rights.

Indeed, the distinction that appears to have been drawn between *Zambrano* and the other cases under examination, which is based on the fact that the protagonists in the former were young minors who were dependent on non-EU

¹⁵² *Dereci*, *supra* n. 3, at para. 67.

¹⁵³ *Dereci*, *supra* n. 3, at para. 68.

nationals,¹⁵⁴ would only be valid if under EU law minor Union citizens were deemed unable to exercise their free movement rights, before reaching majority. This is because in such a case, the minor Union citizens would be unable to move to another Member State using their EU free movement rights, in order to bring their situation within the scope of EU law and, hence, derive from EU law the right to be joined by their non-EU family members in the host State, whilst not abandoning EU territory. This argument, however, immediately collapses, given that the Court in *Zhu and Chen*¹⁵⁵ held that minor Union citizens – even when they are babies – can derive rights from EU law and exercise them through their primary carers. Accordingly, the Zambrano children could, in theory, just as Mrs McCarthy and the family members of the applicants in *Dereci* theoretically could,¹⁵⁶ exercise their free movement rights and, hence, on the facts in *Zambrano*, it was possible, just as it was in the other cases, for the children to move to another Member State and, once there, rely on EU law to derive family reunification rights.

The judgment in *McCarthy* and the Court's approach to a cross-border element in this case can be criticized for another reason as well. The Court distinguished the facts in *McCarthy* from those in *Garcia Avello*, on the basis that in the latter case 'what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement'.¹⁵⁷ However, a perusal of the Court's judgment in *Garcia Avello* illustrates that this reading is a recent 'concoction' of the ECJ, and possibly was prompted by the latter's fear of an overextension of the scope of Article 20 TFEU, following its rulings in *Rottmann* and *Zambrano* and its decision to dispense with a cross-border element in this context. In particular, the Court is now trying to re-read its previous judgment in *Garcia Avello* in a way which removes the emphasis away from discrimination on the grounds of nationality and towards a restriction on inter-State movement, in effect arguing that if there was no impediment to inter-State movement on the facts, the case would be considered to involve a situation that was purely internal to Belgium.¹⁵⁸

This is erroneous on two grounds.

¹⁵⁴ Note that although one of the cases in *Dereci* did involve minor children, the situation was, nonetheless, different from that in *Zambrano*, since one of the parents of the children was a Union citizen who was (also) not dependent on the third-country national in respect of whom a right of residence was sought to be derived from EU law.

¹⁵⁵ *Zhu and Chen*, *supra* n. 19, at para. 20.

¹⁵⁶ See Nic Shuibhne's explanation in her annotation of *McCarthy* and *Dereci* (*supra* n. 2, at 370).

¹⁵⁷ *McCarthy*, *supra* n. 2, at para. 52.

¹⁵⁸ See also, the comments in P.Van Elsuwege, *supra* n. 2, 316–317.

Firstly, the Court in *Garcia Avello* clearly found that the contested discrepancy in surnames amounted to unjustified discrimination on the grounds of nationality contrary to Article 18 TFEU, when read in conjunction with Article 20 TFEU; there is no mention at all in the judgment of the existence – and of an impediment to – inter-State movement. The Garcia Avello children were rightly found to fall within the personal scope of Article 20 TFEU because they were nationals of one Member State lawfully *residing* in the territory of another, this being reminiscent of the reasoning followed in *Martínez Sala*,¹⁵⁹ where the Court focused on discrimination and did not even consider whether the contested discrimination would lead to a restriction on inter-State movement. In fact, this does not appear to be a mere oversight on the part of the Court since the Advocate General in his Opinion in *Garcia Avello* did mention the possibility that the contested measure could qualify as an impediment to the inter-State movement of the father of the children¹⁶⁰ and yet, the Court in its judgment did not pursue this line of argument at all, but rather confined its analysis to the position of the Garcia Avello children.

Secondly, from the facts in *Garcia Avello* it is absolutely clear that no movement had been exercised, and also, there were no concrete plans for the exercise of such movement in the future, this making the latter a ‘pure hypothetical’ possibility which, as is well known, the Court deems to fall short of the requisite cross-border element.¹⁶¹ And, in any event, if – as the Court argues – the facts in *Garcia Avello* did involve an impediment to inter-State movement, then why did the Court have to resort to Article 20 TFEU and not Article 21 TFEU in order to find a violation of EU law, as it did in *Grunkin Paul* subsequently, which did (allegedly) involve an obstacle to movement that was constantly being exercised (from the Member State of residence to the State of nationality and back)?¹⁶² If *Garcia Avello* was an Article 21 case, it would be understandable for the Court to wish to re-read it in a way which clarifies that, for that provision to apply, there must be a restriction on inter-State movement and, in this way, make it clear that the scope of this provision is (now) confined to situations that involve such a cross-border element. However, this was an Article 20 TFEU case, which begs the question whether the Court is implying through this part of the judgment that, bar from exceptional situations like those in *Rottmann* and *Zambrano*, Article 20 TFEU also requires a (potential) impediment to inter-State movement (though not, necessarily, the existence of inter-State movement on the facts) in order to apply – a result with which the present author

¹⁵⁹ *Supra* n. 142.

¹⁶⁰ Opinion of Advocate General Jacobs in *Garcia Avello*, *supra* n. 18, at paras. 51, 65.

¹⁶¹ Case 180/83, *Moser v. Land Baden-Württemberg* [1984] ECR 2539, para. 18.

¹⁶² Case C-353/06, *Grunkin and Paul* [2008] ECR I-7639.

would be in complete disagreement, given that Article 20 TFEU is clearly ‘above and beyond’ movement.

Hence, although at first glance the judgments in *Zambrano* and, even more so, those in *McCarthy* in *Dereci*, appear to be rulings of principle which seek to clarify the limits to the scope of application of the free movement provisions and, in particular, of Article 20 TFEU, in the end, the Court’s application of its newly established principle to the actual facts of the cases, takes us back to square one by leaving us wondering (a) whether Article 20 TFEU does, after all, require proof of an impediment to inter-State *movement*, in order to apply and (b) what is in reality required to be proved in order for a national measure to be found to be capable of leading to a deprivation of the genuine enjoyment of the substance of the rights conferred by the EU on Union citizens?

2.2 THE COURT’S RELUCTANCE TO OPEN THE ‘REVERSE DISCRIMINATION PANDORA’S BOX’

In the previous section, it was explained how the Court in the late 1970s established the purely internal rule according to which situations that are deemed to be purely internal to a Member State, escape the ambit of the EU’s free movement provisions and are to be regulated by the Member State where all their elements are confined. A direct corollary of this rule is that in certain instances, discrimination against purely internal situations may emerge, since the national law that applies may give rise to less favourable treatment than the treatment which is afforded to comparable situations that fall within the scope of EU law. This form of differential treatment is termed ‘reverse discrimination’ since, although it is the norm for Member States to wish to discriminate against non-nationals and goods produced in other Member States in order to protect their own products/persons, in instances of reverse discrimination, it is exactly the opposite that happens:¹⁶³ a Member State treats its own goods and persons worse than the goods/persons of other Member States (as well as its own nationals that fall within the scope of EU law),¹⁶⁴ (usually) not because it wants to, but because the parallel application of

¹⁶³ Sundberg-Weitman has characterised reverse discrimination as ‘the exceptional case that special favours are granted to aliens’. See B. Sundberg-Weitman, *Discrimination on Grounds of Nationality – Free Movement of Workers and Freedom of Establishment under the EEC Treaty* 113 (North-Holland Publishing Company 1977). See also, G. Davies, *Nationality Discrimination in the European Internal Market* 19 (Kluwer 2003).

¹⁶⁴ When the purely internal rule was first established it was at the same time made clear that an individual can rely on EU law against his own Member State if he can show a sufficient cross-border element. See Case 115/78, *Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399.

EU law and national law to similar situations which fall within different spheres of competence (EU and national respectively), leads unavoidably to such a result.¹⁶⁵

The question, of course, is what has the Court's approach to this form of differential treatment been? Is reverse discrimination prohibited by EU law?

The market freedoms have, always, made reference to two concepts when defining what type of national measures are caught within their scope: 'restriction' and 'discrimination'. Some of these provisions refer to only one of these terms,¹⁶⁶ whereas the others make reference – or allude – to both.¹⁶⁷ On the other hand, Article 21 TFEU only makes reference to a right to move and reside freely in the territory of the Member States. The Court of Justice has, nonetheless, made it clear that all the free movement provisions (including Article 21 TFEU) catch national measures that are discriminatory and/or restrict free movement.¹⁶⁸

In EU free movement law, the concepts of 'restriction' and 'discrimination' are closely intertwined. Both concepts are defined and limited by the goals that the free movement provisions purport to achieve. Since, traditionally, these provisions have been read as having as their aim the removal of restrictions on the inter-State movement of persons, products and factors of production, it is only such restrictions that have been caught by the free movement provisions, and it is only instances of discrimination that lead to such restrictions, that have been found to amount to a violation of these provisions.

The Court was first confronted with the question of whether reverse discrimination is contrary to EU law in the 1980s. In all its rulings – and up until today – the Court has expressly held that reverse discrimination does not amount to a violation of the free movement provisions, since it does not hamper the achievement of their aim, which is to liberalize the free movement of products and factors of production. In particular, the Court is of the view that reverse

¹⁶⁵ E. Cannizzaro, *Producing 'Reverse Discrimination' through the exercise of EC competences*, 17(1) YEL 29 (1997); P. Van Elswege and S. Adam, *The limits of Constitutional dialogue for the prevention of reverse discrimination: Constitutional Court, Judgment 11/2009 of 21 January 2009*, 5(2) EuConst 327, at 328 (2009).

¹⁶⁶ See, for instance, Articles 34, 35 and 63 TFEU referring to 'restrictions' and Article 45 TFEU referring to 'discrimination'. Note, also, that Article 18 TFEU prohibits discrimination on the grounds of nationality within the scope of application of the Treaties. Although this latter Article is not one of the free movement provisions, nonetheless it has sometimes been used in combination with one of the free movement provisions to prohibit a national measure which discriminates on the grounds of nationality against a migrant Member State national – see, for example, Case 186/87, *Cowan* [1989] ECR 195.

¹⁶⁷ Article 49 TFEU explicitly mentions 'restrictions' on the freedom of establishment but it also makes reference to 'discrimination', albeit without using the exact term ('under the conditions laid down for its own nationals by the law of the country where such establishment is effected'). In the context of the free movement of services, Article 56 TFEU refers to 'restrictions', whilst Article 57 TFEU places emphasis on discrimination on the grounds of nationality ('under the same conditions as are imposed by that State on its own nationals').

¹⁶⁸ See Opinion of Advocate General Jacobs in Case C-224/02, *Pusa* [2004] ECR I-5763 paras. 18–22 .

discrimination does not impede *inter-State movement*, as it does not treat persons, products and factors of production less favourably because they move.¹⁶⁹ In fact, because it treats those that move more favourably than those that remain sedentary, it may actually have the opposite effect, i.e. it may encourage the exercise of free movement.¹⁷⁰ Hence, unlike in situations which involve ‘discrimination against free movers’¹⁷¹ where Member State nationals can rely on EU law against their *own* Member State because otherwise a restriction on *inter-State* movement will emerge, in instances of reverse discrimination, Member State nationals cannot rely on the free movement provisions because there is no sufficient link with the aim of these provisions.

The Court’s traditional position has been that, if the Member States consider reverse discrimination to be a problem, then, it is up to them to remedy it.¹⁷² Nonetheless, the Court has been inclined to assist them in this, by offering an interpretation of the free movement provisions, in case where this will enable the referring national court to eliminate reverse discrimination. In particular, an interpretation of EU law by the ECJ has been ruled to be necessary when a) national law extends the more favourable EU treatment to situations that are purely internal, precisely in order to avoid the emergence of reverse discrimination¹⁷³ (this is known as ‘spontaneous harmonization’ or ‘renvoi’) and b) when reverse discrimination is held to amount to a violation of the national (constitutional) principle of equality and, therefore, the national constitutional court needs to extend the treatment afforded by EU law to purely internal situations.¹⁷⁴

Nonetheless, in recent years there have been increasing calls by commentators¹⁷⁵ and members of the Court¹⁷⁶ alike, for the resolution of the

¹⁶⁹ Case 98/86, *Criminal proceedings against Arthur Mathot* [1987] ECR 809; Case 44/84, *Hurd v. Jones (Her Majesty’s Inspector of Taxes)* [1986] 2 CMLR 1; Joined Cases C-29/94, C-30/94, C-31/94, C-32/94, C-33/94, C-34/94 and C-35/94, *Criminal proceedings against Aubertin and others* [1995] ECR I-301; Case 355/85, *Public Prosecutor v. Michel Cognet* [1986] ECR 3231.

¹⁷⁰ A. Tryfonidou, *supra* n. 119, at 60.

¹⁷¹ See, *inter alia* Case C-224/98, *D’Hoop* [2002] ECR I-6191; *Pusa*, *supra* n. 168; Case C-192/05, *Tas-Hagen* [2006] ECR I-10451; Case C-499/06, *Nerkowska* [2008] ECR I 3993; Case C-221/07, *Zablocka* [2008] ECR I-9029; Case C-406/04, *De Cuyper v. Office national de l’emploi* [2006] ECR I-6947.

¹⁷² Case C-132/93, *Steen (No. 2)* [1994] ECR I-2715, paras. 10–11.

¹⁷³ See, for instance, Joined Cases 297/88 and 197/89, *Dzodzi* [1990], ECR I-3763. For an explanation see S. L. Kaleda, *Extension of the preliminary rulings procedure outside the scope of Community law: ‘The Dzodzi line of cases’*, 4 EIoP (Oct. 19, 2000) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=302763 (accessed on Feb. 6, 2012).

¹⁷⁴ Case C-448/98, *Guimont* [2000] ECR I-10663; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch* [2002] ECR I-2157; Case C-6/01, *Anomar* [2003] ECR I-8621. For a criticism of this line of case-law see C. Ritter, ‘Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234’, (2006) 31(5) ELRev. 690.

¹⁷⁵ P. Van Elsuwege and S. Adam, *supra* n. 165, at 333; D. Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between States and Rights*, 15(2) CJEL 169, at 212–213

reverse discrimination conundrum by the EU itself. In particular, it has been argued that when it comes to persons, the introduction and development of the status of Union citizenship has meant that reverse discrimination is no longer a form of differential treatment that can escape the ambit of EU law.

Despite the above calls for a wholesome EU solution to the reverse discrimination conundrum, the Court has repeatedly failed to provide a direct response, and this has been the case, also, in its most recent case-law that has been analysed in this piece. Hence, reverse discrimination is still considered to be a form of differential treatment that is not prohibited by EU law. However, a careful examination of the rulings under examination and, more generally, of the Court's case-law in the context of free movement in the past few decades, reveals that the Court may have actually been in the process of providing a more subtle response to the problem of reverse discrimination. In particular, this response consists of extending the scope of application of the free movement provisions as well as, now, of Article 20 TFEU to cover situations which would, otherwise, qualify as purely internal, in this way preventing the emergence of reverse discrimination in these instances.¹⁷⁷ Accordingly, although reverse discrimination is, still, considered to be a form of differential treatment that is not prohibited by the free movement provisions, the extension of the scope of application of Article 20 TFEU and of the free movement provisions reduces, arithmetically, the instances of reverse discrimination that can emerge.

Despite the fact that this may appear, at first glance, a rather satisfactory compromise between the need to maintain separate spheres of EU and national competence, on the one hand, and the need to respond in some way to the reverse discrimination conundrum, on the other, a closer examination illustrates that it creates more problems than it solves.¹⁷⁸

Firstly, as already noted, this is not a wholesome solution to the problem of reverse discrimination but rather leaves it to the ECJ or the national courts to

(2009); N. Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39(4) CMLR.ev. 731 (2002); A. Tryfonidou, *Reverse discrimination in purely internal situations: An incongruity in a Citizens' Europe*, 35(1) LIEI 43 (2008); C. Dautricourt & S. Thomas, *Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?*, 34(3) ELR.ev. 433 (2009); M. Poiares Maduro, *supra* n. 113, at (especially) 126; E. Spaventa, *supra* n. 133, at 30–39; R. C. A. White, *Free Movement, Equal Treatment and Citizenship of the Union*, 54(4) ICLQ 885, at 901 (2005); R. C. A. White, *A fresh look at reverse discrimination*, 18(6) ELRev. 527, at 532 (1993).

¹⁷⁶ See most prominently, Advocate General Sharpston in the *Flemish Care Insurance Scheme* case, *supra* n. 24; Advocate General Sharpston in *Zambrano*, *supra* n. 1; Advocate General Poiares Maduro in *Carbonati Apuani*, *supra* n. 117.

¹⁷⁷ This may, actually, be providing an explanation for the Court's reluctance to include the facts in *McCarthy* within the scope of Article 20 TFEU, since, as explained by Advocate General Kokott in paragraphs 43–44 of her Opinion in that case, reverse discrimination would not emerge on the facts of that case.

¹⁷⁸ For a criticism of this approach see C. Dautricourt & S. Thomas, *supra* n. 175, at 444–447.

decide on a case-by-case basis whether a situation should be included within the scope of EU law, in this way ensuring that the emergence of reverse discrimination is prevented. This, obviously, creates much uncertainty,¹⁷⁹ which is clearly always problematic. However, in addition to this, it makes it even harder to justify the differential treatment that arises in situations that continue being treated as purely internal to a Member State. When the scope of the free movement provisions was confined to situations which involved a real link to their aim of ensuring that persons and products can move freely between Member States, reverse discrimination could be justified as a difference in treatment which emerges as a result of the need to confine the scope of application of the Treaty provisions to situations which are sufficiently related to their objective; as a necessary evil of the system of multi-level governance chosen for the EU.¹⁸⁰ Since, however, in recent years situations which do not appear to involve a sufficient contribution to the achievement of the aims of these provisions have been included within their scope, it appears questionable why certain situations should be privileged and enjoy EU protection, whereas others which, equally, do not contribute to the achievement of these aims should continue being excluded and, thus, be reversely discriminated against. Similar problems with regards to the application of Article 20 TFEU have already appeared to emerge, following, as explained above, the rather arbitrary line drawn between the facts in *Zambrano*, on the one hand, and those in *McCarthy* and (possibly) *Dereci*, on the other. As noted by Nic Shuibhne, 'it is precisely the converse ease with which Community law can be triggered which sours the logic of leaving the rest aside'.¹⁸¹

Secondly, in its effort to prevent the emergence of reverse discrimination in as many situations as possible, the Court has, in certain cases, inappropriately extended the scope of application of EU law at the expense of national sovereignty. In other words, the Court extended the scope of application of the free movement provisions to cover situations which did not, in reality, involve an impediment to inter-State movement.

This is particularly prominent in the context of the Court's jurisprudence in the area of family reunification rights, which lies at the confluence of the EU's free movement and the Member States' immigration policies.¹⁸² According to the Court's 'traditional' approach in this context, migrant Union citizens should be given the right to be accompanied in the host State by their

¹⁷⁹ P. Van Elslande and S. Adam, *supra* n. 165, 333.

¹⁸⁰ Ritter is still of the view that reverse discrimination is a necessary evil of the system chosen for the governance of the EU. C. Ritter, *supra* n. 174.

¹⁸¹ N. Nic Shuibhne, *supra* n. 175, at 738. See also, View of Advocate General Mengozzi in *Dereci*, *supra* n. 3, at para. 44.

¹⁸² For more on this see A. Tryfonidou, *supra* n. 5, at 366–379.

third-country-national family members, if otherwise they would be prevented from exercising inter-State movement. This is the approach that appears to have been followed in cases such as *Morson and Jhanjan*,¹⁸³ where the Court found that the situation of two Dutch nationals who had always lived and worked in the Netherlands and wanted to be accompanied in that State by their Surinamese mothers was a purely internal one and, thus, was not governed by the free movement of workers provisions. Similarly, in the more recent *Akrich* case,¹⁸⁴ the Court ruled that in order for a Union citizen to be able to derive the right to be accompanied in another Member State by his/her family members, the latter must have already lawfully lived together with the Union citizen in another Member State; the so-called 'condition of prior lawful residence'. The rationale behind this is, obviously, to ensure that there is a sufficient link between the claimed right to family reunification and the aim of the free movement provisions to prevent obstacles to inter-State movement: it is only if a Union citizen would lose the right to be with family members that he used to live with in a Member State, as a result of his movement to another Member State, that the latter movement would be impeded.

However, in recent cases such as *Jia*¹⁸⁵ and, more expressly, in *Metock*¹⁸⁶ and *Sahin*,¹⁸⁷ the Court ruled that the condition of prior lawful residence is no longer applicable and its relevance should be confined to the facts in *Akrich*. This means that, under this more 'liberal' approach of the Court in this area,¹⁸⁸ a Union citizen who can point to some kind of a cross border element, can be accompanied by his third-country-national family members even if they come directly from a third country. In other words, whenever a Union citizen moves to another Member State (or returns to his Member State of nationality from another Member State), he can rely on EU law in order to be automatically accompanied in that State by his close family members. As argued elsewhere,¹⁸⁹ this appears to be an adoption by the Court of the suggestion of Advocate General Jacobs in his Opinion in the *Konstantinidis* case¹⁹⁰ back in the early 1990s, that whenever a Union citizen moves to another Member State he can rely on his fundamental rights which are protected as general principles of EU law. Yet, it (overly) extends the scope of application of the free movement provisions to cover situations which

¹⁸³ Joined Cases 35–36/82, *Morson and Jhanjan* [1982] ECR 3723.

¹⁸⁴ Case C-109/01, *Akrich* [2003] ECR I-9607.

¹⁸⁵ Case C-1/05, *Jia* [2007] ECR I-1.

¹⁸⁶ *Supra* n. 35.

¹⁸⁷ *Supra* n. 124.

¹⁸⁸ For more on the Court's 'liberal' approach in this context see A. Tryfonidou, *supra* n. 124.

¹⁸⁹ *Id.*

¹⁹⁰ Opinion of Advocate General Jacobs in Case C-168/91, *Konstantinidis* [1993] ECR I-1191, para. 46.

do not present a link with their objective of ensuring the free inter-State movement of persons.

More specifically, the problematic aspect of this case-law is that it blurs the boundaries between EU powers with regards to free movement *within* the EU and the Member States' immigration policies. Since the creation of (what later became) the EU, the movement of Member State nationals between Member States is wholly governed by EU law. Conversely, the movement of persons into the EU from third countries (and *vice-versa*) is still well within the realm of Member State immigration competence. Whilst at first glance the family reunification cases such as *Metock*, *Sahin* and *Jia* appear to be simply about the rights of Union citizens who move from one Member State to another (which should, thus, be governed by EU law), a more careful examination of their facts reveals that they in reality concern the *initial* admission of a third-country-national into the territory of an EU Member State and thus would traditionally fall within the exclusive competence of the receiving Member State.¹⁹¹ Accordingly, it appears that through these judgments, the Court is not only engaging in an unwarranted intrusion into the internal affairs of the Member States in situations involving migration *within* the EU – since the contested decisions of the Member States do not appear capable of infringing the applicants' right to free movement – but it appears to have cast its net further, and is now requiring Member States to comply with EU law, even in situations which, in essence, involve the exercise of control by the Member States on immigration *from third countries*, which is an area that has always been held to be central to Member State sovereignty.¹⁹²

Accordingly, in my view, the Court's (implicit) solution to the reverse discrimination conundrum, which is based on an (often arbitrary) extension of the scope of application of the free movement provisions, is problematic. It would be much preferable for the Court to revert to its initial, 'traditional' approach towards purely internal situations, under which the free movement provisions only apply when there is a direct link between the contested measure and an impediment to inter-State movement. Reverse discrimination, on the other hand, deserves its own separate treatment. This, of course, does not mean opening the scope of application of EU law to everyone in a purely internal situation. Rather, certain instances of reverse discrimination should, as a matter of principle, fall within the scope of EU

¹⁹¹ See at para. 26 Opinion of Advocate General Geelhoed in *Jia*, *supra* n. 184.

¹⁹² For more on this see A. Tryfonidou, *supra* n. 5, at 366–379. For similar arguments see A. Lansbergen & N. Miller, *supra* n. 1, at 301.

law and it should be up to the Member States to justify it or prove that a particular instance is entirely unrelated to the aims of EU law.¹⁹³

3 CONCLUSION

This piece had as its aim to analyse the three very recent rulings of the Court in the cases of *Zambrano*, *McCarthy* and *Dereci*, and to try to decipher the Court's intentions behind the rather convoluted reasoning that it has followed. It has been seen that the Court appears to have redrawn the scope of application of the citizenship provisions and, in particular, of Article 20 TFEU, by accepting that this provision may no longer be requiring the existence of a cross-border element in order to apply. In the words of the Court, 'Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'.¹⁹⁴

As has been explained, nonetheless, the Court has failed to make it clear where the exact boundaries of the (redrawn) scope of application of Article 20 TFEU now lie. In particular, it has not provided a sufficient explanation of what the terms 'genuine enjoyment' and 'substance of the rights' mean, but has rather chosen to qualify and apply the 'Zambrano principle' on a case-by-case basis, as it has done on the facts of the cases under examination. Moreover, its judgment in *McCarthy* and, in particular, the part of the ruling where the Court seeks to distinguish the facts in that case from those in *Garcia Avello*, makes us wonder whether the Court has, really, dispensed with a requirement for a cross-border element in the form of a (potential) impediment to inter-State movement, before Article 20 TFEU can apply. It has therefore been concluded that a number of questions remain unanswered and, in particular, we have been left in the dark as to a) whether Article 20 TFEU does, after all, require a cross-border element in the form of an obstacle to inter-State *movement*, in order to apply and b) what is in reality required to be proved in order for a national measure to be found to amount to a deprivation of the genuine enjoyment of the substance of the rights conferred by the EU on its citizens.

Furthermore, and at a more theoretical level, although the references in these cases appear to have been prompted by a desire to invite the Court to respond to the problem of reverse discrimination in a more direct way, the latter has, once more, failed to provide a solution to this issue and has rather preferred to have

¹⁹³ For various proposed solutions to reverse discrimination see the Opinion of Advocate General Sharpston in *Zambrano*, *supra* n. 1; Opinion of Advocate General Poiares Maduro in *Carbonati Apuani*, *supra* n. 117, at paras. 59–69; A. Tryfonidou, *supra* n. 119, at Chs. 4, 5 and 6; M Poiares Maduro, *supra* n. 113, at 134–140.

¹⁹⁴ *Zambrano*, *supra* n. 1, at para. 42; *McCarthy*, *supra* n. 2, at para. 47; *Dereci*, *supra* n. 3, at para. 64.

recourse to its tried and tested recipe, i.e. to expand the scope of the Treaty provisions and, in that way, prevent the emergence of reverse discrimination in as many situations as possible. As has been explained, nonetheless, this is not a real solution to the issue of reverse discrimination and it in fact creates more problems than it solves.

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