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CASE LAW

A. Court of Justice

Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, Judgment of the Court of Justice (Third Chamber) of 5 May 2011, nyr;

Case C-256/11, *Dereci and others v. Bundesministerium für Inneres*, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011, nyr.

(Some of) The Kids Are All Right

1. Introduction

The Court of Justice judgments in *McCarthy* and *Dereci* join a significant minority of decisions constraining the scope of European Union citizenship.¹ Generally, the impact of citizenship in the case law is rights-expanding, which, many would argue, is entirely justified by the nature and purpose of citizenship per se. In other words, when Member State nationals invoke EU citizenship rights in claims against host (or even their own) Member States, they tend to succeed. This trend has been strongly apparent in cases involving rights of residence for family members (including third country national family members) and it was confirmed by the Grand Chamber early in 2011, in its controversial decision in *Ruiz Zambrano*.² In that case, the Court found that minor Union citizens who had no connection to another Member State could nonetheless engage the protection of Union citizenship against the State of their birth (and unbroken residence) to secure residence rights and work permits there for their third country national parents.

1. The decision in Case C-158/07, *Forster*, [2008] ECR I-8507 is another prominent example. In that case, the Court approved national limitations regulating access to student maintenance grants; the restrictions were in line with EU legislative conditions, which were, at the time, adopted but not yet in force. See Art. 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. L, 158/77.

2. Case C-34/09, *Ruiz Zambrano*, judgment (Grand Chamber) of 8 March 2011, nyr.

Against that broader trajectory, it is important to reflect on the rights-limiting implications of *McCarthy* and *Dereci*. In both judgments, the significance of establishing a cross-border connection was re-entrenched. Did the Court set these limits in a coherent and appropriate way? This reflection suggests that it did not, for two reasons: first, because of problems already apparent in the Court's strict delineation of its new "genuine enjoyment of the substance of EU citizenship rights" test; and, second, because of the Court's failure to engage properly with standard thresholds established in other strands of its own case law, notably (but not only) on the protection of fundamental rights. The annotation first provides a brief outline of the judgment in *Ruiz Zambrano*. It then presents an overview of the facts, Opinions and judgments in *McCarthy* and *Dereci*. Following a discussion of how we are now supposed to understand the "substance" of EU citizenship rights, the analysis goes on to evaluate the performance of the Court in institutional terms against benchmarks of coherence and legal certainty.

2. The judgment in *Ruiz Zambrano*

The *Ruiz Zambrano* case centred on derived rights to reside and work in Belgium for the Columbian national parents of two minor children who, having been born there, held (only) Belgian nationality.³ The critical point on which the case turned was whether or not a connecting factor to EU law could be established, given that the Union citizens – the Belgian children – had never exercised Treaty rights to move and reside within the Union. A standard application of EU law would generate rights of residence in any of the *other* 26 Member States in that situation (subject to demonstrating economic self-sufficiency after the first three months⁴) but not in the Union citizens' home State.⁵ In a comprehensive and stirring analysis of relevant EU law, Advocate General Sharpston questioned the continuing legitimacy of the resulting reverse discrimination (for static *vis-à-vis* migrant Union citizens), the credibility of the wholly internal rule given the Court's incremental dilution of the concept of movement in any event, and the proper place of fundamental rights in the EU's distinctive constitutional order. In sum, she

3. In Case C-200/02, *Zhu and Chen*, [2004] ECR I-9925, the Court confirmed that minor children are full beneficiaries of the status of Union citizenship, and that derived residence rights in a host Member State should be granted to their (self-sufficient) primary carer. The judgment in *Ruiz Zambrano* may have altered the latter concept to the parent(s?) on whom the minor children are dependent (*Ruiz Zambrano*, cited *supra* note 2, paras. 43–44).

4. See Directive 2004/38, cited *supra* note 1, Articles 2, 6 and 7.

5. See e.g. Joined Cases C-64 & 65/96, *Uecker and Jacquet*, [1997] ECR I-3171.

predicted that the Court would soon have “to confront the question of whether the Union is not now on the cusp of constitutional change”.⁶

Addressing the substantive questions raised in the case, Advocate General Sharpston proposed, first, that Articles 20 and 21 TFEU⁷ conferred standalone rights of residence that are independent from the right to move to or between other Member States, thus bringing the Ruiz Zambrano children within the personal scope of EU law. Second, she suggested that Article 18 TFEU should be interpreted as prohibiting reverse discrimination “caused by the interaction of Article 21 TFEU with 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”.⁸ She thus constricted the impact of the wholly internal rule, removing from its ambit situations requiring the EU to intervene in order to protect the fundamental rights (here, respect for family life) of EU citizens. Her arguments were bold; but they were clear, and thoroughly rationalized.

The Court’s decision was distinctly more modest, but it nonetheless charted new, controversial, territory. In a stunningly short judgment, the Grand Chamber confirmed, first, that Directive 2004/38 could not apply, since Article 3(1) clearly required movement to and/or residence in a State other than the citizen’s State of nationality. Second, the Court recalled the “fundamental” nature of Union citizenship.⁹ On that basis, it held that “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”.¹⁰ The Court then stated that the refusal of rights of residence and a work permit “has such an effect”.¹¹ Its reasoning unfolded (to some extent anyway) as follows:

“[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*

6. *Ruiz Zambrano*, cited *supra* note 2, Opinion, para 177.

7. Art. 20 TFEU states that “[c]itizenship 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.” The right to move and reside freely within the territory of the Member States is noted in Art. 20(2)(a). Art. 21(1) TFEU further provides that “[e]very 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”.

8. *Ruiz Zambrano*, cited *supra* note 2, Opinion, para 150.

9. Citing Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 31; Case C-413/99, *Baumbast and R*, [2002] ECR I-7091, para 82; Case C-148/02, *Garcia Avello*, [2003] ECR I-11613, para 22; *Zhu and Chen*, cited *supra* note 3, para 25; and Case C-135/08, *Rottmann*, [2010] ECR I-1449, para 43.

10. *Ruiz Zambrano*, cited *supra* note 2, para 42 (emphasis added).

11. *Ibid.*, para 43.

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.”¹²

Although not as Advocate General Sharpston had proposed, the Court in *Ruiz Zambrano* did nudge the application of EU law into a tranche of otherwise internal situations. Confusingly, it did not overrule any previous case law pointing to the opposite conclusion (a point returned to below). Moreover, the critical new test – “depriving citizens of the Union of the genuine enjoyment of the substance of their citizenship rights” – was undefined. The Court’s supporting reference to *Rottmann* was cryptic: at the relevant passage (para 42), the earlier judgment refers to “a decision withdrawing [the applicant’s] naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by [Article 20 TFEU] and the rights attaching thereto”. In *Ruiz Zambrano*, the Court seems to be saying that the situation faced by the family was *another* example of deprivation/genuine enjoyment. But it offered no ontological profile of the test and no sense of its outer parameters. Nor did it engage or refer to any evidence to support its factual assumptions.

Initial reaction in the literature was broadly positive with respect to the substance of the decision, in appreciation of its rights-enhancing impetus; but very critical of the Court’s methodology, given the absence of proper reasoning.¹³ The then pending cases of *McCarthy* and *Dereci* thus became fortuitous; here, surely, many unsettled questions would be answered. Moreover, two of the judges that sat in the Grand Chamber for *Ruiz Zambrano* were also members of the Third Chamber in *McCarthy*; and the Grand Chamber sat again to hear *Dereci* through the accelerated procedure, eight judges overlapping with the *Ruiz Zambrano* composition (although with a different *juge-rapporteur*).

12. *Ibid.*, para 44.

13. See e.g. Hailbronner and Thym, case note 48 CML Rev. 1253; Kochenov, “A real European citizenship; a new jurisdiction test; a novel chapter in the development of the Union in Europe”, 18 CJEL (2011, forthcoming); Van Eijken and De Vries, “A new route into the promised land? Being a European citizen after *Ruiz Zambrano*”, 36 EL Rev. (2011), 704.

3. The cases

3.1. *The McCarthy case*

The applicant, Shirley McCarthy, is a British national who was born and has always resided in the United Kingdom. She also holds Irish nationality (her mother was born in Ireland).¹⁴ The case stemmed from a refusal by the Secretary of State for the Home Department in 2004 to issue a residence permit to her on the basis of EU law i.e. as an Irish national residing in the UK. That refusal was grounded in Regulation 5(1) of the (then operative) Immigration (European Economic Area) Regulations 2000, on the basis that she was not a “qualified person” (i.e. a migrant worker, self-employed person, or self-sufficient person – on the latter point, nationality and/or residence issues aside, Mrs McCarthy was in receipt of State benefits from the UK); nor was she exercising Treaty rights within the meaning of EU law.¹⁵ Through a sequence of appeals, her case finally reached the Supreme Court (at that time, the House of Lords).

The unusual step of applying for a residence permit from her home State on the basis of EU law was taken not because of doubts about her own entitlement to live in the UK,¹⁶ but because her husband, George McCarthy, is a Jamaican national who did not have leave to remain there. Had the applicant been granted a residence permit in the UK through the channel of EU citizenship, her husband would have a virtually automatic (derived) right to reside there with her as the spouse of an EU citizen. Mr McCarthy entered the UK as a visitor for six months in 2002. He met the applicant and they married in November of that year. Mr McCarthy applied for a residence card in his own name, having been refused indefinite leave to remain; a second application was refused in 2004, accompanied by a notice that he had no further basis on which to remain in the UK.¹⁷

14. In her Opinion, A.G. Kokott noted that Mrs McCarthy applied for her first Irish passport only after her marriage (*McCarthy*, Opinion, para 11).

15. The Court of Appeal and Supreme Court later considered the situation of the applicant with reference to the Immigration (European Economic Area) Regulations 2006, in accordance with para 5(1) of schedule 4 to those Regulations.

16. As the ECJ later confirmed, international law, as reaffirmed in Art. 3 of Protocol No 4 to the ECHR, “precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason... that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional” (*McCarthy*, para 29).

17. See decision of the Court of Appeal, *Shirley McCarthy v. Secretary of State for the Home Department* [2008] EWCA Civ 641, para 3. The rejection of a further application for a residence card brought his case before the Asylum and Immigration Appeal Tribunal, which adjourned those proceedings pending the outcome of Mrs McCarthy’s case.

Both the Tribunal and Court of Appeal acknowledged Mrs McCarthy's dual nationality in terms of bringing her within the personal scope of EU law.¹⁸ It was also acknowledged that the 2006 Regulations were adopted to transpose Directive 2004/38 into national law, including its concept of "permanent residence".¹⁹ Article 16(2) of the Directive provides that the status of permanent residence extends also "to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years". Mr McCarthy could not come within the scope of Article 16(2). But if Mrs McCarthy obtained a residence permit from the UK on the basis of the Directive, then Mr McCarthy's status would be regularized as the spouse of a lawfully resident EU citizen; all that would then be needed for him to acquire permanent residence is time.

The glitch in this line of argument was that Mrs McCarthy had never "moved" within the meaning of EU law. Article 3(1) of Directive 2004/38 states that it applies to (or, its "beneficiaries" are) "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" (defined in Art. 2 and including spouses of any nationality). But Mrs McCarthy met neither of the conditions in Article 3. Additionally, while Article 16 is focused on continuous and lawful residence, it expressly refers to a "host" Member State. Notwithstanding arguments about the broader intentions of the Directive and the rights-enhancing quality of EU citizenship more generally, neither the Tribunal nor the Court of Appeal were persuaded that a residence permit could be claimed against the applicant's home State under Directive 2004/38 on the sole basis of holding dual nationality.²⁰ At the final stage of her case in the domestic courts, the House of Lords referred two questions to the Court of Justice for a preliminary ruling:

18. In the Court of Appeal, Lord Justice Pill observed that the Tribunal had considered the case for a second time precisely because it had *not* taken account of the applicant's dual nationality in its initial decision (*ibid.*, para 7).

19. See Art. 16(1) of Directive 2004/38 (cited *supra* note 1), which entitles EU citizens who have resided lawfully for a continuous period of five years in a host Member State to a right of permanent residence there. Recital 17 of the preamble to the Directive characterizes permanent residence as "strengthen[ing] the feeling of Union citizenship and [as] a key element in promoting social cohesion, which is one of the fundamental objectives of the Union". Two critical features of the right to permanent residence are, first, the removal of the self-sufficiency conditions in Art. 7 of the Directive as preconditions to lawful residence in the host State and, second, enhanced protection against expulsion from that State (Art. 28).

20. Somewhat tantalizingly, Lord Justice Pill in the Court of Appeal did not find that "the Directive invariably imposes a requirement that there is movement from one country to another and that 'the movement required excludes the appellant'" (judgment cited *supra* note 17, para 33); but no further explanation of this statement was given.

1. Is a person of dual Irish and [British] nationality who has resided in the United Kingdom for her entire life a “beneficiary” within the meaning of Article 3 of Directive 2004/38/EC?
2. Has such a person “resided legally” within the host Member State for the purpose of Article 16 of Directive 2004/38/EC in circumstances where she was unable to satisfy the requirements of Article 7 of that directive?

In addition to the submissions of the applicant and the United Kingdom, Denmark, Estonia, Ireland, the Netherlands and the Commission all submitted written observations to the Court. No other party argued in support of Mrs McCarthy’s claim that dual nationality was a sufficient connecting factor to EU law in the circumstances of her case.²¹

3.1.1. *Opinion of Advocate General Kokott*

Advocate General Kokott delivered her Opinion on 25 November 2010. She confirmed at the outset that no claim to movement under *any* relevant Treaty provisions was asserted in the case;²² dual nationality was the only connection to EU law being raised. On the first question, reviewing the wording of Article 3(1), the Advocate General reasoned that “Directive 2004/38 does *not* apply to the relationship of Union citizens with the Member State of which they are a national and in which they have always resided”.²³ She drew support for this interpretation from the broader aim of the Directive – i.e. facilitation of free movement – and from the enshrinement of the right to move in primary Union law, in Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights. Advocate General Kokott then confirmed two fundamental tenets of existing case law: first, claims against an applicant’s home State *can* be made so long as movement either is being or has in the past been exercised, or is a future prospect;²⁴ but, second, inversely, static EU citizens cannot support claims for family reunification in their home States using EU law.²⁵

She went on to consider whether dual nationality was, in and of itself, sufficient to displace the second strand of case law. Recalling the decision in

21. *McCarthy*, Opinion, para 23.

22. i.e. Arts. 21(1) (citizenship), 45 (work), 49 (establishment) or 56 (services) TFEU; *McCarthy*, Opinion, para 22.

23. *McCarthy*, Opinion, para 25 (emphasis in original).

24. A.G. Kokott cited Cases C-370/90, *Singh*, [1992] ECR I-4265, C-291/05, *Eind*, [2007] ECR I-10719 and C-60/00, *Carpenter*, [2002] ECR I-6279 on the former point, and Case C-33/07, *Jipa*, [2008] ECR I-5157 on prospective movement.

25. Citing Joined Cases 35 & 36/82, *Morson and Jhanjan*, [1982] ECR 3723. In *Uecker and Jacquet*, cited *supra* note 5, the Court confirmed that the introduction of EU citizenship had not affected that case law.

Garcia Avello,²⁶ Advocate General Kokott recognized the significance of dual nationality in a situation involving the legal recognition of names, given that a person's name is an "essential element of his identity" and mindful of the "serious inconvenience at a private or professional level" that a Union citizen might suffer if national rules demanded different versions of that name.²⁷ In seeking to draw an analogy to the present case, she suggested that the only relevant question was whether "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."²⁸ Mrs McCarthy was not being treated any differently, regarding residence rights for her spouse, than British nationals in a comparable situation. This led Advocate General Kokott to reflect briefly on reverse discrimination, since static EU citizens could not claim derivative spousal residence rights in the way that migrant EU citizens clearly could. She referred to the Opinion of Advocate General Sharpston in *Ruiz Zambrano*, still pending at the time, which had called into question the legitimacy of reverse discrimination against the broader evolution of EU citizenship.²⁹ While not saying never, Advocate General Kokott suggested that "the present case does not appear to me to provide the right context for detailed examination of the issue of discrimination against one's own nationals."³⁰ The critical point here, in her view, was Mrs McCarthy's dependence on State benefits, since a mobile EU citizen in the same situation could not claim residency under Directive 2004/38 either (recalling the self-sufficiency conditions in Art. 7).

Addressing the second question, the meaning of "legal residence" under Article 16 of the Directive, Advocate General Kokott drew a connection of logic to the reasoning summarized above: someone must come within the scope of Article 3(1) to be eligible for permanent residence under Article 16. She suggested that allowing a citizen in Mrs McCarthy's position to establish permanent residence while not requiring her to meet the conditions of movement or self-sufficiency "would ultimately result in 'cherry-picking' [which] does not accord with the spirit and purpose of the provisions of EU law on free movement and the right of residence."³¹ In a postscript reminiscent of the judgment in *Akrich*, Advocate General Kokott did remind the referring court of the UK's distinct obligations under the European Convention on

26. *Garcia Avello*, cited *supra* note 9.

27. *McCarthy*, Opinion, para 34.

28. *McCarthy*, Opinion, para 35.

29. See generally, Spaventa, "Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects", 45 *CML Rev.* (2008), 13.

30. *McCarthy*, Opinion, para 43.

31. *Ibid.*, para 56.

Human Rights and, in particular, of the right to respect for family life in Article 8(1), as interpreted by the European Court of Human Rights.³²

3.1.2. *The judgment in McCarthy*

Initially, the judgment in *McCarthy* follows the reasoning of Advocate General Kokott. The Court did not consider that a “literal, teleological or contextual interpretation” of Article 3(1) of Directive 2004/38 could bring a citizen who has never moved within its scope, irrespective of that citizen’s dual nationality.³³ But the Court did not stop there. Rather, it “reformulated” the second question, effectively ignoring Article 16 of the Directive and asking instead “whether Article 21 TFEU is applicable to a Union citizen who has never exercised his right of movement, who has always resided in a Member State and who is also a national of another Member State.”³⁴ The latter criterion constitutes a distinct feature of Mrs McCarthy’s claim compared to the situation of the Ruiz Zambrano children, who held one nationality only. It should also be noted that the Third Chamber framed its discussion around Article 21, not Article 20, TFEU.

The Court first restated its case law on situations confined to one Member State; in other words, it affirmed the continuing relevance of the wholly internal rule as a general benchmark for the triggering of EU citizenship rights. It observed that Mrs McCarthy’s situation could not necessarily be “assimilated” to a purely internal one, drawing from *Ruiz Zambrano* and the “genuine enjoyment” test created there. But the Court then stated categorically 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 her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.”³⁵

The Court found that Mrs McCarthy was not “obliged” to leave the territory of the Union as a result of the contested national decision since she has an unconditional right to reside in the UK under international law. It also referred to the contrasting, in its view, surname/identity decisions in *Garcia Avello* and

32. *Ibid.*, paras. 58–60; Case C-109/01, *Akrich*, [2003] ECR I-9607, paras. 58–60.

33. *McCarthy*, paras. 31–43.

34. *McCarthy*, para 44.

35. *McCarthy*, para 49.

(later) *Grunkin and Paul*,³⁶ noting that the “serious inconvenience” that stemmed from dual nationality in those cases *was* liable to constitute an obstacle to free movement, and *did* have the effect of depriving Union citizens of the genuine enjoyment of their rights (a third example, then?) – but this was materially different, in the Court’s view, from the situation faced by Mrs McCarthy, who could presumably remain in the UK without her husband or move to any of the other 26 Member States without impediment in order to live with him. Neither of these solutions was articulated expressly in *McCarthy*; but the choices at stake provide the backdrop for *Dereci*, which was pending at the time of the *McCarthy* judgment. The extent to which those choices could actually be realized in practice is returned to, however, in section 4.1.2. below.

3.2. *The Dereci case*

Dereci concerns a series of refusals to grant residence permits to third country national family members of Austrian nationals who had never exercised EU free movement rights. A key feature of the applicable national law (the Federal Law on establishment and residence in Austria or “NAG”, in force since 1 Jan. 2006) is that third country national applicants for residence permits must remain outside the territory of Austria pending decision on their applications. The reference in *Dereci* incorporates five different national cases, which can be summarized as follows:

1. A Turkish national who entered Austria illegally (2001) and subsequently married an Austrian national (2003), with whom he has three minor children who are all Austrian nationals (Mr Dereci);³⁷
2. A Sri Lankan national who married an Austrian national in 2006 and then entered Austria (legally) in February 2007, whose application for a residence permit was rejected on the ground that, following the expiry of her initial visa, she should have left and remained outside the territory of Austria pending a decision on her residence permit application (Mrs Heiml);
3. An individual from Kosovo (whose nationality is not made clear) who entered Austria legally in 1984 with his parents (then Yugoslavian

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

37. A question relating specifically to the situation of Mr Dereci, on the nature of standstill clauses in the context of the Association Agreement between the Union and Turkey, will not be addressed in this comment for reasons of space. It is important to note, however, that Mr Dereci’s status as a Turkish national differentiated his situation from that of the other applicants with respect to the more restrictive implications of the NAG: see paras. 76–101 of the judgment of the Court; for comment, see Eisele and Van der Mei, “Portability of Social Benefits and Reverse Discrimination of EU Citizens vis-à-vis Turkish Nationals: Comment on *Akdas*”, 37 *EL Rev.* (2012) forthcoming.

nationals, but whose mother is now an Austrian national) and had a valid residence permit until 2006, whose renewed application for a residence permit in 2007 was rejected on the ground that he should have left and remained outside Austria pending a decision on his application (Mr Kokollari);

4. A Nigerian national who entered Austria illegally in 2003 (and had made an asylum application on the basis of false statements), married an Austrian national and applied for a residence permit in 2005, whose application was rejected because he had not left Austria while that decision was pending and, additionally, on public order grounds with respect to his infringement of asylum rules (Mr Maduike);
5. A Serbian national living in Serbia with her husband and adult children, who applied for a permit to reside in Austria to be reunited with her father, an Austrian national, but whose application was rejected *inter alia* on the grounds that her father could not cover her subsistence (Mrs Stevic).

In all of the first four cases, expulsion orders had been issued against the applicants. There are various differences among them too, however: legal entry to Austria (*Heiml, Kokollari*) and illegal first entry (*Dereci, Maduike*); continued unlawful residence (all except *Stevic*); different family relationships (spouse and minor children (*Dereci*); spouse only (*Heiml* and *Maduike*); parent and adult child (*Kokollari* and *Stevic*)); and the question (and/or extent) of economic dependency (raised in all of the cases except *Maduike*).³⁸

In rejecting all of the applications,³⁹ the *Bundesministerium für Inneres* (Ministry for Home Affairs) ruled out the relevance of Article 8 ECHR and/or Union law, the latter on the basis that all of the situations were purely internal to Austria. Nevertheless, the referring court (the *Verwaltungsgerichtshof*), in order to resolve appeals against those decisions, sought guidance from the Court of Justice on the scope of the judgment in *Ruiz Zambrano* through a series of questions tailored to the different circumstances (family member status, degree of dependency, etc.) of each case. In essence, the questions sought to have the meaning of that judgment's deprivation/genuine enjoyment test clarified. All of the Governments that submitted observations⁴⁰ with the exception of one (Greece) refuted the argument that the situations in any of the

38. This summary draws from the helpful classification outlined by A.G. Mengozzi at para 5.

39. The various reasons given for these decisions are summarized at para 28 of the judgment.

40. i.e. Denmark, Germany, Greece, Ireland, the Netherlands, Poland and the UK; as well as the Commission.

cases either impacted on the enjoyment of the substance of EU citizenship rights or impeded the exercise of movement and residence rights within the territory of the Member States. In their view, as captured by the Court in its framing of the national court's questions, the crux of the cases is that the families "wish, primarily, to live together".⁴¹

3.2.1. *The View of Advocate General Mengozzi*⁴²

Advocate General Mengozzi agreed with the referring court that "it is necessary to gain a better understanding of the implications of the . . . judgment in *Ruiz Zambrano*."⁴³ Following a brief exposition of the key points in that judgment and also in *McCarthy*, he similarly ruled out the application of Directive 2004/38 to any of the situations in *Dereci*, and/or any threat to the enjoyment of the substance of Union citizenship rights, and/or any impediments to movement and residence in the territory of the Member States. In the case of Mr Dereci, for example, his wife, an Austrian national, could remain in Austria or move to any of the other Member States even if Mr Dereci were to be expelled to Turkey. In that regard, the Advocate General disputed a claim made as to the family's dependency on Mr Dereci.⁴⁴ He then drew an analogy between the situations of Mrs Heiml and Mr Maduiké and that of Mrs McCarthy, in that *Mr Heiml* and *Mrs Maduiké* (both Austrian nationals in "stable employment in Vienna"⁴⁵) could similarly continue to reside in Austria or move to another Member State without impediment. Finally, he pointed out that neither Mr Kokollari's mother nor Mrs Stevic's father were dependent on their adult children and would thus not have to leave the territory of the Union if residence permits in Austria were not granted to those applicants either.

The Advocate General then expressed a critical point that was absent from the judgments in *Ruiz Zambrano* and *McCarthy*: "[t]he foregoing conclusions . . . are based on the premiss that 'the substance of the rights attaching to the status of European Union citizen' . . . *does not include* the right to respect for family life enshrined in Article 7 [of the Charter] and in Article 8(1) of the ECHR."⁴⁶ In this regard, he recalled the limitations set out

41. *Dereci*, para 31.

42. Since the case was processed under the accelerated procedure, A.G. Mengozzi's "view" (which is dated 29 Sept. 2011) was published after the judgment of the Court.

43. *Dereci*, A.G. Mengozzi, para 17.

44. *Ibid.*, para 34.

45. *Ibid.*, para 35.

46. *Ibid.*, para 37 (emphasis added). He expressed the point in another way in para 38, pointing out that "the right to respect for family life appears to be insufficient, in itself, to bring within the scope of Union law the situation of a Union citizen who has not exercised his right of

in Article 51(2) of the Charter, which emphasizes that the Charter “does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. But he was open about the “stumbling blocks, or at least . . . paradoxes”⁴⁷ generated by this approach, especially the de facto *forced* movement away from one’s own Member State in order to engage EU rights of residence for third country national family members (discussed in section 4). Note the following proviso, however, which becomes important for arguments developed later:

“[I]f Mrs Dereci were, for whatever reason, unable to work and thus to provide for the needs of her children, I believe that there would be a serious risk that the refusal to issue a residence permit to her husband and, a fortiori, his expulsion to Turkey would deprive the couple’s children of the genuine enjoyment of the substantive rights attaching to citizenship of the Union *by forcing them, de facto, to leave the territory of the Union*. How could a mother of three young children without her own resources, despite the right of residence in Austria which she enjoys by virtue of her nationality, take care of her children if she is unable to work *and, therefore, also unable to settle permanently in another Member State* with her family members?”⁴⁸

He gave a potentially generous interpretation to dependency, which, in his view, embraces economic, legal, administrative or emotional dependence, and which “could expose that citizen to the same risk . . . of having to leave the territory of the Union”⁴⁹ – here, the factual scenario he used was that of a third country national on whom a Union citizen parent is dependent. Importantly, Advocate General Mengozzi also acknowledged the downside, from the perspective of legal certainty, of the inevitable case-by-case refining of the scope of *Ruiz Zambrano* that would emerge through still more preliminary references.⁵⁰

3.2.2. *The judgment in Dereci*

The Court recast the first multi-part question from the referring court as one pivotal query: “whether European Union law and, in particular, the provisions concerning citizenship of the Union, must be interpreted as precluding a

free movement and/or, as the case may be, has not been deprived of the genuine enjoyment of one or other of the rights set out in Article 20(2)(b) to (d) TFEU”.

47. *Ibid.*, para 43.

48. *Ibid.*, para 47 (emphasis added).

49. *Ibid.*, para 48.

50. He noted Joined Cases C-356/11, *O and S*, and C-357/11, *L*, (O.J. 2011, C 269/36), still pending.

Member State from refusing to grant residence within its territory to a third country national, although that third country national wishes to reside with a family member who is a European Union citizen, resident in that Member State and a national of that Member State, who has never exercised his right to free movement and who is not maintained by that third country national".⁵¹ First, unsurprisingly, the Court ruled out the application of Directive 2004/38, following the reasoning in *McCarthy*, discussed above.⁵² Second, the Court addressed the applicability of the Treaty provisions on Union citizenship. It reiterated the formulation in *McCarthy* that non-exercise of movement rights did not imply "assimilation" to a purely internal situation and reconfirmed the *Ruiz Zambrano* deprivation/genuine enjoyment test, referring to Article 20 TFEU on both points. Significantly, the Grand Chamber then stated overtly what was implicit in *McCarthy*: that deprivation of the genuine enjoyment of the substance of citizenship rights is triggered when a 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".⁵³ The Court continued:

"[T]he 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."⁵⁴

The Court went on to determine whether the right to respect for family life affected that conclusion. In line with Advocate General Mengozzi, however, the Court focused on Article 51(2) of the Charter, and advised the national court that it needed first to establish whether any of the situations at issue fell within the scope of Union law, as delimited above, before evaluating only then whether respect for family life had been undermined. In a now familiar parting word, the Court then reminded everyone that, with respect to situations *outside* the scope of Union law, "[a]ll the Member States are, after all, parties to the ECHR".⁵⁵

51. *Dereci*, para 37.

52. The application of Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification (O.J. 2003, L 251/12) was also excluded, since it is not addressed to Union citizens.

53. *Dereci*, para 66.

54. *Dereci*, para 68 (emphasis added).

55. *Dereci*, para 73.

4. Comment

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

This very mixed assessment will now be elaborated under two broad headings: first, an evaluation of the substance of EU citizenship rights after *McCarthy* and *Dereci*; and, second, a reflection on what the judgments tell us about the Court’s approach to reasoning.

4.1. *The emerging profile of EU citizenship*

The lineage of case law on EU citizenship is both dense and rich, as is the significant body of scholarship synthesizing the key moments or constructing normative paradigms around its practice and potential.⁵⁶ The analysis in this section concentrates on what the decisions in *McCarthy* and *Dereci* add to our understanding of the legal scope of the status, especially of the rights that it confers on EU nationals and/or their family members. One general point confirmed by both cases is that citizenship rights are not contained exclusively

56. In addition to the references cited *supra* in notes 13 and 29, see recently e.g. Shaw, “Citizenship: Contrasting dynamics at the interface of integration and constitutionalism” in Craig and De Búrca, (Eds.) *The Evolution of EU Law*, 2nd ed. (OUP, 2011), p. 575; Wollenschläger, “A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration”, 17 *ELJ* (2011), 34; see further, Nic Shuibhne, “The resilience of EU market citizenship”, 47 *CML Rev.* (2010), 1597; Tryfonidou, “In search of the aim of the EC free movement of persons Provisions: Has the Court of Justice missed the point?”, 46 *CML Rev.* (2009), 1591; Kostakopoulou, “Ideas, norms and European citizenship: Explaining institutional change”, 68 *MLR* (2005), 233.

within Directive 2004/38.⁵⁷ But the central substantive development – the evolving meaning and implications of the deprivation/genuine enjoyment test – is the primary focus here. Following an assessment of what the judgments *do* say, section 4.1.2. then considers what they do *not*, focusing on the strangely muffled treatment of actual or potential impediments to prospective movement.

4.1.1. *Refining the “substance” of citizenship rights*

Article 20 TFEU establishes citizenship of the Union; this objective seeks, according to Article 2 TEU, “to strengthen the protection of the rights and interests of the nationals of its Member States”. As noted above, the right to move and reside freely “within the territory of the Member States” is expressed in Articles 20(2)(a) and 21(1) TFEU. We know from the judgment in *Rottmann* that deprivation of citizenship status in a literal sense – through the withdrawal of Member State nationality – falls within the “genuine enjoyment of the substance of citizenship rights” test: if you cannot even access the status, then deprivation of the rights attached to it becomes a secondary (or rather, immaterial) question. The Court in *Rottmann* phrased this as follows: “the situation of a citizen of the Union who . . . is faced with a decision withdrawing his naturalization . . . placing him . . . in a position capable of causing him to lose his status conferred by Article 20 TFEU and the rights attaching thereto falls, *by reason of its nature and consequences*, within the ambit of EU law.”⁵⁸

In *Ruiz Zambrano*, the issue was a level “down” from actual loss of the status of EU citizenship. The *Ruiz Zambrano* children were not about to lose their Belgian (thus Member State) nationality; but if their departure from the territory of the Union was the consequence of enforcing the contested national measure, then this, the Court held, would deprive them, too, of the genuine enjoyment of the substance of their citizenship rights. Advocate General Sharpston remarked that the children could still enjoy diplomatic and consular protection from other Member States in any third country in which they might end up residing; they could also access the rights detailed in Articles 20(2)(d)

57. In both cases, the broader scope of Arts. 20 and/or 21 TFEU (in other words, the primary sources of citizenship rights) was considered after the applicability of the Directive was ruled out; in other strands of case law, family member rights that could not be derived from citizenship at all continue to be grounded in e.g. Art. 45 TFEU and the status of workers (see e.g. Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze*, [2009] ECR I-4585, Case C-310/08, *Ibrahim*, [2010] ECR I-1065, and Case C-480/08, *Teixeira*, [2010] ECR I-1107).

58. *Rottmann*, cited *supra* note 9, para 42 (emphasis added).

and 24 TFEU.⁵⁹ But the Advocate General and the Court effected, on the surface at least, a qualitative hierarchy of norms through privileging the rights to move and reside – the undoubted “core rights” of citizenship, according to Advocate General Sharpston.⁶⁰ In *Ruiz Zambrano*, the Court conceived the “substance” of citizenship rights to capture this. Where genuine enjoyment of that substance is threatened by national action, the veil of internal situations may legitimately be pierced. The protective shield of EU citizenship will then kick in to secure a right of home State residence for Union citizens and the family members on whom they are dependent. There is no need to establish any additional connecting factor to EU law through, for example, prior exercise of movement or residence rights; nor is there any need to invoke an assertion of discriminatory treatment (or, therefore, to consider any real or hypothetical comparator). In *Ruiz Zambrano*, the Treaty provision invoked as the basis for this new test was Article 20 TFEU. We saw above that primary Union law confers a very open right to reside “within the territory of the Member States”. In other words, there is no “except in your own State” proviso in the Treaty itself.

Up to this point, then, a coherent test was emerging. That test, though ground-breaking, was also compatible with the boundaries of the Treaty provisions on citizenship. Tentatively in *Rottmann* and more overtly in *Ruiz Zambrano*, the Court (finally) detached two sets of circumstances from the wholly internal rule.⁶¹ It established the primacy of EU citizenship law over national measures that either threaten the loss of the status of citizenship per se or deprive citizens of the genuine enjoyment of the substance of associated rights. But the factual example distilled from *Ruiz Zambrano*⁶² – forced departure from the territory of the Union – was clearly at the high end of how many thought the Court might progress its deciphering of the “substance” criterion in future cases. Confining its scope to forced departure from the Union suggested a character of crisis, of last resort situations. That profile seemed unduly restrictive from the perspective of construing citizenship as a rights-enhancing status, especially in contemplation of the *depth* of legal

59. I.e. to petition the European Parliament, apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages (and receive a reply in the same language).

60. *Ruiz Zambrano*, Opinion, para 80. Freedom of movement and residence was described as the “central right of citizenship” by A.G. Ruiz-Jarabo Colomer (Joined Cases C-11 & 12/06, *Morgan and Bucher*, [2007] ECR I-9161, para 67 of the Opinion).

61. For a comprehensive, cross-freedom account of the wholly internal rule, see Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, 2009); for a recent (re)appraisal, see O’Leary, “The past, present and future of the purely internal rule in EU law”, in Dougan, Nic Shuibhne and Spaventa (Eds.), *Empowerment and Disempowerment of the European Citizen*, (forthcoming, Hart Publishing, 2012).

62. Though not necessarily correctly in that case, a point returned to below.

protection that opens up through very minor catalysts of movement – including prospective movement not yet concretely (or required to be) identified.⁶³ But given the seismic constitutional shift involved in the Court’s overt review of any internal situations at all, a very high threshold is perhaps merited – not least in the interests of generating sufficient legitimacy for this new EU jurisdiction. It is also worth noting that the Court (even after *McCarthy* and *Dereci*) still does not speak of a *positive* right to live in the Union territory, in the way that Advocate General Sharpston did in *Ruiz Zambrano*; it prefers a *negative* casting of the right not to be forced to leave it.

Things start to fall apart, however, when the judgment in *McCarthy* is added to the mix. The Court first restated the wholly internal rule, but rather than confirming *Ruiz Zambrano* as an exception, it said instead that deprivation/genuine enjoyment situations “cannot be *assimilated* to a purely internal situation”.⁶⁴ This construction adds an unhelpful layer of ambiguity around what actually happened in *Ruiz Zambrano*. The motivation behind the Court’s caution in *McCarthy* may be driven by (appropriate) concerns about the boundaries of competence, but linguistic gymnastics can end up doing more harm than good – not least for the Court’s reputation and credibility. There is no “assimilation” formula needed here – in *Ruiz Zambrano*, it was a purely internal situation; but a particularly serious one, according to the Court. What the Court then emphasized in both *McCarthy* and *Dereci* is that being forced to leave a particular Member State, but not the territory of the Union, does *not* deprive an EU citizen of the substance of his or her rights. The precedent set by *Ruiz Zambrano* was thus confined as tightly as it could be. But problems emerge when that finding is blended back into EU law more generally, especially with respect to prospective movement rights and the right to respect for family life.

In *McCarthy*, the deprivation/genuine enjoyment test was presented as a *distinct* test, additional to (or perhaps more accurately, beyond) the conventional standard of “impeding the exercise of right[s] to move and reside freely within the territory of the Member States”.⁶⁵ In *Dereci*, the Court focused exclusively on the deprivation/genuine enjoyment test, with no discussion at all of actual or possible impediments to movement and/or

63. The indeterminate “liable to impede” and “deter” understandings of an obstacle to movement are firmly established in EU law on the free movement of persons; in citizenship case law specifically, see e.g. Case C-224/02, *Pusa*, [2004] ECR I-5763, para 19; Case C-520/04, *Turpeinen*, [2006] ECR I-10685, para 21; and Case C-499/06, *Nerkowska*, [2008] ECR I-3993, para 33. In *Ruiz Zambrano*, A.G. Sharpston reasons this finding through discussion of *Chen*, *Garcia Avello* and *Rottmann* (see paras. 69–78 of her Opinion in particular); this point is discussed again *infra*.

64. *McCarthy*, para 46, (emphasis added).

65. *McCarthy*, para 49.

residence rights. This is a critical point of disjointedness, not only as regards *Ruiz Zambrano*, *McCarthy* and *Dereci*, but also having regard to the weight of EU case law generally. In the first case, we see *no need* for movement; in the second, movement is considered but there is a *problematic rejection* of the possibility that there might be any impediment to it; and in the third, there is *no discussion* of it at all. Is it not somewhat ironic, to say the least, that the supposedly sacrosanct purely internal barrier was breached only then to have decisions on movement rights out of sync with established EU law?

In *McCarthy*, as noted, the Court stated 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” impacted on her with respect to *either* of the two tests: movement rights or enjoyment of the substance of EU citizenship rights. In other words, the Court was confident that “failure by the authorities . . . to take into account [her] Irish nationality . . . for the purposes of granting her a right to 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”.⁶⁶

Well, why not? It was acknowledged in section 3.1 that applying for a residence permit from your own State is unusual. But the Court *itself* widened the scope of the case beyond the formal options available under the Directive. It then went on to distinguish Mrs McCarthy’s situation from that in *Ruiz Zambrano*, however, on the basis that the effect of the national measure (i.e. failure to recognize her residence in the UK as an Irish national) did not require Mrs McCarthy to leave the territory of the Union, connecting this point to her unconditional right to reside in the UK anyway under international law.⁶⁷ In contrast, the Court was content to “assume” (para 44) enforced departure from the Union with respect to the *Ruiz Zambrano* family. It did this by detaching their situation from the protective floor provided by international law through stressing the dependence of the children, in every sense, on their parents. In other words, a right to remain in Belgium on their own meant nothing to the children in real terms. We see an even starker emphasis on dependence in *Dereci*. Here, the Court stresses the requirement of actual (im)possibility with respect to staying in the territory of the Union. As noted above, “mere” economic dependency or desire to keep a family together will not suffice.

Would the *Ruiz Zambrano* family have been able to reside lawfully in one of the other 26 Member States? Critically, they were not asked to find out. Yet, a few months later in *Dereci*, the Court established a material distinction

66. *Ibid.*, para 49.

67. *Ibid.*, para 50.

between enforced departure from the Union and enforced departure from your home State (something implicit though not articulated in *McCarthy*). The extent to which this holds up in light of rights-infused EU case law more generally is questionable, as discussed in section 4.2 below. We start, for now, with the Court's own requirement of (im)possibility.

Article 6(1) of Directive 2004/38 confers a right of residence on Union citizens in "another Member State" for up to three months "without any conditions or other formalities". Article 6(2) extends the same rights to the Ruiz Zambrano parents, Mr McCarthy and the claimants in *Dereci*. Since the Court's judgment in *Metock*, we know that prior lawful residence in the Union is not a precondition.⁶⁸ That gives all of these families some time, at least, to attempt to find work or set up a business to support themselves in order to stay for longer in a host State. So while the Court decreed that the Ruiz Zambrano family may remain in Belgium, Mrs McCarthy, for example, may reside in the UK but potentially without her husband (option 1); move to another Member State (option 2); or leave the Union altogether and move, perhaps, to Jamaica (option 3). Can any of these options, mirroring choices possibly facing the families in *Dereci* too, be construed as depriving her of the substance of her rights as an EU citizen? On the first point, establishing a right of residence in your own State under Union law, invoking respect for family life seems central in normative terms; it did not help the families in *Dereci*, but that finding is questioned in section 4.2. The second option, moving to another Member State, does not deprive Mrs McCarthy of the substance of her citizenship rights following the clarification in *Dereci*, but there may be *impediments* to her exercising her right to move elsewhere within the Union, returned to in a moment. Enforced departure to Jamaica (option 3) is clearly analogous to the facts of *Ruiz Zambrano*. So why did the Court treat the *McCarthy* case differently from *Ruiz Zambrano* at the time? The *Dereci* clarification did not yet exist (option 2) and there may have been a real prospect of her having to move to Jamaica (option 3). S ofra O'Leary asked a direct question in this context: "[h]ad the third country national for whom a derived right of residence was sought been a minor child, a disabled spouse or an aged parent, would the genuine enjoyment of the substance of the rights conferred by the status of Union citizen have been called into question?"⁶⁹ It is absolutely great *but not enough* that the Ruiz Zambrano kids are all right. After *McCarthy*, the extent to which the Court had intended to create tiers of families for the purposes of invoking the protection of EU citizenship rights was raised.⁷⁰

68. Case C-127/08, *Metock and Others*, [2008] ECR I-6241, para 58.

69. O'Leary, *op. cit. supra* note 61.

70. Wiesbrock argued strongly against the legitimacy of such an interpretation of *McCarthy*, citing Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647, para 40 and *Zhu*

After *Dereci*, fears that families with children were being privileged over those without were laid to rest: by ensuring fewer rights for everyone. It would seem that the Ruiz Zambrano children were, basically, extremely lucky.

4.1.2. *So movement is (mostly) back again: but wait, where did it go?*

Disentangling, for now, the substance of citizenship rights and asking independently whether there was any impediment to the exercise of free movement rights in *McCarthy* or *Dereci*, the Court's dismissal of that possibility is far from the obviously apparent truth that was presented in the former case; the question was ignored in *Dereci*, but the same concerns can be asked about the correctness of that omission.

We saw earlier that the judgment in *Garcia Avello* was reasoned through the “serious inconvenience” principle but that consequence was not, at the time, linked to an impact on prospective movement rights. The key concern of the Court was the more internally-focused ambition of “enabl[ing] those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.”⁷¹ This is actually much closer to an early expression of the deprivation/genuine enjoyment test than our revised understanding of the judgment in the language of future impediments to movement: something that did not occur until *Grunkin and Paul*, five years later. In *McCarthy*, the Court confirms that rationalization of *Garcia Avello* through the lens of *Grunkin and Paul* – i.e. “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 and constituted an obstacle to freedom of movement”.⁷²

In *McCarthy*, Advocate General Kokott had also acknowledged that “the existence of dual nationality can . . . in principle be entirely relevant when assessing the legal position of Union citizens vis-à-vis their Member States of origin”.⁷³ This rationale is based on a solid line of case law.⁷⁴ The point made just before the statement is noteworthy too, where the Advocate General

and Chen, cited *supra* note 3, para 20, as well as the broader “fundamental status” objective in support of an inclusive reading of EU citizenship; Wiesbrock, “Disentangling the ‘Union citizenship puzzle’? The *McCarthy* case”, 36 EL Rev. (2011), at 866–7. Additionally, ECtHR case law speaks neutrally of “family members” in discussion of the right to respect for family life, discussed further in section 4.2 *infra*.

71. *Garcia Avello*, cited *supra* note 9, para 45.

72. *McCarthy*, para 52.

73. *McCarthy*, Opinion, para 33.

74. A.G. Kokott cites Case C-369/90, *Micheletti and Others*, [1992] ECR I-4239, para 10; *Garcia Avello*, cited *supra* note 9, para 28; and *Zhu and Chen*, cited *supra* note 3, para 39. See also Case C-138/02, *Collins*, [2004] ECR I-2703.

observes that the case “ultimately concerns family unification which is intended to be achieved circuitously via EU law because domestic law in the United Kingdom does not permit it.”⁷⁵ But can this not be said of *most* cases that come before the Court through the preliminary reference procedure? Few national litigants pursue arguments based on EU law owing to some selfless interest in the European integration project. The generous stance of the Court with respect to instrumental use of EU law reflects a pragmatic awareness of this fact, whatever else such an approach might represent in ideological terms too.

Mrs McCarthy, like the Garcia Avello children, holds dual nationality. This fact, following established case law, brings her within the personal scope of EU law. Then, focusing here on the “movement” test in isolation, the question to determine is whether she is impeded from exercising free movement and residence rights if she wishes to reside in the UK with her husband, or, inversely, whether *not* being able to do so will cause “serious inconvenience” that cannot be justified by the UK. The spousal relationship was enough to require in-depth consideration of these questions; Mr McCarthy is a family member. But even if there *was* a bias in EU citizenship law at the time that privileged the rights of children, the *McCarthy* case was not the right vehicle for realizing such a precarious value judgment in any event. While the Opinion and judgment refer throughout to the applicant and her husband only, Mrs McCarthy has three children and is the full-time carer of her disabled son.⁷⁶ Her dependency on State benefits is highlighted in both the Opinion and judgment, but not the nature of those benefits. Does she receive them because of her status as a full-time carer? Is this why she is unable to support herself through other means? How old are her children? Clearly at least one of them is dependent on her. Are the others? Taking all of this into account, can she easily uproot her family to move to another Member State? It really would not seem so. Advocate General Mengozzi’s understanding of dependence in *Dereci* seems to leave a door ajar for a future revisiting of these questions, notwithstanding the Court’s ruling them out of the scope of the “substance” of citizenship rights in its judgment. Impediments to movement are supposed to constitute a distinct – and sufficient – test. The Advocate General’s words,

75. *McCarthy*, Opinion, para 21; see similarly, the first half of para 33, in which the A.G. alludes nonetheless to the fact that “in the present case everything points to Mrs McCarthy’s British nationality being the one that is far more real and effective, as she as always lived in England and applied for her Irish passport solely in the run-up to her request for a residence permit under EU law”. The Court has insisted, however, and A.G. Kokott clearly accepted, that instrumental use of EU law is perfectly permissible (see *Akrich*, cited *supra* note 32, paras. 55–57; see also, Directive 2004/38, cited *supra* note 1, Art. 35 of which confirms the Court’s finding that the threshold of abuse of EU law is set at fraudulent behaviour).

76. See the judgment of the Court of Appeal, cited *supra* note 17, para 8.

cited in full in section 3.2.1 above, are worth restating: “[h]ow could a mother of three young children *without her own resources, despite the right of residence in Austria which she enjoys by virtue of her nationality*, take care of her children if she is unable to work *and, therefore, also unable to settle permanently in another Member State* with her family members?” (emphasis added). Mrs McCarthy’s circumstances could be pasted into that reasoning rather seamlessly, but the Court does not seem to have considered this.

Thus, even before raising the right to respect for family life, whether the movement options open to Mrs McCarthy in principle are actually feasible in practice seems far less likely than the Court presumed. Saying that nothing in her circumstances *as described by the national court* (para 49) suggests an impediment to her movement rights is just not good enough. No such proviso was added in *Ruiz Zambrano*. The Court should, in Article 267 TFEU proceedings, leave determinations of fact to the referring national court. If it is going to venture into the hazardous territory of offering its own assessments, then it has a *responsibility* to establish and consider all relevant facts. It makes categorical factual statements in both *Ruiz Zambrano* and *McCarthy*, one to the benefit of the applicant, the other not. But it should not have done so in either case. We see a problem of conflation also entering into these fact-finding statements in the case law: the Court’s conflation of refusal to grant a work permit with enforced departure from the Union in *Ruiz Zambrano*; Advocate General Mengozzi’s conflation of similar issues with respect to the Dereci family, flagged in section 3.2.1. above. Although the Court did not engage in any discussion of impediments to movement rights in *Dereci* – a huge problem in and of itself, in the interests of analytical rigour as well as legal certainty – it did at least recognize that determining whether the situations of the claimant families came within EU law or not was, in fact, a matter for the national court.

Despite the Court’s undoubted intention in *McCarthy* and *Dereci* to contain the impact of *Ruiz Zambrano* by reviving the purely internal rule in most situations, we will probably see an avalanche of further preliminary references, each one highlighting narrow factual tweaks to test and distinguish existing case law. This scenario seems profoundly removed from the objectives of the preliminary reference procedure. It also empowers the Court in an unusual and dangerous dual way: it becomes at once a lower court engaged in detailed analyses of facts (but without the knowledge that the referring court necessarily has, demonstrated acutely by the Court’s failure to note the existence of children and issues of dependency in *McCarthy*) and a constitutional court embedding every one of these factual decisions in a bizarrely over-detailed matrix of primary Union law.

Finally, it is worth asking: even if Mrs McCarthy or any of the Union citizens in *Dereci* were in a position to reside temporarily in another Member State, and thereby to effect a purely instrumental trigger of movement and residence rights (sanctioned by the Court in *Akrich* and *Metock*),⁷⁷ is it really better to urge EU citizens to engage protection of their rights through this patently staged route? Why are we required to continue pretending that never residing in another Member State and residing elsewhere “on purpose” for a brief period of time are materially different? On a more practical note, how long would any of them need to stay away from their home States? Would the three-month window for unconditional residence provided by Article 6 of Directive 2004/38 be enough? Would less time suffice? In light of the judgments in *McCarthy* and *Dereci*, it is highly likely that these questions will come up through the preliminary reference procedure, sooner rather than later.

4.2. Legal uncertainty: the Court’s use of “judicial formulas”

Cases at the edges of our current sense of the law sit at the junction of precedent and reasoning. The resolution of a new point of law may be perfectly predictable, drawing from the building blocks in existing jurisprudence; or it may be genuinely novel, in the sense that several different outcomes are rationally *possible*, at least. In the first case, should predictability ever be outweighed by other factors? And in the second, how best can the Court arrive at the “right” outcome? In his work on the controversial judgments in *Laval* and *Viking Line*,⁷⁸ Loïc Azoulai used the language of “judicial formulas” to explain the methodology of the Court in terms of how it presents (though not necessarily arrives at or develops) its reasoning:

“...everything takes place as if the solutions found were the result of a complex kind of ‘collage’ of judicial formulas. Thus, the reasoning behind these two decisions can easily be reconstructed on the basis of a number of well-known cases, which each relate to a seminal step in the Court’s case law . . . It is certain that, in difficult cases, these formulas, which were forged as part of the reasoning of some of the ‘grands arrêts’ help the judges to reach a decision. They form the conceptual and ideological framework of the Court’s reasoning. They act as elements offering security and permanence in the judicial work. Nevertheless, they do not dictate the outcome. Finding the actual solution remains a product of imagination.”⁷⁹

77. *Akrich*, cited *supra* note 32, paras. 55–57; *Metock*, cited *supra* note 68, para 75.

78. Case C-341/05, *Laval*, [2007] ECR I-11767; Case C-438/05, *Viking Line*, [2007] ECR I-10779.

79. Azoulai, “The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization”, 45 *CML Rev.* (2008), 1335 at 1339–1340.

Notwithstanding the “adaptive capacity” of these judicial formulas, and shedding interesting light on the use of precedent as a mechanism for achieving legal certainty, Azoulai traces the problems that emerged from the application of established free movement law formulas to novel and particular circumstances in the *Laval* and *Viking Line* cases. In this way, he demonstrates how those decisions reveal the limitations of judicial formulas. In *McCarthy* and *Dereci*, however, the second problem identified above comes to the fore – what happens when the Court has to choose *between* potentially applicable formulas?

In section 4.1. questions on this theme have already been opened: we saw, for example, how the “liable to impede movement” formula was applied differently (thinly in *McCarthy*, not at all in *Dereci*) in cases that are actually more alike than distinct. But what was most striking about the judgment in *McCarthy* was the complete absence of any discussion of the applicant’s right to respect for family life – a judicial formula that is *thoroughly* embedded in jurisprudence on the free movement of persons. At that time, we did not know how that general principle of EU law connected with the “genuine enjoyment of the substance of Union citizenship rights”. Looking at the balance of the Court’s case law before *McCarthy*, how could it not? But reflecting now on the strict limitations drawn in *Dereci*, how do *they* fit with that broader case law? And, again, thinking of the result effected in *Ruiz Zambrano* (even though respect for family life is not mentioned anywhere in that judgment either), why did that family receive protection *there*?

The right to respect for family life – protected by Article 8 ECHR and Article 7 of the Charter of Fundamental Rights, but recognized distinctly as a general principle of EU law – made its first controversial imprint in the Court’s judgment in *Carpenter*.⁸⁰ In her Opinion in *Ruiz Zambrano*, Advocate General Sharpston outlined the key features of European Court of Human Rights case law on the right to respect for family life. Essentially, “removal of a person from his family members is permissible only when it is shown to be ‘necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the aim pursued’.”⁸¹ Critically, however, the ECtHR protects a family’s right to live *somewhere*; not somewhere *in particular*.⁸² That became the benchmark applied implicitly in *McCarthy* and overtly in *Dereci*. But is it the right benchmark for Union, as distinct from ECHR, law?

80. *Carpenter*, cited *supra* note 24.

81. *Ruiz Zambrano*, Opinion, para 55, citing relevant case law from the Strasbourg court. See generally, paras. 54–60 of the Opinion.

82. See further, the case law cited by Wiesbrock, *op. cit. supra* at note 70, at note 52.

Mr Carpenter is a British national who resided in the UK but provided services from time to time in other Member States. The Court found that the UK's decision to deport Mrs Carpenter, a national of the Philippines, contravened her husband's right to respect for family life, on the following reasoning:

“[i]t is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.”⁸³

Mr Carpenter submitted that the impact on his freedom to provide services would be felt through the fact that Mrs Carpenter cared for his children (from a previous marriage). The extent to which this influenced the decision of the Court is not clear, as the material paragraph, extracted above, does not hinge on that particular contribution on Mrs Carpenter's part.⁸⁴ In any event, the forging of family member residence rights through the inherently ephemeral freedom to provide services was much criticized.⁸⁵

In subsequent case law, notably *MRAX*,⁸⁶ *Baumbast*⁸⁷ and *Metock*,⁸⁸ the Court continued to insist that due acknowledgement had to be given by national authorities to respect for family life – albeit, increasingly, in the safer normative terrain of Union citizenship. Indeed, in *Metock*, the Court acknowledged that its previous insistence, in *Akrich*,⁸⁹ that a worker's third country national spouse had to demonstrate lawful residence in a Member State before accompanying that worker to another Member State, had to be “reconsidered” following the adoption of Directive 2004/38.⁹⁰ Crucially, the Court in *Metock* also emphasized that “if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the

83. *Carpenter*, judgment, para 39.

84. See also, the more general language of para 42, in which the Court discusses the ECtHR's interpretation of Art. 8: “Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention.”

85. The Editors of this journal, for example, offered a stinging appraisal of the judgment; “Editorial comments: Freedoms unlimited?” 40 CML Rev. (2003), 537.

86. Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)*, [2002] ECR I-6591.

87. *Baumbast and R*, cited *supra* note 9.

88. *Metock and Others*, cited *supra* note 68.

89. *Akrich*, cited *supra* note 32.

90. *Metock*, cited *supra* note 68, para 58.

freedoms they are guaranteed by the Treaty would be seriously obstructed.”⁹¹ Moreover, the net result of most of these cases was not a family member’s right of residence in a *host* State, but in the Union citizen’s *home* State. In *McCarthy* – or in *Ruiz Zambrano* – there is no discussion on the right to respect for family life: *at all*. In *Ruiz Zambrano*, the Court construes the potential departure of minor Union citizens from the territory of the Union as a deprivation of the genuine enjoyment of the substance of citizenship rights. It may seem odd that the right to respect for family life is not mentioned, but in strict terms, it is not needed given the Court’s approach to the resolution of the case. And because of the Court’s breaching of the wholly internal paradigm, it may also be a strategic omission – remembering Article 51(2) of the Charter of Fundamental Rights, the Court would have wanted to avoid any charges of “new” competence-creating. Given that the Treaty simply creates a right to reside “within the territory of the Member States”, however, breaching the wholly internal rule to protect the rights of EU citizens would not necessarily be a new *competence* in strict terms; as argued above, it is more a political or constitutional than technically legal revolution. Protection of a right to reside would be the primary objective, with the right to respect for family life then infusing that protection in a secondary sense. The Charter *per se* would not, therefore, be “modify[ing] powers and tasks *defined by the Treaties*” (emphasis added).

The absence of consideration of fundamental rights in *McCarthy* cannot, however, be overlooked, given that the Court engaged with impediments to Mrs McCarthy’s right to move and not just the deprivation/genuine enjoyment test. In the context of Advocate General Kokott’s Opinion, the omission was at least rational; she did not believe that the circumstances of the case could come within the scope of EU law at all, and she thus pointed to the obligations of the UK with respect to the ECHR as the applicant’s only potential avenue for redress. In section 4.1., it was observed that the Court probably assumed that the McCarthys could simply reside elsewhere in the Union since, relying on *Metock*, Mr McCarthy would not need to demonstrate that he had resided lawfully in the UK to begin with. But that was never explained in the judgment. Moreover, why not offer the same advice to the Ruiz Zambrano children? Furthermore, neither the Ruiz Zambrano children (via their parents) nor Mrs McCarthy were self-sufficient at the time of their respective cases, so that factor cannot, of itself, constitute a sufficient distinguishing feature. Furthermore, a Union citizen does not have to meet the self-sufficiency

91. *Ibid.*, para 62; in para 56, the Court cites six authorities for the same point, beginning with *Carpenter*. The origins of the reasoning can be found also in *Singh*, cited *supra* note 24.

requirements laid down in Directive 2004/38 through their own enterprise.⁹² Conversely, in *Dereci*, the self-sufficiency of the families involved *without* the input of the third country national applicants was emphasized expressly in both the Opinion and judgment.

Linking respect for family life with the impediments to movement test, we have to focus on the prospective exercise of those rights in both *McCarthy* and *Dereci*, given that none of the Union citizens involved had moved anywhere by the time of the proceedings.⁹³ The reasoning of the Court in *Garcia Avello* is worth returning to on this point:

“[A] link with Community law does...exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State. *That conclusion cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth* and which, according to the authorities of that State, is by virtue of that fact the only nationality recognized by the latter. It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty....”⁹⁴

It was argued above that the implications of this finding should have been relevant for Mrs McCarthy even *before* we get on to the secondary question of her right to respect for family life.⁹⁵ But even without dual nationality, adding the two formulas (respect for family life + impediments to movement) together, and reflecting again on the various spousal and other family relationships in *Dereci* (and, in particular, on Mrs McCarthy’s status as the full-time carer for her disabled son), far less has been accepted by the Court as constituting an obstacle to movement, including the “serious inconvenience” likely to be caused by differing forms of surnames in *Garcia Avello* and, in *Carpenter*, the fact that the exercise of Treaty freedoms “could not be fully effective if [an applicant] were to be deterred from [their exercise] by obstacles raised in [their] country of origin to the entry and residence of [their] spouse”.

92. *Zhu and Chen*, cited *supra* note 3, para 33; confirmed in Case C-408/03, *Commission v. Belgium*, [2006] ECR I-2647, paras. 40–51.

93. But: recall the additional angle of Mrs McCarthy’s dual nationality, discussed *supra*.

94. *Garcia Avello*, cited *supra* note 9, paras. 27–29 (emphasis added), citing *Micheletti*, cited *supra* note 74, para 10.

95. Although not explained, this was also a strand of the argument submitted by the Greek Government in *Dereci*, see para 43 of the judgment.

How can uprooting a family possibly be seen as less “serious” than surname-use “inconvenience”?

There is simply *no* engagement with these points in *McCarthy* or *Dereci*. The discussion on family life in the latter case is related exclusively to the deprivation/genuine enjoyment test. It was noted in section 3.2.2 above that the Court directed the Member States to their obligations under the ECHR when situations fall outside the scope of EU law, as it had done in *Akrich*. Interpreting this mandate in the kindest light, the Court is here recognizing the fact of intertwined legal orders. It is effecting a pluralist understanding of contemporary constitutional obligations, which stem from different legal orders at both State and transnational levels. In his View in *Dereci*, Advocate General Mengozzi expresses the same point in a less condescending way, reflecting on the “complementary” dynamics of the national, Union and ECHR legal orders, and noting that respect for family life in purely internal situations must be managed through the first and third of those orders only.⁹⁶ There is much merit to this proposition; not least from the perspective of proper respect for competence boundaries, an objective given particular weight through the Lisbon Treaty process.

The acceptance of impediments to prospective movement as a sufficient cross-border connection is undoubtedly hugely expansive; it has the potential to bring virtually anything within the scope of free “movement” law. But, like it or not, it has long happened. Furthermore, in cases like *Carpenter*, the Court had already crossed another line in protecting family life, beyond the floor of protection demanded by the ECtHR and, in effect, protecting a home State right of residence for EU market actors. In *Ruiz Zambrano*, it crossed another one, protecting the same right for Union citizens. Since then, it has tried to retrace its steps, but it is trampling established lines of its own case law in the process. Meanwhile, national courts continue to ask the Court to pin down the edges of EU citizenship law.⁹⁷ One might ask why they persist in the repeated sending of very similar questions. But why shouldn’t they? After all, there is always the possibility of another *Ruiz Zambrano* paradigm shift. The implications of this facts-driven pattern for the Court are troubling in institutional terms, however, as explained in section 4.1. above. The Court is trying to be *both* local immigration adjudicator and supranational standard-setter in these cases: but this is not proving to be an effective or appropriate blend of functions, and the performance of both is now suffering.

Commenting on the overall thrust of the case law on citizenship, O’Leary suggests that “it is not that the Court has made a choice between legal certainty and the protection of fundamental rights, opting for the latter at the expense of

96. *Dereci*, A.G. Mengozzi, para 40.

97. See again the references cited *supra* note 50.

expense of the former, but . . . in determining the scope of application of EU law, fundamental rights considerations, even if explicit reference is not made to them, may have an increasingly important role to play.”⁹⁸ Looking across the bigger picture of EU citizenship jurisprudence, this is right, empirically, in the sense that the posited choice would explain many of the Court’s decisions. But is it right from a conceptual perspective, taking into account the rule of law and legal certainty? The case law has become so individualistic, so facts-specific, as to raise accusations of arbitrariness. In rapid response to *Ruiz Zambrano*, I argued that seeking to effect the protection of fundamental rights goes a long way towards redressing the balance of concern with respect to legitimacy and charges of undue judicial activism. But then, fundamental rights have to be protected *consistently*, or their engagement as an appropriate motivation, even in explanatory terms, will continue to be called into question.⁹⁹ The judgment in *McCarthy* brought those concerns into strikingly sharp relief. The response in *Dereci* tries to imprint more coherence retrospectively, but through the high price of reducing the level of protection for family life below that seen in previous cases and ignoring the implications for prospective movement, despite the latter being another seemingly entrenched strand of EU law. In *Ruiz Zambrano*, Advocate General Sharpston suggested that “[l]ottery rather than logic would seem to be governing the exercise of EU citizenship rights”.¹⁰⁰ Reflecting on the use – and non-use – of opposite judicial formulas in *McCarthy* and *Dereci*, it is difficult to disagree.

5. Conclusion

We may not like or even approve of developments in the case law of the Court of Justice. But we must work with(in) the case law that we have. Legal certainty dictates that the Court should do the same. It must either endeavour to weave its case law logically together or, if there are good reasons to push the law in a different direction, articulate its reasoning as clearly and explicitly as possible. The circumstances in *Ruiz Zambrano*, *McCarthy* and *Dereci* were

98. O’Leary, *op. cit. supra* note 61.

99. Nic Shuibhne, “Editorial: Seven questions for seven paragraphs (Editorial)”, 36 *EL Rev.* (2011), 161 at 162: “[T]here is a family at the heart of this case, a family living under constant strain for almost a decade . . . But however much the Court of Justice might want to help, and I believe this to be the motivation underpinning its judgment, it is simply not constitutionally possible or legitimate for the Court to resolve every breach of fundamental rights that occurs. Or, if it is truly serious about pushing the constitutional reach of EU law this far, then be open about it, be thorough, be direct, and persuade us as to why this must be the outcome . . . The Court is trying to do good things in individual cases; but it cannot continue to ignore the systemic legitimacy – and credibility – consequences of this choice.”

100. *Ruiz Zambrano*, Opinion, para 88.

either *all* purely internal to one Member State, on a strict construction of the plain facts (and diluting the dual nationality point in *McCarthy*); or the actual likelihood of forced departure from the Union should have been established rather than presumed in *all* of them, via the referring courts; or they should *all* come within a more rights-infused deprivation/genuine enjoyment test; and/or the catch-all net of impediments to prospective movement (drawing from case law such as *Garcia Avello* and *Rottmann*).

All three references were really about the extent to which national immigration authorities should be mindful of the right to respect for family life in cases involving the third country national family members of their own citizens. The Strasbourg court is indeed the proper place for the resolution of these questions if the wholly internal rule is retained in EU law and/or if the case law on prospective movement is modified significantly or even reversed. In *Ruiz Zambrano*, however, the Court moved the law on from the first fundamental premise. In *McCarthy*, it struggled to pretend that it didn't and it fudged the second (movement) dimension. In *Dereci*, it fastened both harder edges into place. The Court may have wished to be seen as construing *Ruiz Zambrano* narrowly in order to dampen controversy stirred in the wake of that judgment. With respect, the horse had already bolted. More fundamentally: reducing the degree of protection in certain cases that has already been extended in others is just unacceptable, on so many levels.

From time to time, EU citizens like Jacqueline Forster, Shirley McCarthy and Murat Dereci earn the dubious distinction of paying a price for significant developments in the law that precede their claims. It may be a rudimentary yardstick, but when an area of law becomes almost impossible to explain, to teach or to advise, then something is seriously wrong. EU citizenship law falls within that category at present. Few constitutional courts get, or take, "three goes" to work out fundamental concepts in the way we have seen in this case law, and most certainly not in one year. This Court has emphasized the speedy delivery of judgments as a strategic priority in recent years. But if the recent trilogy of rushed attempts is the result of that ambition, it should revert to taking its time.

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