

# SHOULD THE CONCEPT OF EUROPEAN CITIZENSHIP BE EXPANDED TO INCLUDE STATELESS CHILDREN?

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*Under European Union law, possession of a nationality is a prerequisite for European Union citizenship. Member States of the European Union are free to determine the persons who it considers to be its nationals. As a result, there are inconsistencies among Member States, specifically regarding whether a child born in the country can obtain citizenship if the child would otherwise become stateless, if citizenship is not provided. Article fifteen of The Universal Declaration of Human Rights states that everyone has the right to a nationality. However, statelessness remains a problem, particularly among children. Current European Union law does not provide for the protection of children who would be considered “stateless” upon birth. This article examines whether the concept of European Union citizenship should be expanded to include children who would become stateless upon birth in Member States.*

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## INTRODUCTION

Article 15 of The Universal Declaration of Human Rights states that “1. [e]veryone has the right to a nationality” and that “2. [n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>1</sup> However, statelessness remains a problem, particularly among children, who inherit statelessness from their parents who were stateless before them or are the “unsuspecting victims of a gap or conflict in nationality laws.”<sup>2</sup> Statelessness means “a person who is not considered as a national by any State under the operation of its law.”<sup>3</sup> Statelessness obstructs the rights conferred upon citizens of a nation, such as the right to “education, health, work, family life, and free movement.”<sup>4</sup> Citizenship is the “right to have rights.”<sup>5</sup> Without citizenship, one lacks social, economic, and political rights; on a symbolic level, one lacks the right to identify and become a full member of a national community.<sup>6</sup>

There are over ten million people worldwide who are stateless, including hundreds of thousands in Europe who do not hold the

1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948).

2. *None of Europe’s Children Should be Stateless*, EUR. NETWORK ON STATELESSNESS, <http://www.statelessness.eu/communications/campaigns/none-europes-children-should-be-stateless> (last visited Jan. 31, 2017).

3. Convention Relating to the Status of Stateless Persons art. 1, *opened for signature* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

4. Addressing the Human Rights Impact of Statelessness in the EU’S External Action, EUR. PARL. DOC. PE 534.983, 8 (2014).

5. Nils Muižnieks, *Governments Should Act in the Best Interest of Stateless Children*, COUNCIL EUR. (Jan. 15, 2013), <http://www.coe.int/en/web/commissioner/-/governments-should-act-in-the-best-interest-of-stateless-childr-1>.

6. *Id.*

citizenship of any state.<sup>7</sup> Member States of the European Union are free to determine the persons who it considers to be its nationals. As a result, there are inconsistencies among Member States, specifically regarding whether a child born in the country can obtain citizenship if the child would otherwise become stateless, if citizenship were not provided. More particularly, “[i]ndividual membership of the European Union is unlike traditional models of citizenship,” since “[i]ts nature is complementary.<sup>8</sup> In other words, the nationality of one of the twenty-eight Member States is currently a prerequisite to obtaining European Union citizenship.<sup>9</sup> As a result, children born in states, which do not provide for citizenship rights for children who would otherwise become stateless, have no recourse under European Union law. Therefore, the European Union should amend the concept of European Union citizenship in order to provide protection for children who would otherwise become stateless upon birth.

The European Court of Justice has contributed to the further consolidation of the scope and content of European Union citizenship and has addressed questions regarding the rights of third-country nationals in the territory of the European Union.<sup>10</sup> Advocate General Sharpston poses the following question regarding European Union citizenship in her Opinion of Case C-34/09 *Zambrano v. Office national de l’emploi*,<sup>11</sup>

[i]s the exercise of rights as a Union citizen dependent – like the exercise of the classic economic ‘freedoms’ – on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or does Union citizenship look forward to the future, rather than back to the past, to define the rights

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7. *Id.*; see also EUROPEAN NETWORK ON STATELESSNESS, PREVENTING CHILDHOOD STATELESSNESS IN EUROPE: ISSUES, GAPS, AND GOOD PRACTICES 2 (2014).

8. Severine Picard, *The EU Constitutional Treaty: Towards a European Citizenship for Third-country nationals?* 1 J. CONTEMP. EUR. RES. 73, 73 (2005).

9. *Id.*

10. Ineta Ziemele, Nationality and Third-Country Nationals, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW* 471, 472 (Allan Rosas et al. eds., 2013).

11. Case C-34/09, *Zambrano v. Office nat’l de l’emploi*, 2011 E.C.R. I-01177.

and obligations that it confers? To put the same question from a slightly different angle: is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?<sup>12</sup>

This article will analyze whether the concept of European Union citizenship should be expanded to include children who would become stateless upon birth in Member States. Part I will address the emergence of the principle of European Union citizenship. Part II will examine the relevant cases that have come before the European Court of Justice. Finally, Part III will evaluate whether stateless children should be brought under the scope of European Union citizenship or if acquiring citizenship upon birth should remain solely within the purview of the Member States.

#### PART I. BACKGROUND: THE EMERGENCE OF THE CONCEPT OF “EUROPEAN CITIZENSHIP” AND DERIVATIVE RIGHTS FOR THIRD- COUNTRY NATIONALS

Citizenship remains a complex legal notion and social phenomenon.<sup>13</sup> Citizenship has been defined as “reciprocity of rights and duties [to the State].”<sup>14</sup> At the heart of citizenship is the feeling of belonging. In *Kaur*, the European Court of Justice stated that under international law it is up to each Member State, “having due regard to [Union] law, to lay down the conditions for the acquisition and loss of nationality.”<sup>15</sup> Member States and not the European Union were considered the gatekeepers to European Union citizenship, since Member State nationality is a

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12. Case C-34/09, *Zambrano v. Office nat'l de l'emploi*, 2011 E.C.R. I-01177, ¶ 3.

13. Ziemele, *supra* note 10, at 472.

14. *Id.*

15. CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 476 (4th ed., 2013).

precondition to Union citizenship.<sup>16</sup> Originally, the line between European Union law and national law was more clear-cut, and the category of persons covered by European Union law was limited to those participating in the development of the internal market, i.e. workers.<sup>17</sup> However, with the entrance into force of Maastricht, this line was blurred. Therefore, it is important to consider, where does the European Union stand when it comes to citizenship?<sup>18</sup> The desire to create a “Europe for Citizens” or a “People’s Europe” dates back to the 1970s; however, it was not until Spain pressed the issue at Maastricht that the European citizen concept took shape.<sup>19</sup>

#### A. Maastricht Treaty of 1993

Part Two of the Maastricht Treaty of 1993 established the “Citizens of the Union” concept and laid down the specific rights that the “European citizen” could enjoy.<sup>20</sup> Article 8 of the Maastricht Treaty states that “[e]very person holding the nationality of a Member State shall be a citizen of the Union.”<sup>21</sup> Moreover, Article 8(a) established the right of every citizen of the European Union to “move and reside freely within the territory of the Member States.”<sup>22</sup> Article 8(b)(2) provided the right to vote and stand as a candidate in elections to the European Parliament in the Member State in which he resides,<sup>23</sup> Article 8(c) provided for the protection by the diplomatic or consular authorities of any Member States, when a citizen of the Union is in the territory of a third country,<sup>24</sup> and Article 8(d) provided for the right to petition of the European Parliament and the ability to apply to the Ombudsman.<sup>25</sup> The Maastricht

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16. *See id.* at 438.

17. Erik Kotlárík, *The EU Citizenship in Purely Internal Situations and Reverse Discrimination*, CENT. EUR. U. 1, 2 (2013).

18. BARNARD, *supra* note 15, at 433.

19. *Id.* at 432.

20. *Id.*

21. Treaty on European Union art. 8, Feb. 7 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht Treaty].

22. *Id.* at art. 8(a).

23. *Id.* at art. 8(b)(2).

24. *Id.* at art. 8(c).

25. *Id.* at art. 8(d).

Treaty also recognized the fundamental role of individuals in the newly created Union, regardless of whether they were economically active.<sup>26</sup>

In *Gryzelczk*, the European Court of Justice went further and stated “the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights... and the subjects of which comprise not only Member States but also their nationals.”<sup>27</sup> Moreover, the Court held that the “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exception as are expressly provided for.”<sup>28</sup>

#### B. Treaty of Amsterdam of 1999

The Treaty of Amsterdam, which entered into force in 1999, further expanded the concept of European citizenship.<sup>29</sup> The Treaty of Amsterdam introduced current Article 3(2) of the Treaty of the European Union, which states that “[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”<sup>30</sup> As a result, the Treaty “communitarised migration-related issues” and gave European Union institutions the competence to define “conditions of entry and residence, including long-term residence permits, and the rights and conditions under which nationals of third countries,” who were legal residents in one Member State could reside in another Member State.<sup>31</sup>

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26. Case C-34/09, *Zambrano v. Office nat'l de l'emploi*, 2011 E.C.R. I-01177, ¶ 67.

27. *Id.* ¶ 68.

28. Case C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-06193, R. ; *see also* BARNARD, *supra* note 15, at 437.

29. BARNARD, *supra* note 15, at 432.

30. Consolidated Version of the Treaty on the European Union art. 3(2), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter Treaty of Amsterdam].

31. Picard, *supra* note 8, at 74 stating “[r]ecent years have seen progress in terms of political will. In 1999, the Tampere European Council concluded that the status of long term resident third-country nationals should be approximated to the status of member states’ nationals i.e. with a set of similar rights. In June 2002, the Seville European

### C. Treaty of Lisbon of 2009

The entry into force of the Treaty of Lisbon further cemented the notion of European Union citizenship, particularly in Articles 20 and 21 of the Treaty on the Functioning of the European Union. Article 20 states that:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
  - (a) the right to move and reside freely within the territory of the Member States;
  - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
  - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

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Council further acknowledged the importance of the contribution by third country nationals to economic, social and cultural life.”

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.<sup>32</sup>

However, the rights listed in Article 20(2) are not exhaustive. In other words, citizens also enjoy rights found in Article 18 TFEU, the right to non-discrimination on the ground of nationality.<sup>33</sup> Moreover, the European Court of Justice has also taken into account the Charter of Fundamental Rights of the European Union, in order to strike down legislation that violates a fundamental right.<sup>34</sup> The notion of European citizenship is also important because [w]hen the ties of identity with a single State are broken so that they may be shared with others, a connection is woven in a wider sphere.<sup>35</sup>

Article 21 of the Treaty on the Functioning of the European Union states that:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures

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32. Consolidated Version of the Treaty on the Functioning of the European Union art. 20, Oct. 26, 2012, 2012 O.J. (C 326/47) 1 [hereinafter Treaty of Lisbon].

33. BARNARD, *supra* note 15, at 437.

34. *Id.* at 435.

35. Catherine Barnard, Citizenship of the Union and the Area of Justice: (Almost) The Court's Moment of Glory, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW* 505, 520 (Allan Rosas et al. eds., 2013).



concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.<sup>36</sup>

Article 21 is considered the primary right of European citizenship, freedom of movement. In *Baumbast*, the European Court of Justice severed the link between migration and having to be economically active by stating that “the Treaty on European Union does not require that citizens of the Union pursue a profession or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two [TFEU], on citizenship of the Union.”<sup>37</sup>

#### D. Directive 2004/38

With the introduction of European Union citizenship under the Maastricht Treaty, also came an extension of the scope of application of family reunification rights to Member State nationals who were not engaged in economic activity. Nationals of Member States could rely on their European Union citizenship rights, including a right of residence for third-country family members, when the issue falls under the scope of European Union law.<sup>38</sup> However, if the situation did not have a link with European Union law, it would be subject to the more restrictive national rules on reunification of the Member States.<sup>39</sup> Directive 2004/38 specifically deals with the rights enjoyed by “citizens of the Union and their family members,”<sup>40</sup> and applies to citizens as defined under Article 20 of the Treaty on the Functioning of the European Union.<sup>41</sup> Article 2 and Article 3 of the Directive must be taken into consideration when determining whether rights can be allocated to a European Union citizen’s family members. Article 2 defines who is considered a “Union citizen” and a “Family member” under the Directive:<sup>42</sup>

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36. Treaty of Lisbon, *supra* note 32, at art. 21.

37. BARNARD, *supra* note 15, at 330..

38. Peter Van Elsuwege & Dmitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 EUR. J. MIGRATION & L. 443, 443 (2011).

39. *Id.*

40. BARNARD, *supra* note 15, at 437.

41. Treaty of Lisbon, *supra* note 32, at art. 20.

42. Council Directive 2004/38, art. 2, 2004 O.J. (L 158) 77 (EC).

For the purposes of this Directive:

1)“Union citizen” means any person having the nationality of a Member State;

2)“Family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are [dependents] and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);<sup>43</sup>

and Article 3 on Beneficiaries states that:

1. This Directive shall apply 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 as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence,

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43. *Id.* at art. 2.

or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.<sup>44</sup>

The Directive also lays down the conditions that must be satisfied before European Union citizens or their family members can acquire the right of residence in a Member State for longer than three months.<sup>45</sup> In order for a family member to obtain a right of residence for more than three months, the citizen “must either be a worker or employed person in the host Member State or ‘have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State.’”<sup>46</sup>

The European Court of Justice has helped clarify not only who is considered a European Union citizen but also when third-country national family members can derive rights under Directive 2004/38. Moreover, given that European citizenship is a “transnational polity,” should European Union citizenship aim to replicate citizenship of a nation state (so that European Union citizenship means citizen of a European Union nation state)?<sup>47</sup> If so, can the notion of European Union citizen be expanded to include children who are born in Member States and who could potentially end up being stateless?<sup>48</sup>

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44. Council Directive 2004/38, *supra* note 42, at art. 3.

45. *Id.* at art. 6.

46. Tom Richards, *Zambrano, McCarthy and Dereci: Reading the Leaves of EU Citizenship Jurisprudence*, 17 JUD. REV. 272, 275 (2012).

47. Van Elsuwege & Kochenov, *supra* note 38, at 444.

48. BARNARD, *supra* note 15, at 432.

PART II: EUROPEAN COURT OF JUSTICE CASE LAW ON UNION  
CITIZENSHIP AND THIRD-COUNTRY NATIONALS

The case law of the European Court of Justice on European citizenship is complex, rapidly evolving, and often highly technical. Part II will address the evolution of the notion of the European Union citizen, citizen rights, and rights conferred on third-country nationals, under European Court of Justice case law. The freedom of movement of individuals under European Union law was originally a right restricted to those who were economically active.<sup>49</sup> However, with the entrance into force of the Maastricht Treaty in 1993, the concept of the European Union citizenship extended the right of freedom of movement to all citizens, regardless of whether they were economically active.<sup>50</sup> Moreover, the question of whether residence rights can be extended to third-country nationals, through European Union citizens has been under scrutiny for some time. Rights have been extended to third-country national parents via children holding European Union citizenship, even in a situation where “intra-Union mobility was not exercised.”<sup>51</sup> The European Court of Justice has relied on Article 20 TFEU to derive the right of residence for third-country national parents of European Union citizens, as seen in *Chen*.<sup>52</sup> The following cases will be discussed in this section: *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, *Janko Rottman v Freistaat Bayern*, *Gerardo Ruiz Zambrano v Office national de l’emploi*, *Shirley McCarthy v Secretary of State for the Home Department*, and *Murat Dereci and Others v Bundesministerium für Inneres*.

A. *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*

The parties in *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* sought to ascertain whether

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49. Richards, *supra* note 46, at 272.

50. *Id.* at 273.

51. *Id.*

52. Sonia Morano-Foadi, *Un-Nesting the “Matrioska” Doll: Problems and Paradoxes at the Intersection Between Citizenship, Migration and Human Rights*, 27–28 *REVISTA DE DERECHO DE LA UNION EUROPEA* 301, 309 (2014).

Directive 73148, Directive 90/364 or Article 18 EC, read in conjunction with Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental freedoms, conferred upon a young minor, who is a national of a Member State and in the care of a parent who is a third-country national, the right to reside in another Member State, where the minor receives childcare services.<sup>53</sup> If so, do these provisions confer a right of residence on the parent?<sup>54</sup> Mrs. Chen moved to Northern Ireland with the intention of having her child acquire the nationality of another Member State.<sup>55</sup> Mrs. Chen worked with her husband for a company registered in China.<sup>56</sup> The company exported chemicals to various parts of the world, including the United Kingdom and other European Union Member States.<sup>57</sup>

Mr. Chen was one of the directors of the company, and as a result, travelled frequently to the United Kingdom.<sup>58</sup> Despite the one child policy adopted by China, Mr. and Mrs. Chen decided to have a second child.<sup>59</sup> As a result, Mrs. Chen decided to give birth to her child abroad in order to avoid any repercussions that may befall her family as a result of China's "one child policy."<sup>60</sup> Therefore, they decided to take advantage of Ireland's law, which granted *jus soli* citizenship – i.e. nationality to anyone born in Ireland.<sup>61</sup> Catherine was born on September 16, 2000, in Belfast, Northern Ireland.<sup>62</sup> Mr. and Mrs. Chen had specifically chosen Belfast because they wanted to take advantage of the European citizens right that would be conferred upon Catherine, upon her birth, namely the right to establish themselves in the United Kingdom.<sup>63</sup> Although Catherine gained Irish nationality, she did not acquire United Kingdom

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53. Case C-200/02, *Zhu v. Sec'y of State for the Home Dep't*, 2005 E.C.R. I-9951, ¶ 16.

54. *Id.*

55. *Id.* ¶ 34.

56. *Id.* ¶ 8.

57. *Id.* ¶ 8.

58. *Id.* ¶ 9.

59. *Id.* ¶ 10.

60. *Id.* ¶ 11.

61. David H. King, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, 29 LOY. L.A. INT'L & COMP. L. REV. 291, 293–94 (2007).

62. *Zhu*, 2004 E.C.R. I-9925, ¶ 12.

63. *Id.* ¶ 13.

nationality because she did not meet the requirements laid down by UK law.<sup>64</sup> As a result, Mrs. Chen applied to the UK for a permit that would allow her and Catherine to reside in the UK.<sup>65</sup> However, the Secretary of State rejected the applications.<sup>66</sup> It is also important to note that Mrs. Chen was economically self-sufficient and could provide for Catherine.<sup>67</sup>

The United Kingdom and Ireland claimed that the benefit on free movement of persons and residence could not apply to a person in Catherine's position since she had never moved from one Member State to another Member State.<sup>68</sup> The United Kingdom also argued that the Chen's were not entitled to rely on the Community provisions, since they attempted to exploit Community law by giving birth "in a part of the host Member State to which another Member State applies its rules governing acquisition of nationality *jure soli*."<sup>69</sup> Moreover, the United Kingdom argued that Member States should have the ability to implement measures in order to prevent individuals from improperly taking advantage of Community law.<sup>70</sup>

The Court began by stating that a situation cannot be made purely internal just because a national of a Member State, who was born in the host Member State, has not made use of the right to freedom of movement.<sup>71</sup> This would deprive the national of the provisions of Community law.<sup>72</sup> Moreover, regarding the right to reside in the territory of the Member States provided for in current Article 21(1) TFEU, the right is granted directly to every citizen of the Union, purely as a national of a Member State, and therefore as a citizen of the Union.<sup>73</sup> Therefore, Catherine was entitled to rely on Article 21(1).<sup>74</sup> However, the right of citizens of the Union to reside in another Member State is recognized subject to the limitations and conditions imposed by the Treaty and by

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64. *Id.* ¶ 14.

65. *Zhu*, 2005 E.C.R. 1-9951, ¶ 12.

66. *Id.* ¶ 14.

67. *See id.* ¶ 13.

68. *Id.* ¶ 26.

69. *Id.* ¶ 34.

70. *See id.* ¶ 30.

71. *Id.* ¶ 19.

72. *Id.* ¶¶ 24–25.

73. *Id.*

74. *Id.* ¶ 26.

the measures adopted to give it affect.<sup>75</sup> While Mrs. Chen admitted that the purpose of her stay in the United Kingdom was to create a situation where her child could acquire the nationality of another Member State, so that she and her child could secure a long-term right to reside in the United Kingdom, the Court held that it is for each Member State, having “due regard” of Community law, to lay down the conditions for the acquisition and loss of nationality.<sup>76</sup>

The Court also stated that Member States could not impose additional conditions for recognition of the nationality granted by another Member State.<sup>77</sup> Finally, the Court held that “a young minor who is a national of a Member State, is covered by the appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.”<sup>78</sup> Moreover, Article 21 TFEU and Council Directive 9-/364/EEC allows a “parent who is that minor’s primary care [provider] to reside with the child in the host Member State.”<sup>79</sup>

#### B. Janko Rottman v. Freistaat Bayern

*Janko Rottman v. Freistaat Bayern* helped flesh out other features of European Union citizenship. *Rottmann* concerned the interpretation of the citizenship provisions of the European Community Treaty.<sup>80</sup> The question referred for preliminary ruling was whether,

it is contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality

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75. *Id.*

76. *Id.* ¶¶ 36–37.

77. *Id.* ¶ 39.

78. *Id.* ¶ 47; *see also Id.* ¶ 47; *Zhu*, 2004 E.C.R. I-9925, ¶¶ 53, 55 stating (“there is no doubt that minors can be vested with residence rights. In the case of *Echternach* and *Moritz*, for example, it was explicitly stated that a minor who was the son of a worker who had in the meantime left the host country ‘retains the right to rely on the provisions of Community law’, which allow him to remain in that country to complete [his] studies already commenced.” Therefore, “a very young minor like Catherine can be vested with rights of movement and residence within the Community.”).

79. *Zhu*, 2005 E.C.R. I-9951, ¶ 47.

80. Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-01449, ¶ 1.

of that State acquired by naturalisation [sic] and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless.<sup>81</sup>

Rottmann was born in Austria and at birth acquired Austrian nationality.<sup>82</sup> However, after the opening of a criminal procedure against him in Austria, Rottmann transferred his residence to Germany.<sup>83</sup> In February 1997, a warrant for Rottmann arrest was issued and in 1998 Rottmann applied for German nationality.<sup>84</sup> However, during his naturalization proceedings, Rottmann forgot to mention the proceedings against him in Austria.<sup>85</sup> Moreover, upon application for the German nationality, under Austrian law, Rottmann lost his Austrian nationality.<sup>86</sup> After becoming aware of the circumstances, the Freistaat Bayern “withdrew the naturalisation [sic] with retroactive effect,” as a result of Rottmann trying to obtain German nationality through deception.<sup>87</sup>

The European Court of Justice began by stating that when examining a decision to withdraw naturalization it is necessary to take into account the consequences the decision may have for the person concerned and, if relevant, for members of his family with regards to rights enjoyed by every citizen in the Union.<sup>88</sup> Moreover, the Court held that it would not be contrary to European Union Law for a Member State to withdraw from a “citizen of the Union the nationality of that state acquired by naturalization [sic] when the nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality” allowing “the person concerned to be afforded a reasonable period of time in to try to recover the nationality of his Member State of origin.”<sup>89</sup>

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81. *Id.* ¶¶ 35–36.

82. *Id.* ¶ 22.

83. *Id.* ¶ 23.

84. *Id.* ¶¶ 24–25.

85. *Id.* ¶ 25.

86. *Id.* ¶ 26.

87. *Id.* ¶ 28.

88. *Id.* ¶ 56.

89. *Id.* ¶ 58–59.



## C. Gerardo Ruiz Zambrano v Office national de l'emploi

*Zambrano* is a seminal case, which like *Chen*, relied upon Article 20 TFEU to grant a derived right of residence to third-country nationals on the basis of their children's citizenship rights. The preliminary reference was made in the context of proceedings between Mr. Zambrano, a Colombian national, and the Office national de l'emploi, concerning the refusal of the Office national de l'emploi to grant Zambrano unemployment benefits under Belgian legislation.<sup>90</sup> In 1999, Mr. Zambrano, a Colombian national applied for asylum in Belgium and in 2000 so did his wife.<sup>91</sup> However, the applications were refused in September 2000, and Belgian authorities ordered the Zambrano's to leave Belgium.<sup>92</sup> The order stated that the Zambranos should not be sent back to Colombia, as a result of the civil war that was going on in Colombia at the time.<sup>93</sup> Mr. Zambrano once again applied to have his situation regularized on October 2000 however his application was refused in August 2001.<sup>94</sup> Although he did not have a work permit, Mr. Zambrano began working with Plastoria company.<sup>95</sup>

On September 2003, Mrs. Zambrano gave birth to a second child, Diego, who acquired Belgian nationality under Article 10(1) of the Belgian Nationality code which stated that "[a]ny child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian."<sup>96</sup> In the present situation, Diego would have been stateless had Belgium not had this provision, since "Columbian law does not recognize Colombian nationality for children born outside the territory of Columbia where the parents do not take specific steps to have them

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90. Case C-34/09, *Zambrano v Office nat'l de l'emploi*, 2011 E.C.R. I-1235, ¶ 2.

91. *Id.* ¶ 14.

92. *Id.* ¶ 15.

93. *Id.*

94. *Id.* ¶ 17.

95. *Id.* ¶ 18. Sharpston was of the opinion that the right to move and to reside freely under Art. 20(1) TFEU ought to be interpreted as creating a free-standing right to reside irrespective of prior exercise of free movement rights. See Opinion of Advocate General, Case C-34/09, *Zambrano v Office nat'l de l'emploi*, 2010 E.C.R. I-1208, ¶¶ 100–02.

96. Case C-34/09, *Zambrano v Office nat'l de l'emploi*, 2011 E.C.R. I-1235, ¶ 4.

recognized.”<sup>97</sup> In 2004, the Zambranos applied to have their situation regularized, putting forward the birth of their second child and relying on an “Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,” which “prevents that child from being required to leave the territory of the State of which he is a national.”<sup>98</sup> Once again, after the birth of their third child Jessica in 2005, the Zambrano’s lodged an application to take up residency in Belgium.<sup>99</sup> In September 2005, a registration certificate was issued to them providing them with residence until February 2006.<sup>100</sup> Moreover, in 2007, Mr. Zambrano brought an action for annulment.<sup>101</sup>

The European Court of Justice began by stating that Article 3(1) of Directive 2004/38 applies to all “Union citizens who move to reside in a Member State other than that of which they are a national.”<sup>102</sup> Moreover, Article 20 confers the status of EU citizen to every person holding a nationality of a Member State, such as Diego and Jessica.<sup>103</sup> Since citizenship of the Union is intended to be “the fundamental status of nationals of the Member States,” then Article 20 TFEU precludes national measures, which would deprive citizens of the Union of the “genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”<sup>104</sup> Denying the Zambranos, whose two children are Belgian nationals, the right of residence would most likely lead to a situation where the children, citizens of the Union, would have to leave the Union in order to accompany their parents.<sup>105</sup> Therefore, the Court held that denying the right of residence to the Zambranos would “deprive [the] children of the genuine enjoyment of the substance of the rights attaching to the status of European Union Citizenship.”<sup>106</sup> The brevity of the Courts judgment in this case led to uncertainty. More specifically, the court did not provide criteria to help

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97. *Id.* ¶ 19.

98. *Id.* ¶ 21.

99. *Id.* ¶ 22.

100. *Id.*

101. *Id.* ¶ 30.

102. *Id.* ¶ 39.

103. *Id.* ¶ 40.

104. *Id.* ¶ 42.

105. *Id.* ¶ 44.

106. *Id.* ¶ 46.

determine what constituted deprivation of the genuine enjoyment of the substance of a European Union citizens' right.

#### D. Shirley McCarthy v Secretary of State for the Home Department

While Zambrano broadened the scope of Article 20 TFEU, McCarthy narrowed the test set out in Zambrano on the genuine enjoyment of the substance of European Union citizen rights. In *McCarthy v. Secretary of State for the Home Department*, Mrs. McCarthy, a British and Irish national, who has only lived in the United Kingdom, tried to obtain the right to reside in the United Kingdom for her and her Jamaican husband under her rights as a Union citizen and Irish national.<sup>107</sup> In 2002, after her marriage, Mrs. McCarthy applied for an Irish passport for the first time.<sup>108</sup> In 2004, Mrs. McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law, a Union citizen and the spouse of said citizen.<sup>109</sup> The Secretary of State for the Home Department refused this application because Mrs. McCarthy was not considered a “‘qualified person,’ (essentially, a worker, self-employed person or self-sufficient person).”<sup>110</sup> In turn, Mr. McCarthy could not be considered a spouse of a qualified person under Directive 2004/38.<sup>111</sup>

The Court began by stating that Union citizenship confers on each Union citizen a “primary and individual rights to move and reside freely within the territory of the Member States.”<sup>112</sup> Moreover, Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within that territory.<sup>113</sup> However, Directive 2004/38 does not apply to a citizen in Mrs. McCarthy's position, who has never exercised her right of free movement.<sup>114</sup> Regarding whether Article 21 TFEU applies to a Union

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107. Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 2010 E.C.R. ¶ 15.

108. *Id.*

109. *Id.* ¶ 17.

110. *Id.*

111. *Id.*

112. *Id.* ¶ 27.

113. *Id.* ¶ 28.

114. *Id.* ¶ 30.

citizen who has never exercised his right of free movement, has always resided in the Member State of his/her own nationality, and who is a national of another Member State, the Court stated that the rules governing freedom of movement under European Union law cannot be applied to situations which have no linking factor and which are confined to a single Member State.<sup>115</sup>

However, the fact that Mrs. McCarthy has not exercised her right to free movement should not automatically be assumed to be an internal matter.<sup>116</sup> Moreover, as a national of at least one Member State, Mrs. McCarthy enjoys the rights of a Union citizen under Article 20(1) TFEU and may rely on the right to move and reside freely within the territory of Member States set out in Article 21 TFEU.<sup>117</sup> However, the Court found that there was no indication that the national measure would deprive Mrs. McCarthy of the genuine enjoyment of the substance of the rights derived from her Union citizenship or of her right to move freely within Member States, in accordance with Article 21 TFEU.<sup>118</sup> Therefore, unlike the measure in *Zambrano*, which had the effect of depriving Union citizens of the genuine enjoyment of the substance of rights conferred upon them, Mrs. McCarthy would not be deprived of such rights nor would she be forced to leave the European Union.<sup>119</sup>

#### E. Murat Dereci and Others v Bundesministerium für Inneres

*McCarthy* was followed by *Dereci*. In *Dereci v. Bundesministerium für Inneres*, the Ministry of Home Affairs rejected applications for residence made by Mr. Dereci, Mrs. Heiml, Mr. Kokollari, Mr. Maduiké, and Mrs. Stevic.<sup>120</sup> The question referred to the European Court of Justice dealt with whether the provisions concerning citizenship of the Union must be interpreted as “precluding a Member State from refusing to grant residence within its territory to a third country national,” even though the third-country national wants to reside with a family member

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115. *Id.* ¶ 45.

116. *Id.* ¶ 46.

117. *Id.* ¶ 48.

118. *Id.* ¶ 49–50.

119. *Id.* ¶ 50.

120. Case C-256/11, *Dereci v. Bundesministerium für Inneres*, 2011 E.C.R. I-11315, ¶ 2.

who is a European citizen, and a resident in that Member State but who has never exercised his right to free movement.<sup>121</sup>

The European Court of Justice stated that the criteria relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizenship, refers to situations in which the Union citizen has to, in fact, “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,” clarifying the principle set out in *Zambrano*.<sup>122</sup> With respect to the concept of private and family life, the Court held that in so far as Article 7, concerning respect for private and family life, of the Charter of Fundamental Rights of the European Union, contains rights guaranteed by Article 8(1), these rights are addressed to Member States only when they are implementing European Union law.<sup>123</sup> Therefore, if the issue is covered by European Union law, it must be examined whether the refusal of the right of residence undermines Article 7 of the Charter, the right to respect for private and family life and if not, then the court must make the examination in light of Article 8(1).<sup>124</sup> Finally, the Court held that a Member State is not precluded from “refusing to allow a third country national to reside on its territory, where th[e] third country national wishes to reside with a member of his family,” where the “citizen of the Union residing in the Member State of which he” is a national “has never exercised his right to freedom of movement.”<sup>125</sup> However, the refusal shall not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union.<sup>126</sup>

Finally, the case law demonstrates that “citizenship rights Under 20 and 21 TFEU are only engaged where (i) there is a cross-border element” . . . or where “(ii) a national measure would have the effect of” denying a national of a Member State “the genuine enjoyment of the substance of

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121. *Id.* ¶ 37.

122. *Id.* ¶ 66.

123. *Id.* ¶ 72.

124. *Id.*

125. *Id.* ¶ 102.

126. *Id.* ¶ 74.

the rights conferred by virtue of E[uropean] U[nion] citizen[ship].”<sup>127</sup> The “rights conferred by virtue of European Union citizen status does not include Charter rights as freestanding rights” in the absence of any connection with European Union law.<sup>128</sup> Wholly internal situations continue to fall within the purview of the Member States and remain outside the scope of European Union law.<sup>129</sup> Additionally, the European Court of Justice reiterated the fact that “Union citizens, who have never exercised free movement rights, cannot for that reason alone be assimilated to a purely internal situation.”<sup>130</sup> “This is because citizenship of the Union is intended to be the fundamental status of nationals of Member States[] and thus they may rely on rights pertaining to that status, including those exercised against their Member States.”<sup>131</sup> But should it? Could the principle of European citizenship be expanded to include children who would otherwise become stateless under current Member State laws?<sup>132</sup> In her *Zambrano* Opinion, Advocate General Sharpston “welcomed a new era where the EU citizenship’s philosophy would have the ability to reverse the relationship between the refugee (third-country national) and the citizen.”<sup>133</sup> Therefore, expanding the notion of European Union citizenship to include refugees, making the “concept of citizenship inclusive rather than exclusive,” in order to help

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127. Richards, *supra* note 46, at 284.

128. *Id.*

129. *Id.*

130. *Dereci*, 2011 E.C.R. I-11315, ¶ 161.

131. Morano-Foadi, *supra* note 52, at 312.

132. *Id.* at 316 (quoting Case C-86/12 *Aloka and Others v Ministre du Travail, de l’Emploi et de l’Immigration*, 2013 E.C.R. I-000, ¶ 36, where the Court reiterated the *Zambrano* test but concluded that “Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they do not preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and making use of their right to freedom of movement, in so far as those Union citizens do not satisfy the conditions set out in Directive 2004/38 or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship, a matter which is to be determined by the referring court.”

133. *Id.* at 317.

prevent social exclusion and achieve further integration in the European Union.<sup>134</sup>

### PART III: SHOULD THE CONCEPT OF EU CITIZENSHIP BE EXPANDED TO INCLUDE STATELESS CHILDREN?

A stateless person is someone who is not considered a national by any state because of the law of the state (*de jure statelessness*) or due to an inability to prove identity (*de facto statelessness*).<sup>135</sup> The concept of statelessness and nationality are two sides of the same coin. Someone who does not possess a nationality is stateless and statelessness can only be eliminated through acquisition of a nationality. While there are several international instruments that address the issue of statelessness including: the 1954 Convention Relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality, and the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, statelessness still remains a serious problem, particularly among children.<sup>136</sup> Signatories of these conventions “are urged to provide ‘facilitated access to nationality’” in order to prevent statelessness; however, not all states provide such protection.<sup>137</sup>

Statelessness is increasingly recognized as one of Europe’s major human rights issues, and over 400,000 stateless persons are estimated to be living in the European Union.<sup>138</sup> For example, there are an estimated 13,000 stateless persons living in Germany, 1,100 in France, 2,000 in the

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134. *Id.* at 318.

135. Matilda Månsson, *Reduction of Statelessness & Access to Nationality – The Need for EU Regulation – The Showcase of Stateless Roma in Slovenia*, at 4 (2013) (unpublished Graduate Thesis, Lund University) (on file with author).

136. *Id.*

137. *Id.* at 1.

138. *ENS Submission to the European Commission Consultation on the Future of Home Affairs Policies: An Open and Safe Europe – What’s Next?*, EUR. NETWORK ON STATELESSNESS, <http://www.statelessness.eu/law-policy/briefings/ens-submission-european-commission-consultation-future-home-affairs-policies> (last visited Nov. 12, 2016) [hereinafter, *ENS Submission*].

Netherlands, and 9,000 in Sweden.<sup>139</sup> Addressing statelessness at the European Union level is crucial in order to prevent children from entering into a state of limbo upon birth. Additionally, it is estimated that half of the world's stateless individuals are children, many of whom became stateless at birth.<sup>140</sup> This stands at odds with the international norms, which explicitly provide for a child's right to acquire a nationality.<sup>141</sup>

Under European Union law, possession of nationality is a prerequisite for European Union citizenship.<sup>142</sup> Acquisition of nationality is not based on a common European Union policy but is dependent on the nationality laws of the Member States.<sup>143</sup> Current case law does not provide for the protection of children who would be considered "stateless" upon birth.<sup>144</sup> Regarding European Union citizenship rights, the European Court of Justice has held that a situation cannot be made purely internal just because a national of a Member State, who was born in the host Member State, has not made use of the right to freedom of movement.<sup>145</sup> The Court has also stated that Member States are not allowed to impose additional conditions for recognition of the nationality granted by another Member State.<sup>146</sup> The Court has found that a young minor who is a national of a Member State, "is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State."<sup>147</sup> Moreover, Article 18 TFEU and

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139. Proposal for an EU Directive on the identification of Statelessness and the Protection of Stateless Persons from Meijers Committee to Cecilia Malmström, Commissioner for Home Affairs (Oct. 13, 2014) (on file with Committee).

140. Jessica Parra, *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness*, 34 *FORDHAM INT'L L.J.* 1666, 1675 (2011).

141. *Id.* at 1675.

142. Picard, *supra* note 8, at 73.

143. *Id.*

144. *Id.*

145. *Zhu*, 2004 E.C.R. I-09925, ¶ 19.

146. *Id.* ¶ 39.

147. *Id.* ¶ 47; *see also* Opinion of Advocate General, Case C-200/02, *Zhu*, 2004 E.C.R. I-09925, which states "[T]here is no doubt that minors can be vested with residence rights. In the case of *Echternach and Moritz*, for example, it was explicitly



Council Directive 9-/364/EEC “allows a parent who is that minor’s primary [care provider] to reside with the child in the host Member State.”<sup>148</sup> The Court has also found that when examining a decision to withdraw naturalization, it is necessary to take into account the consequences the decision may have for the person concerned and, if relevant, for members of his family with regards to rights enjoyed by every citizen in the Union.<sup>149</sup>

Since citizenship of the Union is intended to be “the fundamental status of nationals of the Member States,” then Article 20 TFEU precludes national measures, which would deprive the citizens of the “genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”<sup>150</sup> Moreover, Union citizenship confers on each Union citizen a “primary and individual right[] to move and reside freely within the territory of the Member States.”<sup>151</sup> Finally, the Court has stated that the rules governing freedom of movement under European Union law cannot be applied to situations which have no linking factor and which are confined to a single Member State.<sup>152</sup>

However, can the notion of European Union citizenship be expanded to include children who would otherwise become stateless upon birth in certain Member States? In *Chen*, Mrs. Chen gave birth to her second child in Ireland.<sup>153</sup> Mrs. Chen and her husband had picked Ireland because of a provision in Ireland’s law at the time, which granted nationality rights to children born in Ireland who would become stateless upon birth. As a result of China’s “one child policy,” that is exactly what would have happened to Mrs. Chen’s daughter Catherine had Ireland not provided children in such a position with nationality.<sup>154</sup> Now, imagine

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stated that a minor who was the son of worker who had in the meantime left the host country ‘retains the right to rely on the provisions of Community law’, which allow him to remain in that country to complete his studies already commenced.” Therefore, “a very young minor like Catherine can be vested with rights of movement and residence within the Community.”

148. *Zhu*, 2004 E.C.R. I-09925, ¶ 47.

149. *Rottmann*, 2010 E.C.R. I-01449, ¶ 56.

150. *Zambrano*, 2011 I-01177, ¶ 42.

151. *Id.* ¶ 35(2).

152. *Id.* ¶ 39.

153. *Zhu*, 2004 E.C.R. I-09925, ¶ 8–10.

154. Ireland eventually changed its law in order to prevent similar situations from occurring.

that Mrs. Chen and Mr. Chen had not selected Ireland because of its law and that Ireland did not provide nationality to children who would otherwise be stateless. In this hypothetical, imagine that Mrs. Chen was just visiting Ireland and happened to give birth early. In such a situation, as happens on a daily basis all over the world, the child would be deprived of a nationality and of an identity. Catherine would not be able to claim Chinese citizenship or any other citizenship for that matter. A similar situation would have happened to Mr. and Mrs. Zambrano's children had Belgium not provided for a similar protection, as did Ireland at the time of the birth of their two children. Not only would the deprivation of nationality have left the children without citizenship of a country but it would have also left them in legal limbo.

Article 2 of the Treaty on the European Union states that

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.<sup>155</sup>

Therefore, the European Union has an ethical obligation to protect the innocent children and provide them with an identity. A solution to the problem of stateless children in the European Union could be to eliminate the derivative nature of European Union citizenship by allowing individuals to become European Union citizens without the prerequisite of a Member State nationality. This would allow children, who would otherwise become stateless under the Member State's law, to obtain European Union citizenship and the benefits attached to it.<sup>156</sup> The European Union could harmonize the rules on the granting of nationality based on international agreements for the reduction and prevention of statelessness.

Given the European Union's interest in the protection of children's rights in its external action and the fact that addressing childhood "would go a long way to contributing to ultimately eradicating statelessness,

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155. Treaty of Lisbon, *supra* note 32, art. 1a.

156. Parra, *supra* note 140, at 1687.

promoting children's right to a nationality can be put forward as another priority area of European Union engagement.<sup>157</sup> The harmonization of nationality laws concerning children born to third-country nationals in Member States, who do not have recourse to their own parent's citizenship, will help reduce statelessness. While some may argue that Member States should be the ones to address statelessness, harmonization can help prevent inequality and can set a standard that all Member States must meet.

Moreover, the Lisbon Treaty specifically addresses the legal position of stateless persons and could serve as the basis for setting common criteria for a statelessness directive, regulation, or procedure. Under Article 67(2) of the Treaty on the Functioning of the European Union, the Union

shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.<sup>158</sup>

Additionally, legislation based on Title V of the Treaty on the Functioning of the European Union applies equally to stateless persons.<sup>159</sup> Under the Treaty of Lisbon, the Union legislator is given the authority to develop conditions of residence for third-country nationals and stateless persons (Article 79(1) TFEU) and Article 79(2)(a) provides the legal basis for defining the conditions of entry and residence of stateless persons.<sup>160</sup> Article 79 can serve as the legal basis for setting common criteria for statelessness determination procedure in combination with Article 67(2).<sup>161</sup>

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157. Addressing the Human Rights Impact of Statelessness in the EU'S External Action, *supra* note 4, at 36.

158. Treaty of Lisbon, *supra* note 32, at art. 61(2).

159. Månsson, *supra* note 135, at 5.

160. *Id.* at 6.

161. *Id.* at 6; for other directives adopted on the basis of Article 79 TFEU, *see generally* Council Directive 2004/114, 2005 O.J. (L 375) (EC) (for students); Council Directive 2003/86, 2003 O.J. (L 251) (EC) (for family reunification); and Council Directive 2003/109, 2004 O.J. (L 16) (EC) Concerning the Status of Third-Country Nationals Who Are Long-Term Residents,.

Finally, in the *Origins of Totalitarianism*, Hannah Arendt stated that “[t]o be stripped of worldliness; it is like returning to a wilderness as cavemen or savages . . . A man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow man . . . they can live and die without leaving any trace, without having contributed anything to the common world.”<sup>162</sup> No child should be placed in this position. Currently, Member States are free to restrict the right of nationality upon birth. If laws were based solely on the basis of descent of the parents, children born to stateless parents would not be able to acquire nationality. There should be no stateless children in Europe. It is important to emphasize that the fulfillment of the right of acquiring a nationality does not require Member States to grant nationality to every child born on their territory, but rather, ensure that every child has a right to acquire a nationality, in order to avoid statelessness.

#### CONCLUSION

With the entry into force of the Maastricht Treaty came the notion of “European citizenship,” which the European Court of Justice claimed was to be the “fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exception as are expressly provided for.”<sup>163</sup> The treaty also “communitarized” migration issues and gave European Union institutions the competence to define “conditions of entry and residence, including long-term residence permits, and the rights and conditions under which nationals of third countries,” who were legal residents in one Member State could reside in another Member State.<sup>164</sup> As the principle of European Union citizenship has continued to evolve, some have argued that the prerequisite of needing to be a national of a member state in order to obtain European Union citizenship rights should be

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162. *ENS Submission*, *supra* note 138, at 5 (quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951)).

163. *Grzelczyk*, 2001 E.C.R. I-06299, ¶-0629 *see also* BARNARD, *supra* note 15, at 437.

164. Picard, *supra* note 8, at 74.

eliminated in turn, expanding the individuals who could fall under the scope of this principle. Among those who deserve protection are the children who are being born in Member States and who become stateless upon entering the world, as a result of neither parent being a resident or citizen of that country or because the country does not grant nationality to stateless people. The European Union has an ethical duty to protect these children, whether by compelling Member States to adapt their law in order to provide children in such a situation with citizenship, or by expanding the notion of European Union citizenship to include such children. If necessary, the child's parent should obtain residency rights in order to protect the child's "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."<sup>165</sup>

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165. *Zambrano*, 2011 E.C.R. I-01177, ¶ 42.